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43 Cal.2d 828

Charles E. BURCHELL, Individually and as administrator of the Estate of Charles G. Moore, deceased, Plaintiff,

v.

Charles J. C. STRUBE, Carolyn M. Strube, as administratrix of the Estate of Lucy Falkner, deceased, Carolyn M. Strube, as administratrix of the Estate of Reinhold R. Strube, deceased, Defendants and Respondents,

W. C. Cox, Defendant,

E. Wiley, Defendant and Appellant.

S. F. 18780.

Supreme Court of California.
In Bank.
Jan. 25, 1955.
Rehearing Denied Feb. 24, 1955.

Interpleader action against a decedent's heirs and other claimants of a cash residue in decedent's estate, of which plaintiff was the administrator. From a judgment of the Superior Court, City and County of San Francisco, William T. Sweigert, J., declaring the claim of one defendant barred under the heirs' plea of res judicata, such defendant appealed. The Supreme Court, Shenk, J., held that a judgment of another Superior Court, sitting in probate and such court's final distribution decree, declaring that another defendant, who assigned to the appealing defendant all of assignor's interest in the heirs' previous assignments to him of 40 per cent of their interests in the estate in consideration of his having revealed the existence thereof to them and his promise to devote his time to and incur the expense of investigating and procuring proof of their relationship to decedent, was entitled to only ten per cent of the heirs' shares of the estate, were res judicata as to the rights of appellant and the heirs.

Judgment affirmed.

Prior opinion, 266 P.2d 548.

1. Descent and Distribution ⇐86

The statute providing that Superior Court, sitting in probate, may refuse to make distribution of decedent's estate to an heir's assignee or transferee of property thereof, except on such terms as court deems just and equitable, if it finds that fee, charge or consideration paid by heir was grossly unreasonable or that assignment was obtained by duress, fraud or undue influence, impliedly authorizes such court to determine validity of agreement between heir and assignee for distribution of property of estate in certain manner. Probate Code, § 1020.1.

2. Courts ⇐201

A probate court has jurisdiction to determine rights under contracts ancillary to exercise of its probate jurisdiction.

3. Courts ⇐201
Equity ⇐35

The Superior Court, while sitting in probate, is same as while sitting in equity, in cases at law, or in special proceedings, and when it has jurisdiction of subject-matter of case within either of such classes, it has power to hear and determine, in mode provided by law, all questions of law and fact determination of which is ancillary to proper judgment in case, such power being incidental power pertaining to all courts for purpose of enabling them to exercise jurisdiction conferred on them.

4. Courts ⇐198

The "probate court" is the Superior Court exercising probate jurisdiction.

5. Constitutional Law ⇐56

The Legislature may constitutionally enlarge power of Superior Court, sitting in probate, to determine questions arising under statute authorizing such court to refuse to make distribution of decedent's estate to heir's assignee of property thereof, ex-

cept on such terms as court deems just and equitable, if it finds that fee, charge or consideration paid by heir was grossly unreasonable or that assignment was obtained by duress, fraud or undue influence. Probate Code, § 1020.1.

6. Descent and Distribution ⇐86

A final order of Superior Court, sitting in probate, under statute authorizing it to refuse to make distribution of decedent's estate to heir's assignee of property thereof, if it finds that fee, charge or consideration paid by heir was grossly unreasonable or that assignment was obtained by duress, fraud or undue influence, is binding on all parties to proceeding thereunder in all further actions. Probate Code, § 1020.1.

7. Descent and Distribution ⇐86

A contract for assignment of interest of decedent's heir in decedent's estate after enactment of statute authorizing Superior Court, sitting in probate, to refuse to make distribution to such an assignee, except on such terms as it deems just and equitable, if it finds that fee, charge or consideration paid by heir was grossly unreasonable or that assignment was obtained by duress, fraud or undue influence, is entered into in contemplation of terms of such statute, which becomes part of contract for benefit of those coming within its terms. Probate Code, § 1020.1.

8. Constitutional Law ⇐89(1), 113

The right to contract is not absolute and unqualified, and reasnoable restrictions thereon are not prohibited by constitutional provisions respecting impairment of obligations of contracts and right to contract.

9. Statutes ⇐74(2)

The Probate Code section, authorizing Superior Court, sitting in probate, to refuse to make distribution of decedent's estate to heir's assignee of property thereof, except on such terms as court deems just and equitable, if it finds that fee, charge or consideration paid by heir was grossly unreasonable or that assignment was obtained by duress, fraud or undue influence, is a statute of general applicability. Probate Code, § 1020.1.

10. Descent and Distribution ⇐86

Under statute authorizing Superior Court, sitting in probate, to refuse to make distribution of decedent's estate to heir's assignee of any property thereof, except on such terms as court deems just and equitable, if it finds that fee, charge or consideration paid by heir was grossly unreasonable, court may look to value of consideration for assignment in determining whether it is grossly unreasonable. Probate Code, § 1020.1.

11. Descent and Distribution ⇐86

The effect of determination by Superior Court, sitting in probate, that assignment of property of decedent's estate by heir of decedent was for grossly unreasonable consideration within statute authorizing court in such case to refuse to make distribution of estate to assignee, except on such terms as it deems just and equitable, is to set aside portion of assignment found to be grossly unreasonable. Probate Code, § 1020.1.

12. Descent and Distribution ⇐86

Where consideration for assignment of interest in decedent's estate by heir of decedent to an heir hunter or another is grossly unreasonable, burden is on assignee to prove real value of consideration. Probate Code, § 1020.1.

13. Descent and Distribution ⇐86

Contracts or agreements involving assignment of interest in decedent's estate by an heir or legatee of decedent before distribution of estate are of such character that legislation may be enacted permitting courts to inquire into value of consideration given for assignment. Probate Code, § 1020.1.

14. Constitutional Law ⇐306
Descent and Distribution ⇐86

The Probate Code section, authorizing Superior Court, sitting in probate, to refuse to make distribution of decedent's estate to heir's assignee of property thereof, if court finds that fee, charge or consideration paid by heir was "grossly unreasonable," without defining such words, is not so indefinite as to render its application a violation of due process of law; question

whether consideration was grossly unreasonable being one of fact. Probate Code, § 1020.1.

15. Executors and Administrators ⇐315(6)

Questions concerning right to jury trial in proceeding under statute authorizing Superior Court, sitting in probate, to refuse to make distribution of decedent's estate to heir's assignee of property thereof, if fee, charge or consideration paid by heir was grossly unreasonable or assignment was obtained by duress, fraud or undue influence, were properly determinable in such proceeding and were foreclosed in administrator's subsequent interpleader action against party raising such questions and others claiming cash residue in estate after final distribution decree adjudicating that such party's assignor, to whom heirs assigned 40 per cent of their interests in estate, was entitled to only ten per cent thereof.

16. Executors and Administrators ⇐315(6)

A judgment of Superior Court, sitting in probate, and such court's decree of final distribution of decedent's estate, declaring one to whom decedent's heirs assigned 40 per cent of their interests in estate in consideration of his having revealed existence thereof to them and his promise to devote his time to and incur expense of investigating and procuring proof of assignors' relationship to decedent entitled to only ten per cent of heirs' distributive shares of estate because assignments were obtained by high pressure methods and consideration for assignments was grossly unreasonable, were res judicata as to rights of heirs and one to whom such assignee assigned all his interest in assignments in administrator's subsequent interpleader action against all such parties as claimants of cash residue in estate. Probate Code, § 1020.1.

Robert E. Hatch, San Francisco, for appellant.

Thomas C. Vassar, F. A. Devlin and Edward L. Cragen, San Francisco, for respondents.

Marvin C. Hix, San Francisco, amicus curiæ, in behalf of respondents.

SHENK, Justice.

This is an appeal from a judgment in an interpleader action which held the appellant's claim to be barred under the defensive plea of res judicata.

Walter C. Cox is in the business of heir-hunting. Lucy Falkner, Charles J. C. Strube, and Reinhold Strube were the heirs of Charles G. Moore. Cox obtained written assignments of 40 percent of each heir's interest in Moore's estate in consideration for his having revealed the existence of the estate and his promise to devote his time and incur the expense of investigating and procuring proof of their relationship to the decedent. While the estate was in the course of probate in the Superior Court in and for the County of Napa, Reinhold Strube petitioned the court for an order to disregard the assignments to Cox under the authority of Probate Code section 1020.1. That section provides: "The court before making distribution of any property of a decedent to any assignee or transferee of any heir * * * or before making distribution to any person other than an heir * * * or of any attorney-in-fact of an heir * * * may on the motion of any person interested in the estate or on the motion of the public administrator or on its own motion inquire into the consideration for such assignment, transfer, agreement, request or instructions and into the amount of any fees, charges, or consideration paid or agreed to be paid by the heir, devisee or legatee and into the circumstances surrounding the execution of such assignment * * and if it finds that the fees, charges or consideration paid by any such heir * * * is grossly unreasonable or that any such assignment * * * was obtained by duress, fraud or undue influence it may refuse to make distribution pursuant thereto except upon such terms as it deems just and equitable."

Cox was properly served and appeared by counsel in opposition to Reinhold's petition. A hearing was had and evidence was taken. The court sitting in probate found that Reinhold R. Strube, Charles J. C. Strube, and Lucy Falkner were the heirs of Charles

G. Moore; that they assigned to Cox 40 percent of their interest in Moore's estate; that the assignments were obtained by at least high pressure methods; that Cox negotiated for and procured legal representation for the heirs; that Cox is not an attorney-at-law; and that his action in procuring legal representation for the heirs was contrary to public policy; that the public administrator had sufficient information available to have located the heirs without the services of Cox; that Cox's fee of 40 percent of the heirs' interest in the estate was grossly unreasonable; that the reasonable value of the services rendered by Cox was no more than 10 percent of the heirs' interest in the estate, and that the heirs were not lost or missing heirs.

The court entered a judgment on December 20, 1949, holding that Cox was entitled to 10 percent of the heirs' share of Moore's estate. No appeal was taken from that judgment. On March 15, 1950, a decree of final distribution in the matter of Moore's estate was entered. The decree provided that Cox was entitled to 10 percent of the heirs' distributive share in the estate. No appeal was taken from that decree. On April 28, 1950, Cox assigned all of his right, title, and interest in the assignments of the heirs to him to E. Wiley, the defendant-appellant in this action. Wiley served notice on Burchell, the administrator of Moore's estate, that as Cox's assignee he claimed an additional 30 percent of the heirs' share of the estate under the assignments executed to Cox by the heirs.

Burchell brought an interpleader action in the San Francisco Superior Court. He alleged that he was the administrator of Moore's estate; that a cash residue remained in the estate; that a final decree of distribution had been entered in which it was adjudicated that Cox was entitled to receive 10 percent of what the heirs were entitled to receive; that Wiley, Cox's assignee, claimed a right to an additional 30 percent of what the heirs received; and that the heirs disputed this claim. Burchell named as defendants Charles J. C. Strube, Wiley, Cox, and Carolyn M. Strube, the administratrix of the estates of Lucy Falkner and Reinhold R. Strube, who had died in the meantime. The cash residue was transferred to the clerk of the court and Burchell was discharged from the case.

Wiley filed an answer in the interpleader action in which he admitted the truth of all the allegations in the complaint, and alleged that he was entitled to the additional 30 percent of the heirs' share under the terms of the assignments from the heirs to Cox. The heirs filed an answer in the interpleader action in which they denied that Wiley had any interest in any money due them from Moore's estate, and alleged that the judgments rendered in the probate proceedings were res judicata as to Wiley, thereby barring him from asserting his claim in this action.

Upon the trial Wiley waived any right he might have had to a trial by jury. Documentary evidence was submitted by both sides. Wiley introduced copies of the assignment agreements made by Cox with the heirs, and a copy of the assignment by Cox of his interest in the heirs' assignments to Wiley. The heirs introduced a copy of the judgment entered in the proceeding under Probate Code, section 1020.1, and a copy of the decree of final distribution in the matter of Moore's estate.

The trial court found that no appeal was taken from the decree of final distribution and that the time to appeal had expired. It concluded that: "Said decree of the Superior Court for the County of Napa heretofore fully determined and adjudicated all of the rights and liabilities between these parties arising out of or connected with said assignments and is res judicata in respect thereto."

Wiley contends that the trial court erred in sustaining the defense of res judicata, and that he is entitled to a judgment for 30 percent of the heirs' interest in the money interpleaded in this action. He argues that Probate Code section 1020.1 vests in the court only a limited control over assignments and agreements involving property in probate for the purposes of distribution; that an order or judgment based upon section 1020.1 for the purposes of distribution does not preclude a subsequent action to

enforce the assignment; that any other construction of section 1020.1 would render it unconstitutional as impairing the obligation of contracts and his right to contract, and that, therefore, the defense of res judicata was improperly sustained.

This appears to be the first time that the question of the effect of a final order under section 1020.1 upon a subsequent proceeding based upon the same assignment or agreement considered in the prior section 1020.1 proceeding has been considered by the courts of this state. Exhaustive research has disclosed that apparently every case to date involving section 1020.1 has been one in which an appeal was taken from an order under that section. It has not been necessary to pass upon the questions here involved in the determination of those cases.

Two basic questions here are: (1) What did the Legislature intend by the enactment of section 1020.1?; and (2) Is that section constitutional?

In Re Estate of Lund, 65 Cal.App.2d 151, 150 P.2d 211, an appeal was taken from an order under section 1020.1. The District Court of Appeal stated in 65 Cal.App.2d at page 153, 150 P.2d at page 213: "The anomalous nature of section 1020.1 is at once apparent. Prior to the enactment of said section and its forerunner, the probate court had no jurisdiction to determine the issue of the validity of an assignment upon the distribution of an estate. In re Estate of Howe, 161 Cal. 152, 118 P. 515. This section apparently attempted to give the probate court jurisdiction to determine that issue, at least for the purpose of distribution. It further attempted to give the probate court jurisdiction, assuming the validity of the assignment, to determine the question of the reasonableness of the compensation, at least for the purpose of distribution. We are not called upon here, however, to determine the numerous questions which may arise with respect to said section. Appellant invoked its provisions and respondent is not complaining of the decision of the probate court. In other words, neither party claims that the section is invalid." The court further stated in 65 Cal.App.2d at page 155, 150 P.2d at page 214: "It is elemental that the probate court is a court of special and limited jurisdiction and that it has jurisdiction only to the extent that the law prescribes. As we read section 1020.1 of the Probate Code, it does not purport to grant to the probate court general jurisdiction to 'set aside' an assignment in its entirety and for all purposes. It merely purports to grant to the probate court the limited jurisdiction, under certain circumstances, to ignore the assignment in whole or in part for the purposes of the distribution of the estate." In a later case, In re Estate of Cazaurang, 75 Cal. App.2d 217, 170 P.2d 694, the court held that on an appeal from an order under section 1020.1 it was unnecessary to determine the effect of the code section as it related to other matters. It was stated in 75 Cal. App.2d at page 224, 170 P.2d at page 698: "Whether the assignee might seek relief against the assignor in another independent action based upon the claimed assignment, if the probate court had refused to recognize the assignment at all and had refused to make distribution to the assignee but distributed the estate directly to the devisee is not before us, and that question is not necessary to determine in this proceeding."

Wiley points to certain cases, such as In re Estate of Abdallah, 80 Cal.App.2d 634, 182 P.2d 596, and McCarthy v. Superior Court, 64 Cal.App.2d 468, 149 P.2d 55, to support his contention that the court in a probate proceeding has no jurisdiction to enter an order under section 1020.1 which does more than temporarily allocate the funds in the estate for the purposes of distribution. These cases are not in point. They hold that where there is a dispute between an estate and a stranger to the estate, the court sitting in probate is not the proper forum to try the question of title. In this case the interpleaded money is part of the estate. Wiley's claim is based upon the fact that the money belongs to the heirs, and that as their assignee he is entitled to a portion thereof through the heirs.

[1–3] In Re Estate of Stanley, 34 Cal.2d 311, 209 P.2d 941, the two heirs entered into an agreement concerning the distribution of the estate. One of them sought to avoid the agreement and to secure a different

measure of distribution. The validity and effectiveness of the agreement was inquired into by the court sitting in probate under section 1020.1. The court upheld the validity of the agreement and framed the final decree of distribution in accordance therewith. This court affirmed the decree of distribution ordered by the trial court. It was stated in 34 Cal.2d at page 319, 209 P.2d at page 945, "The clear implication from the foregoing [discussion concerning the effect of section 1020.1] is that a probate court may determine the validity of an agreement that property shall be distributed in a certain manner. * * * It must be remembered that a probate court has jurisdiction to determine rights under contracts ancillary to the exercise of its probate jurisdiction. Bennett v. Forrest, 24 Cal.2d 485, 150 P.2d 416; Dobbins v. Title Guar. & Trust Co., 22 Cal.2d 64, 136 P.2d 572. And, as is said in Re Estate of Cover, 188 Cal. 133, 139, 204 P. 583, 586, quoting from Estate of Warner, 6 Cal.App. 361, 92 P. 191: 'The superior court, while sitting in matters of probate, is the same as it is while sitting in equity, in cases at law, or in a special proceeding; and when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment in such case. This is an incidental power pertaining "to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them."'"

[4–6] The reasoning in the Stanley case appears to be applicable to the case at bar. Cf. Hough v. Hough, 26 Cal.2d 605, 616, 160 P.2d 15. It may here be noted that while some judicial opinions refer in terms to a "probate court", strictly speaking no probate court, as such, has existed in California since the adoption of the 1879 Constitution. It is the superior court exercising probate jurisdiction. Schlyen v. Schlyen, 43 Cal.2d 361, 273 P.2d 897. In an action involving a determination pursuant to the provisions of section 1020.1 the superior court, sitting in probate, is called upon to exercise a power specifically conferred upon it by statute in connection with the proper distribution of the estate. There can be no question but that the Legislature may constitutionally enlarge the power of the superior court sitting in probate to determine questions arising under section 1020.1. It seems unreasonable to assume, as Wiley contends, that the Legislature intended that the superior court sitting in probate should make a determination under section 1020.1 of the rights of the parties, but that this determination should have no effect, as between the same parties, outside of the probate proceeding and that the matter could again be litigated before the same court in another proceeding. It is therefore concluded that an order under section 1020.1 which has become final is binding upon the parties in all further actions.

The constitutional question presented by Wiley seems to be that the enactment of section 1020.1 has, if applied to his situation, interfered with and has impaired the constitutional rights and privileges granted to him under the State and Federal Constitutions.

[7] It should be noted that the assignment involved in this case was entered into long after the enactment of section 1020.1, and we are not confronted with an attempt to apply the terms of a new law to an existing contract. It is well settled that under these circumstances the assignment contract was entered into in contemplation of the terms of the code section. In other words the statute was a part of the contract for the benefit of those coming within its terms. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435, 436, 54 S.Ct. 231, 78 L.Ed. 413; In re Maier Brewing Co., D.C., 38 F.Supp. 806, 818; Castleman v. Scudder, 81 Cal.App.2d 737, 740, 185 P.2d 35. Here, those for whom protection of the statute was intended were the heirs of the estate seeking distribution thereof as against the claim of another seeking a share in the estate.

Wiley concedes that a court having equity jurisdiction could set aside entirely an assignment or agreement procured by fraud or undue influence. He contends, however, that by permitting the court in a section

1020.1 proceeding to refuse to recognize an assignment or agreement because it is grossly unreasonable and to make an order in connection therewith which is just and equitable, is to have the court make a new contract for the parties contrary to the general law of contracts, thereby interfering with his right to contract.

[8] It has been held: "The right to contract is not absolute and unqualified, and reasonable restrictions are not prohibited by the constitutional provisions." Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, 486, 171 P.2d 21, 24, 166 A.L.R. 701. It is not necessary to go further than to point to the usury statutes of this and other jurisdictions to find support for the proposition that in certain classes of contracts, agreements, and assignments, the Legislature may regulate the value of the consideration.

[9–12] Probate Code section 1020.1 is a statute of general applicability. In re Estate of Butler, 29 Cal.2d 644, 653, 177 P.2d 16, 171 A.L.R. 343. Under it the court is empowered to look to the value of the consideration in determining whether the agreement or assignment is grossly unreasonable. The effect of a determination under section 1020.1 that an assignment or agreement is grossly unreasonable is to set aside that portion thereof found to be grossly unreasonable. In Re Estate of Larson, 92 Cal.App.2d 267, at page 273, 206 P.2d 852, at page 856, it was stated: "Where the consideration is 'grossly unreasonable,' the burden is upon the heir hunter [or other assignee] to prove their real value." See also In re Guardianship of O'Donnell's Estate, 85 Cal.App.2d 1, 12, 192 P.2d 94; In re Estate of Reilly, 81 Cal.App.2d 564, 569, 184 P.2d 922.

The rights of heirs or legatees can never be fully established until the death of the person from whom they take. Often, there is a period before the heir learns of the death of the person from whom he will take, and, often, the rights of an heir or legatee cannot be fully established until probate. In dealing with the problem here involved the Legislature could consider that because of the situation of the parties it is possible to take unfair advantage of them and that assignments are often secured from them by which large portions of their shares in the estate are surrendered in consideration for information which would have come to their attention in the normal course of events and which was of only nominal value.

[13] It is concluded that contracts or agreements involving the assignment by an heir or legatee of his interest in the estate prior to distribution are of such a character that legislation may be enacted permitting the courts to inquire into the value of the consideration given.

[14] Wiley next contends that section 1020.1 is unconstitutional because it is too indefinite in that the words "grossly unreasonable" therein contained are not defined. He argues that those words are so indefinite as to make the application of the statute in violation of due process. Questions of negligence, unreasonable restraint of trade, probable cause, reasonable doubt, and preponderance of evidence and the like are usually questions of fact. The term "grossly unreasonable" would seem to fall within the same category, and as here applied presents a question of fact. The section is therefore not so indefinite as to make its application a violation of due process. In re Leach, 215 Cal. 536, 12 P.2d 3; Pacific Coast Dairy v. Police Court, 214 Cal. 668, 8 P.2d 140, 80 A.L.R. 1217; People v. Associated Oil Co., 211 Cal. 93, 294 P. 717; Mitchell v. Morris, 94 Cal.App. 2d 446, 210 P.2d 857.

[15] Wiley raises questions concerning the right to a jury trial in the prior proceeding under section 1020.1. They were properly determinable in that proceeding and are now foreclosed.

[16] The proceedings in the Superior Court in and for the County of Napa fully determined the rights of Wiley and also of the heirs. Those proceedings have become final. The trial court properly sustained the defense of res judicata.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

Ines BERRI, Individually and as Administratrix of the Estate of Silvio Berri, Deceased, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Melvyn I. Cronin, Judge thereof, and Martin Mongan, County Clerk of the City and County of San Francisco, State of California, Respondents,

Bank of America (Eureka, California), Del Norte County Bank (Crescent City, California), Bank of America National Trust and Savings Association (Crescent City, California), Bank of America National Trust and Savings Association (San Francisco, California), National Bank Italy Company, a corporation, Corporation of America (Home Savings Bank) (Eureka, California), Liberty Bank (Crescent City, California), Bank of Italy National Trust and Savings Association, Home Savings Branch (Eureka, California), Charles Maffia, T. A. Greig, R. H. Pearce, Victor K. Meedom, E. B. Campbell, James F. De Martini, R. P. A. Everhard, et al., Real Parties in Interest.

S. F. 19059.

Supreme Court of California.
In Bank.

Jan. 28, 1955.
Rehearing Denied Feb. 24, 1955.

Proceeding on a petition for a writ of mandate to compel the entry of a judgment in the trial court either by the trial judge or the clerk of the court. The Supreme Court, Carter, J., construed the statute authorizing a dismissal unless action is brought to trial within five years and held that mandamus would lie as a proper remedy since it was necessary to put plaintiff in a position to test on appeal the propriety of the order sustaining a demurrer to the complaint.

Writ issued.

Edmonds and Traynor, JJ., dissented.

Prior opinion 267 P.2d 865.

1. Dismissal and Nonsuit ⇐60(2)

Under the statute authorizing dismissal of an action unless brought to "trial" within five years, determination or hearing on a demurrer to the complaint is not a "trial" within the statute and hence the action is subject to dismissal after the five-year period has expired unless the ruling on a demurrer is a final determination of the case. West's Ann.Code Civ.Proc. § 583.

See publication Words and Phrases, for other judicial constructions and definitions of "Trial".

2. Dismissal and Nonsuit ⇐60(2)

When a demurrer has been sustained and judgment of dismissal has been entered, there has been a "trial" and the action is not subject to dismissal under the statute providing therefor unless the action is brought to "trial" within five years after plaintiff has filed his action. West's Ann. Code Civ.Proc. § 583.

3. Dismissal and Nonsuit ⇐5

Under the statute involving the right of plaintiff to voluntarily dismiss "before trial", plaintiff could not dismiss after a demurrer has been sustained without leave to amend but before judgment, since the case has been brought to trial. West's Ann.Code Civ.Proc. § 581.

See publication Words and Phrases, for other judicial constructions and definitions of "Before Trial".

4. Pleading ⇐189
Trial ⇐1

A "trial" is a determination of an issue of law or fact while a "demurrer" calls for determination of an issue of law only.

See publication Words and Phrases, for other judicial constructions and definitions of "Demurrer".

5. Judgment ⇐217

Where there has been a judgment of dismissal after demurrer sustained without leave to amend or leave to amend is granted but plaintiff fails to amend within time allowed, the action is finally terminated by the judgment since there is no longer any pending undetermined action to dismiss.

6. Dismissal and Nonsuit ⇐7(1)

An action is not subject to dismissal where issues of law leading to its final determination have been submitted. West's Ann.Code Civ.Proc. § 583.

7. Appeal and Error ⇐78(3)

An order sustaining a demurrer without leave to amend is not appealable, since it is not a "final judgment", and the trial court may reconsider its ruling after such an order but before judgment and come to a different conclusion.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

3. Pleading ⇐223

Ordinarily, in the absence of a request for a reconsideration after a demurrer is sustained without leave to amend, no formal motion to dismiss the action is necessary, since the entry of judgment of dismissal follows as a matter of course.

9. Dismissal and Nonsuit ⇐60(2)

Where a demurrer has been sustained without leave to amend or time given to amend has expired, the matter has reached such a stage that a final determination is contemplated and hence the statute does not require a dismissal because the action is not brought to trial within five years from the commencement of the action. West's Ann.Code Civ.Proc. § 583.

10. Mandamus ⇐51

Where the trial judge had refused to have a judgment entered after demurrer was sustained without leave to amend and no appeal would lie from that refusal, mandamus was a proper remedy to compel the trial judge to render judgment in order to put plaintiff in a position to test on appeal the propriety of the order sustaining the demurrer.

11. Mandamus ⇐176

In mandamus to compel a trial judge who had sustained a demurrer without leave to amend and without rendition of judgment on the order, Supreme Court directed the trial court to render judgment, or if it deems advisable, to give consideration to a re-examination of its ruling.

12. Dismissal and Nonsuit ⇐60(2)

In mandamus to compel a trial judge sustaining a demurrer without leave to amend and without rendition of judgment on the order, where Supreme Court directed trial judge to give consideration to a re-examination of its ruling, in event it did so, the action was not dismissable under the statute because not brought to trial within five years, since there would be in effect a "partial trial". West's Ann.Code Civ.Proc. § 583.

Alfred J. Hennessy, San Francisco, for petitioner.

Samuel B. Stewart, Jr., Christopher M. Jenks and Arthur V. Toupin, San Francisco, for respondents and real parties in interest.

CARTER, Justice.

This case involves the interpretation of section 583 of the Code of Civil Procedure.[1] On April 21, 1948, plaintiff commenced an action. First and second amended complaints were filed before defendants appeared. Defendants' demurrers to plaintiff's second, third and fourth amended complaints were sustained with leave to amend. On March 4, 1953, the court made an order sustaining, without leave to amend, defendants' demurrer to the fifth amended complaint, 48 days before the expiration of the five-year period after commencement of the action. No judgment was ever entered. On April 10, 1953, plaintiff filed notice of appeal from that order. The appeal was dismissed on November 9, 1953, by the District Court of Appeal.[2] On October 19, 1953, after the five-year period had expired, plaintiff allegedly discovered that no judgment had

1. "Any action * * * shall be dismissed by the court * * * on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, * * *." Code Civ.Proc. § 583.

2. An appeal may not be taken from an order sustaining a demurrer; it must be taken from the judgment entered thereon. Cole v. Rush, 40 Cal.2d 178, 252 P.2d 1; 3 Cal.Jur.2d, Appeal & Error, § 48.

been entered on the order sustaining the demurrer, and he presented a judgment to the court for signing and entry. The court refused, stating it thought a formal motion for entry of a judgment should be made inasmuch as the five years had elapsed. Defendants served and filed a notice of motion (November 12, 1953) to dismiss the action on the ground that it had not been brought to trial within five years of the commencement of the action as required by section 583, supra. That motion is now pending as the trial court deferred ruling thereon pending the decision in the instant proceeding. Plaintiff, petitioner here, seeks mandamus against the court and clerk thereof to compel the entry of judgment pursuant to the order sustaining the demurrer.

[1, 2] With regard to the running of the five-year period, it has been held that the determination or a hearing on a demurrer to the complaint is not a trial within the meaning of section 583 of the Code of Civil Procedure and hence the action is subject to dismissal after the five-year period has expired unless the ruling on demurrer is a final determination of the case. Where the demurrer or demurrers were sustained but leave to amend was given: De Roode v. County of Placer, 112 Cal. App.2d 859, 247 P.2d 390; Anderson v. City of San Diego, 118 Cal.App.2d 726, 258 P.2d 842; Breakstone v. Giannini, 70 Cal.App.2d 224, 160 P.2d 887; Meier v. Superior Court of Orange County, 55 Cal. App.2d 675, 131 P.2d 554; where demurrer pending; Jackson v. De Benedetti, 39 Cal. App.2d 574, 103 P.2d 990; where the demurrer was overruled: Perrin v. Miller, 35 Cal.App. 129, 169 P. 426. When the demurrer has been sustained and judgment of dismissal has been entered there has been a trial and the action is not subject to dismissal under section 583. Smith v. City of Los Angeles, 84 Cal.App.2d 297, 190 P.2d 943; see Erganian v. Brightman, 13 Cal.App.2d 696, 57 P.2d 971.

[3, 4] However, in cases involving the right of the plaintiff to voluntarily dismiss "before trial" under section 581 of the Code of Civil Procedure it has been held that he could not dismiss after a demurrer had been sustained without leave to amend but before judgment because the case had been brought to trial. See Goldtree v. Spreckels, 135 Cal. 666, 67 P. 1091; London v. Morrison, 99 Cal.App.2d 876, 222 P.2d 941; Gibbon v. Justice's Court of City and County of San Francisco, 81 Cal.App. 396, 253 P. 961; Provencher v. City of Los Angeles, 10 Cal.App.2d 730, 52 P.2d 983, judgment of dismissal entered; contra Home Real Estate Co. v. Winnants, 39 Cal.App. 643, 179 P. 534. And it has been said generally in defining a trial that it is the determination of an issue of law or fact; a demurrer of course calls for the determination of an issue of law only. City of Pasadena v. Superior Court of Los Angeles County, 212 Cal. 309, 298 P. 968; O'Day v. Superior Court of Los Angeles County, 18 Cal.2d 540, 116 P.2d 621; Redington v. Cornwell, 90 Cal. 49, 27 P. 40; Tregambo v. Comanche Mill & Mining Co., 57 Cal. 501; Booth v. County of Los Angeles, 69 Cal.App.2d 104, 158 P.2d 401; see Code Civ.Proc., §§ 588–591, defining issues and mode of determination. But in Superior Oil Co. v. Superior Court of Kings County, 6 Cal.2d 113, 56 P.2d 950, the court held that an action was not brought to trial within the meaning of section 583 where a hearing had been had on an application for a preliminary injunction in an action for an injunction, the court stating that a trial is a trial of issues of fact with the purpose of determining the case on the merits.

[5–9] It is clear that where there has been a judgment of dismissal after demurrer sustained without leave to amend or leave to amend is granted but plaintiff fails to amend within the time allowed, the action is finally terminated by the judgment because there is no longer any pending undetermined action to dismiss. It should also be clear that an action is not subject to dismissal where issues of law leading to its final determination have been submitted. If that were not true, then an action presented on stipulated facts could be dismissed even though it had been submitted for decision on those facts. See Martin v. Gibson, 48 Cal.App.2d 449, 119

P.2d 1012. The essential thing is that the action be brought to a stage where final disposition is to be made of it. Actions can be finally disposed of by an order sustaining a demurrer and the entry of an ensuing judgment dismissing the action. It is true that an order sustaining a demurrer without leave to amend is not appealable as it is not the final judgment in the case (see authorities cited supra) and that the trial court may reconsider its ruling after such an order but before judgment and come to a different conclusion. Bank of America Nat. Trust and Savings Ass'n v. Superior Court of Los Angeles County, 20 Cal.2d 697, 128 P.2d 357; Frantz v. Mallen, 204 Cal. 159, 267 P. 314; Davis v. Stroud, 52 Cal.App.2d 308, 126 P.2d 409; De La Beckwith v. Superior Court of Colusa County, 146 Cal. 496, 80 P. 717. Ordinarily, in the absence of a request for a reconsideration, after a demurrer is sustained without leave to amend, as here, no formal motion to dismiss the action is necessary. The entry of a judgment of dismissal follows as a matter of course. It is only by the entry of the judgment that plaintiff is in a position to test the correctness of the court's ruling since there is no appeal from a ruling on a demurrer but only from the ensuing judgment. Michaels v. Mulholland, 115 Cal.App.2d 563, 564, 252 P.2d 757. Where a demurrer has been sustained without leave to amend, or the time given to amend has expired, the matter has reached such a stage that a final determination of the action is contemplated, and hence section 583 does not require a dismissal because of the lapse of five years since the commencement of the action. There is nothing in the instant case to indicate other than that the case is to be finally disposed of on issues of law—by way of demurrer. Cf. Superior Oil Co. v. Superior Court of Kings County, supra, 6 Cal.2d 113, 56 P.2d 950.

[10] It is suggested that mandamus is not the proper remedy as other remedies are adequate and the trial court did not have an opportunity to pass on the question. But the trial court refused to have the judgment entered after demurrer was sustained without leave to amend and no appeal would lie from that refusal. While it did suggest that plaintiff file a formal motion for the entry of judgment, that was only to present the issue of whether the five years had run between the commencement of the action and the trial, if any, was had. Defendants presented that issue to the court by their motion to dismiss. If that motion had been denied defendants could obtain relief by mandamus, Superior Oil Co. v. Superior Court of Kings County, supra, 6 Cal.2d 113, 56 P.2d 950; 16 Cal.Jur.2d, Dismissal, etc., § 67, but the validity of the order sustaining the demurrer would still not have been determined. Of course, if defendants' motion were granted, a judgment of dismissal would have been entered and plaintiff could have appealed from it, but that is not the situation presented here. This is a case where mandamus is necessary to put plaintiff in a position to test on appeal the propriety of an order sustaining a demurrer without leave to amend and there must be a judgment entered in order to do that.

[11, 12] Inasmuch, however, as the trial court may change its ruling on the demurrer, as no judgment has been entered, the trial court is hereby directed to render judgment, or if it deems advisable, give consideration to a re-examination of its ruling. In case it does the latter, however, the action is not subject to dismissal because under the above reasoning there has been, in effect, a partial trial of the action and section 583 is inoperative. A partial trial of an action will take the case out of the operation of section 583. City of Los Angeles v. Superior Court in and for Los Angeles County, 15 Cal.2d 16, 98 P.2d 207; see O'Day v. Superior Court of Los Angeles County, supra, 18 Cal.2d 540, 116 P.2d 621. Let the writ issue directing the trial court to enter a judgment of dismissal or overrule the demurrer.

SHENK, SCHAUER and SPENCE, JJ., concur.

GIBSON, C. J., concurs in the judgment.

EDMONDS, Justice (dissenting).

The respondent contends that mandate is not available to Berri because of his re-

fusal to pursue a plain and adequate remedy in the trial court. In Phelan v. Superior Court in and for City and County of San Francisco, 35 Cal.2d 363, 217 P.2d 951, it is said: "Section 1086 of the Code of Civil Procedure provides that the writ of mandate 'must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.' * * * Although the statute does not expressly forbid the issuance of the writ if another adequate remedy exists, it has long been established as a general rule that the writ will not be issued if another such remedy was available to the petitioner. [Citations.] The burden, of course, is on the petitioner to show that he did not have such a remedy." 35 Cal.2d at page 366, 217 P.2d at page 953.

When a proposed judgment was presented to the trial judge for signature, he requested counsel for Berri to show it to the defendants' attorneys. One of them notified the judge that because more than five years had elapsed from the date of filing of the original complaint, a motion for dismissal pursuant to section 583 of the Code of Civil Procedure would be made. The judge then directed Berri to move for entry of judgment in order that he might hear argument upon the legal question presented. Berri declined to do so, but commenced the present proceeding to compel the entry of a judgment. This court now issues a peremptory writ, not to compel the entry of judgment as sought by Berri, but to command the judge to hear and determine the matter as he would have done had Berri made the requested motion.

The writ is allowed upon the ground that "the trial court refused to have the judgment entered after demurrer was sustained without leave to amend and no appeal would lie from that refusal." This statement is contrary to the record.[1] The only "refusals" of the judge were to decline to sign a proposed judgment presented to him *ex parte* and to require a formal motion for entry of judgment in order to determine whether the defendants are entitled to have the action dismissed pursuant to section 583 of the Code of Civil Procedure.

The court has decided by the present proceeding only that the defendants are not entitled to a dismissal. In other words, mandate is used to decide an issue in advance of a decision upon it by the trial judge, when he did not refuse to decide it but designated a procedure expressly for that purpose. The writ of mandate which os-

1. Judge Cronin's affidavit includes the following:

"[O]n or about October 19, 1953, Alfred J. Hennessy, Esq., attorney for the plaintiff in said action [Berri], requested me, as Judge of the Respondent Superior Court, to sign a form of judgment presented by him and based upon my previous order sustaining the demurrer without leave to amend. At the time that Mr. Hennessy made this request, I requested him to exhibit this proposed form of judgment to counsel for the defendants, since under said form of judgment, defendants were the prevailing parties. Shortly thereafter, I received a telephone call from Arthur V. Toupin, one of the attorneys for the defendants, advising me that Mr. Hennessy had been in to see him concerning said form of judgment, that more than five years had elapsed since the filing of the original complaint in said action, that defendants intended to file a motion to dismiss upon that ground, and that in any event the defendants desired an opportunity to be heard upon the question of the application in said action of the five-year provision of Section 583 of the Code of Civil Procedure. When Mr. Hennessy, shortly thereafter, returned to see me, I suggested to him that because of the legal question presented by the running of five years from the filing of the complaint, and because I believed both sides should be heard on said question of law, that he prepare an appropriate notice of motion and that I would, if he wished, shorten the time for the hearing of such motion to 24 hours after service of the notice of motion upon counsel for the defendants. I did not at that time nor have I at any other time unqualifiedly refused to sign a judgment in said action based upon the order sustaining the demurrer without leave to amend. Neither the plaintiff in said action nor her counsel has at any time filed in the Respondent Court such a notice of motion or motion as suggested by me nor have either of them requested me, or, to my knowledge, any other department of the Respondent Court to hear legal argument on said question."

tensibly is peremptory commands nothing more than that the trial judge decide the other issues which would have been presented in such a proceeding.

The majority opinion observes that the question which now is decided also was presented to the trial judge by the defendants' motion to dismiss. What possible relevancy that fact may have to a determination of whether Berri's remedies in the trial court were adequate is not stated. If bearing at all upon that determination it would tend to show that the present proceeding is unnecessary to have the question of a dismissal decided. An alternative writ of mandate was issued before the date set for a hearing upon the motion, and when the trial judge was told of that fact he continued a hearing of the motion pending the outcome of the mandate proceeding. In these circumstances, a discussion of the alternatives available to him in ruling upon the motion seems to stray even farther from the question for decision.

The respondents correctly point out that the procedure directed by the trial judge and ignored by Berri, is that characterized in Phelan v. Superior Court, supra, as being plain, speedy and adequate. A motion for entry of judgment might have been granted based either upon the order sustaining the demurrer to the complaint or upon a dismissal of the action pursuant to section 583 of the Code of Civil Procedure. In either event, upon a single appeal, both the procedural question and the merits of the controversy which concerns the correctness of the order sustaining a general demurrer to Berri's complaint could have been determined.

In my opinion, the issuance of the writ of mandate to compel action which would have been obtained by following the procedure invited by the trial judge is contrary to the principles which govern the use of the writ. And in view of the plain remedy available to Berri in the trial court, to compel the respondent to bear the costs of this proceeding which nominally is in Berri's favor seems particularly unjust.

I would deny the writ.

TRAYNOR, J., concurs.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

43 Cal.2d 847

M & M LIVESTOCK TRANSPORT CO., Plaintiff-Respondent,

v.

CALIFORNIA AUTO TRANSPORT COMPANY et al., Defendants;

Walter Alves et al., Appellants.

Vern BAKER, Plaintiff-Respondent,

v.

Walter ALVES, doing business as Alves Service Transportation Company, a corporation, Hanley Henry Madrid, and Floyd Gonzales, Defendants-Appellants.

Nos. L. A. 23197, 23198.

Supreme Court of California, In Bank.

Jan. 28, 1955.

Actions to recover for damage to truck in collision between several trucks. The Superior Court, Kern County, Robert B. Lambert, J., rendered judgments for plaintiffs and certain defendants appealed. The Supreme Court, Carter, J., held, inter alia, that evidence supported finding that driver of plaintiffs' truck had not been contributorily negligent in attempting to pass under the circumstances.

Judgments affirmed.

Traynor and Spence, JJ., dissented.

Prior opinion 267 P.2d 430.

1. Automobiles ⇐244(44)

In action by owner of automobile carrier truck for damage sustained when driver of automobile carrier truck attempted to overtake and pass tractor-truck on blind curve on upgrade and was struck by on-coming truck, evidence supported finding that driver of automobile carrier truck had not been contributorily negligent in attempting to pass under the circumstances. Vehicle Code, §§ 530, 531.

2. Automobiles ⇐244(44)

In action for damage to cattle truck, which was following automobile carrier which was following loaded tractor-truck, for damage sustained when on-coming truck collided with automobile carrier, which was then attempting to pass loaded tractor-truck, and pushed automobile carrier back into cattle truck, evidence whether driver of

cattle truck was attempting to pass loaded tractor-truck supported finding that he had not been contributorily negligent in respect to following tractor-truck too closely. Vehicle Code, § 531.

Conron, Heard & James and Calvin H. Conron, Bakersfield, for appellants.

Kenneth J. Thayer, Dorsett M. Phillips, Bakersfield, William A. Kurlander and Leslie G. MacGowan, San Francisco, for respondents.

CARTER, Justice.

Defendants appeal from judgments awarding plaintiffs Baker and M & M Livestock Transport Company damages for harm to their trucks arising out of a collision in which three other trucks were involved. The cases were consolidated for trial by the court sitting without a jury.

Viewing the evidence most favorable to plaintiffs the following appears: The collision occurred about 2 p.m. on a clear day on Highway 466 in the Tehachapi Mountains. The highway ran generally in an east-west direction and was marked with a broken center line. At the point of impact it was about 34 feet wide including the shoulders, and on each side there was a steep embankment to a ravine below. The upgrade to the east was estimated variously at 3% to 6½%.

Before the collision, three trucks averaging 60 feet in length and 8 feet in width, were proceeding upgrade in the eastbound lane. The first was the Automobile Forwarding Service Truck, a two-ton tractor-trailer loaded with four cars, which was driven by Charles French in its proper lane at 7 to 8 miles an hour. Behind French was plaintiff Baker's truck, a top-type automobile carrier truck, which was unloaded. Following Baker was plaintiff M & M Livestock Transport Company's unloaded tractor-truck driven by Curtis Lacert.

Prior to the collision Baker had been ascending the grade at about 32 miles per hour and he was able to accelerate his speed on the grade and was doing so. Thus there was evidence that Baker's truck was capable of passing French's truck safely considering the extent of the view ahead. When Baker pulled up behind French and commenced his maneuver to pass French, the latter veered sharply to the right as far as his truck would go and onto the shoulder, thus leaving about 9 feet between the left side of his truck and the center line. When Baker was passing on French's lefthand side he was going about 15 miles per hour. The right side of Baker's truck was 1 to 2 feet from the left side of French's. Although Baker testified he estimated the left side of his truck was about 2 feet to the left of the center line, it could have been on or to the right of the center line on the basis of the above figures. When he started to make the passing maneuver, Baker had a clear view of the road ahead for 800 feet to a point where the road curved. No one was approaching from the east. While passing, Baker's truck "faltered" or "stopped" as described by various witnesses. That was due to a slipping of the gears which he had had repaired immediately before the trip on which he was driving when the collision occurred. When the tractor portion of Baker's truck (20 feet long) and 2 feet of the trailer had passed French, a truck owned by defendant Alves and driven by defendant Madrid rounded the curve between 400 and 500 feet away, travelling west toward Baker and French at a speed of 50 or 60 miles per hour. Madrid's truck weaved from right to left on the highway and finally collided with the right front end of Baker's truck and left front of French's truck, the latter two trucks having stopped. Madrid's truck weighed 65,000 pounds and was travelling downhill. Apparently he had little control over it. It was going 50 miles per hour at the time of the impact.

Baker's truck was pushed back until it collided with the M & M truck. A moment later a second truck owned by defendant Alves and driven by defendant Gonzales came round the same curve from the east and, being unable to stop, skidded into the first Alves truck and turned over. The trucks caught fire, but the drivers escaped uninjured.

Defendants assert that plaintiff Baker was contributively negligent as a matter of law in that he violated section 530 of the Vehicle Code.[1] No contention is made that defendants were not negligent.

As we read section 530, it requires that when passing, the view of the road and distance ahead of oncoming traffic be such that the passing maneuver may be made with safety and that the passing shall not be done on a curved road where, to do so, creates a hazard; it does not mean that when passing the conditions must be such that the passer guarantees he may safely pass or that he has necessarily violated the section by failing to complete the maneuver without accident, that is, the question is not entirely one of hindsight. Essentially the passer is required to act in a reasonable and prudent manner under the circumstances such as are presented in this case.

[1] To say that under the foregoing circumstances Baker was contributorily negligent as a matter of law is not sustained by the record. The trial court was justified in finding, as it did, that Baker was not guilty of contributory negligence which proximately contributed to the collision. It is true that Baker did not succeed in getting past French and ahead of him on the right side of the road before Madrid came within collision distance. It may be that that failure is some indication that it was not safe for Baker to attempt to pass but his failure could be attributed to the slipping of the gears which was not his fault. In any case, however, we look at the situation as it appeared to a man of ordinary prudence at the time Baker commenced to pass French. As he commenced passing, French pulled over to the right indicating he would have room even if there was approaching traffic. The view was clear for 800 feet. The grade was only 3% or 4% and his truck was unloaded and had been previously gaining speed. As a person of ordinary prudence he was justified in assuming he could pass safely. He was not required to assume that an approaching vehicle 800 feet away would be travelling at such high and uncontrollable (considering the weight of Madrid's truck) speed that with that margin of safety he could not complete the passing maneuver. See Leo v. Dunham, 41 Cal.2d 712, 715, 264 P.2d 1. Certainly the question was one for the finder of fact, the trial court in the instant case. Even if Baker made a mistake in judging his ability to pass safely, that would not necessarily be contributory negligence. 65 C.J.S., Negligence, § 2; 38 Am.Jur., Negligence, § 33. The question of whether a man of ordinary prudence would have endeavored to pass is peculiarly a question for the trier of fact as it involves an exercise of judgment probably more difficult than any other conduct in driving a motor vehicle. "But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against,

1. "(a) [* * * *Return to right-hand side.*] Except when a roadway has been divided into three traffic lanes, no vehicle shall be driven to the left side of the center line of a roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction.

"(b) No vehicle shall at any time be driven to the left side of the roadway under the following conditions:

"1. When approaching the crest of a grade or upon a curve in the highway where the driver's view is obstructed within such distance as to create a hazard in the event another vehicle might approach from the opposite direction." Vehicle Code, § 530.

the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. See Johnson v. Southern Pacific R. R. Co., 154 Cal. 285, 97 P. 520; Wise v. Stott, 114 Cal.App. 702, 300 P. 883; Heitman v. Pacific Electric Ry. Co., 10 Cal.App. 397, 102 P. 15; Daly v. Hinz, 113 Cal. 366, 45 P. 693; Robinet v. Hawks, 200 Cal. 265, 252 P. 1045; McVea v. Nickols, 105 Cal.App. 28, 286 P. 761; Schneider v. Market Street Ry. Co., 134 Cal. 482, 66 P. 734; Walker v. Southern Pacific Co., 38 Cal.App. 377, 176 P. 175; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Moss v. H. R. Boynton Co., 44 Cal.App. 474, 186 P. 631; Green v. Southern Pac. Co., 53 Cal.App. 194, 199 P. 1059; Kienlen v. Holt, 106 Cal.App. 135, 288 P. 866; Grimes v. Richfield Oil Co., 106 Cal.App. 416, 289 P. 245; Schellin v. North Alaska Salmon Co., 167 Cal. 103, 138 P. 723; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125; Smith v. Southern Pacific Co., 201 Cal. 57, 255 P. 500; Flores v. Fitzgerald, 204 Cal. 374, 268 P. 369; Toschi v. Christian, 24 Cal.2d 354, 149 P.2d 848". Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829. The cases cited by defendants are distinguishable.

[2] Defendants' contention that contributory negligence must be imputed to M & M Livestock Transport Company, because Lacert was violating section 531 of the Vehicle Code[2] at the time of the collision, cannot be sustained. Section 531 provides that a truck being driven on a highway must be kept at a distance of at least 300 feet to the rear of any vehicle immediately preceding it. The evidence is clear that the M & M truck was within a few feet of the rear of French's truck at the time of the collision, but section 531 expressly provides that its provisions "shall not prevent overtaking and passing * * *." The trier of fact could reasonably infer that Lacert had pulled up close behind the slow-moving truck driven by French with the intention of passing it when the highway was clear. The evidence therefore supports the finding that Lacert was not guilty of contributory negligence.

The judgments are affirmed.

GIBSON, C. J., and SHENK, J., concur.

EDMONDS, Justice (concurring).

[1] I agree that the evidence does not show, as a matter of law, any negligence of Baker proximately contributing to his injury. However, I do not agree with the construction which has been placed upon section 530 of the Vehicle Code.

That statute defines the situation in which it is lawful to attempt to overtake and pass another vehicle by driving on the left side of the center line. This may be done when the left side is free from oncoming traffic "for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken." Sub. a. The next sentence reads: "In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction." The holding that the passer need only "act in a reasonable and prudent manner under the circumstances such as are presented in this case" gives no effect to the standard of care required by the Legislature.

In Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279, we said: "[T]he proper conduct of a reasonable person under particular situations may become settled by judicial decision or be prescribed by statute or ordinance. * * * An act or failure to act below the statutory standard is negligence *per se*, or negligence

2. "(b) the driver of any motor truck, or the driver of any motor vehicle which is drawing or towing another vehicle, upon a roadway outside of a business or residence district shall keep the vehicle he is driving at a distance of not less than 300 feet to the rear of any vehicle immediately preceding it being driven in the same direction. The provisions of this subdivision shall not prevent overtaking and passing * * *."

as a matter of law. And if the evidence establishes that the plaintiff's or defendant's violation of the statute or ordinance proximately caused the injury and no excuse or justification for violation is shown by the evidence, responsibility may be fixed upon the violator without other proof of failure to exercise due care. (Citations.) However, in an emergency, or under unusual conditions, it is generally held that circumstances may be shown to excuse the violation. * * * [T]he fact which will excuse the violation of a statute has been defined by the court as one resulting 'from causes or things beyond the control of the person charged with the violation.' (Citations.) * * * In the application of this rule each violation of a statutory requirement must be considered in connection with the surrounding circumstances. Ordinarily, the excuse relied upon by the violator presents a question of fact for the jury's determination." 29 Cal.2d at pages 587-590, 177 P.2d at page 283. The principles stated and applied in the Satterlee case were followed in Ornales v. Wigger, 35 Cal.2d 474, 480, 218 P.2d 531.

Without question, Baker failed to return to his proper lane "before coming within one hundred feet of any vehicle approaching" and presumptively was negligent. However, a proper disposition of the case requires a determination as to whether Baker's conduct was excused and, if not, whether his negligence contributed to the injury.

With regard to the first issue there is evidence that when Baker drove out of his lane to pass, the truck preceding him pulled on to the shoulder to its right leaving sufficient room to pass in the right-hand lane without crossing the center line. The testimony also shows a mechanical failure in Baker's truck while he was attempting to pass, that Madrid approached at an excessive rate of speed and driving in an erratic manner, and that the truck preceding Baker had stopped at the time of the impact. It may be inferred from this evidence that Baker was excused from returning to his proper lane because of a combination of the excessive speed of Madrid's vehicle and Baker's inability either to fall behind the preceding truck because it had stopped or to get ahead of it because of the mechanical failure in his own truck.

But even if Baker's violation of the statute was not justified, I do not believe there is any basis for holding, as a matter of law, that his negligence proximately contributed to the accident. The record shows that Madrid's truck was veering from side to side and had crossed the center line sufficiently to strike not only Baker's vehicle, but the one preceding him, which admittedly was in the proper lane. Although Madrid's truck may have swerved because of the application of brakes and the driver's attempt to avoid a collision, the trier of fact reasonably might have found that it was so far out of control when rounding the curve that it would have collided with Baker's vehicle regardless of whether the latter was entirely within its proper lane or two or three feet to the left of the center line as the record seems to indicate.

[2] I, therefore, concur in affirming the judgment in its entirety.

SCHAUER, J., concurs.

TRAYNOR, Justice (dissenting).

[2] I agree that the judgment in favor of plaintiff M & M Livestock Transport Co. should be affirmed, but I cannot agree that plaintiff Baker was not contributively negligent as a matter of law.

Section 530 of the Vehicle Code provides not only that overtaking and passing shall be "completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken", but that "*In every event* the overtaking vehicle *must return* to the right-hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction." (Italics added.) Thus, even if "safe operation" in the first clause means what a reasonably prudent driver would regard as "safe operation," the standard of care required by the second clause is not what the reasonably prudent driver would do under the circumstances but what the

Legislature has commanded, namely, that the driver of an overtaking vehicle return to the right-hand side of the roadway within the distance prescribed unless prevented from doing so by "'"causes or things beyond [his] control * * *."'" Ornales v. Wigger, 35 Cal.2d 474, 479, 218 P.2d 531, 534. Baker did not return to the right-hand side of the roadway within the distance prescribed. Nor could he have done so even if his gears had not slipped or if French had not stopped his truck. It is undisputed that those incidents occurred simultaneously with the appearance of defendant's truck round the curve. The evidence viewed most favorably to Baker clearly shows that, even if the gears had not slipped and French had not stopped, Baker could not have completed the passing maneuver or fallen behind French and thus returned to the right-hand side of the roadway within 100 feet of any vehicle approaching from the opposite direction even at a speed of only 55 miles an hour. See, Vehicle Code, § 511.

To leave to the trier of fact the question whether Baker's violation of the statute was excused, i. e., whether he could reasonably believe that he could pass without crossing the center line or return to his proper lane without endangering oncoming traffic, is to substitute for the statutory rule the view of the trier of fact as to what constitutes reasonable conduct. See my concurring opinion in Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 594, 177 P.2d 279.

I find no evidence in the record to support the conclusion that the accident would have occurred even if Baker had not attempted his ill-fated passing maneuver. The evidence clearly shows that Madrid was in control of his truck and was in his proper lane until he rounded the curve, saw Baker's truck in a position of danger, and applied his brakes in an attempt to avoid the collision. There can be no doubt that Baker's violation of the statute was a substantial factor in bringing about the collision and was, therefore, a contributing cause thereof.

SPENCE, J., concurs.

43 Cal.2d 838

Application of Tyler W. BERRY on Habeas Corpus.

Cr. 5573.

Supreme Court of California.
In Bank.

Jan. 25, 1955.

Rehearing Denied Feb. 24, 1955.

Habeas corpus proceeding for petitioner's release from confinement in a state prison under a sentence imposed by the Superior Court, Sacramento County, Hilliard Comstock, J., on petitioner's plea of guilty of fraudulently issuing a worthless check. On an order to show cause on petitioner's claim that the Superior Court was without jurisdiction to pronounce judgment against him because he was not represented by counsel at his preliminary hearing before a city recorder's court and his plea of guilty was made as the result of his prolonged incarceration in jail incommunicado, the Supreme Court, Spence, J., held that petitioner's claim of having been improperly held in jail for an unnecessarily extended period was without merit, and that the evidence warranted the trial court's conclusion that petitioner intelligently and effectively waived his right to counsel and entered the plea of guilty without coercion or threat of any kind.

Order to show cause discharged, and writ denied.

1. Habeas Corpus ⇐25(1)

One confined in state prison under sentence imposed by Superior Court on his plea of guilty of fraudulently issuing worthless check was not entitled to release on habeas corpus petition on ground that court had no jurisdiction to pronounce judgment because petitioner was not represented by counsel at preliminary hearing before committing magistrate, who nevertheless accepted his plea of guilty and waiver of preliminary examination, where magistrate's docket and petitioner's "affidavit waiving time and confessing guilt" disclosed that petitioner was fully advised of his constitutional rights and had full opportunity to object to proceedings and right to request appointment of counsel and contest validity of charge. Pen.Code, §§ 476a, 859, 860.

2. Criminal Law ⇐234, 238

An accused's voluntary written statement before magistrate, acknowledging commission of offense charged, consent to use of statement as evidence, and expression of desire for immediate hearing, constituted competent and sufficient evidence on which to hold him to answer in Superior Court to such charge, without necessity of swearing witnesses to prove facts confessed, and such proceedings satisfied constitutional requirement of preliminary examination. West's Ann.Const. art. 1, § 8.

3. Indictment and Information ⇐1

Where magistrate's order at conclusion of preliminary arraignment of one charged by warrant and complaint with fraudulently issuing worthless check, did not purport to certify case to Superior Court as on plea of guilty by a defendant not represented by counsel, but simply held accused to answer in such court, subsequent filing of information charging such offense in Superior Court gave it jurisdiction to proceed in matter. Pen.Code, §§ 476a, 859a–860.

4. Criminal Law ⇐245

An accused, failing to object to preliminary proceedings before magistrate, who committed him to Superior Court to answer criminal charge, and failing to move to set aside information subsequently filed in such court, waived irregularity of proceedings before magistrate and insufficiency of evidence at preliminary hearing. Pen.Code, § 995.

5. Habeas Corpus ⇐3

Alleged defects or irregularities in preliminary proceedings before magistrate committing accused to Superior Court to answer criminal charge may not be raised for first time on habeas corpus for accused's release from confinement in penitentiary under sentence imposed by Superior Court on his plea of guilty. Pen.Code, § 996.

6. Criminal Law ⇐641(1)
Habeas Corpus ⇐25(1)

A prisoner held on criminal charge has constitutional right to aid of counsel, and habeas corpus may be used to assure him private consultation with counsel. West's Ann.Const. art. 1, § 13; U.S.C.A. Const. Amend. 14.

7. Criminal Law ⇐264

Refusal to grant accused's request for counsel before his arraignment and plea of guilty of crime charged constitutes denial of fundamental civil rights. West's Ann. Const. art. 1, § 13; U.S.C.A. Const. Amend. 14.

8. Arrest ⇐70

Where incarceration of one charged with fraudulently issuing worthless check in county jail for 36 days was related not only to such offense, but to other criminal charges pending against him and to his violation of probation granted him in connection with previous conviction in city recorder's court for petty theft, as well as possibility that authorities of Nevada state prison, wherein he had been confined on conviction of forgery, might demand his return thereto because of parole violations, his claim of having been improperly held in jail for unnecessarily extended period was without merit.

9. Criminal Law ⇐641(1)

While a prisoner's right to counsel will be protected, it may be waived. West's Ann. Const. art. 1, § 13; U.S.C.A. Const. Amend. 14.

10. Habeas Corpus ⇐85(1)

In habeas corpus proceeding for petitioner's release from confinement in state penitentiary under sentence on plea of guilty of crime, burden is on petitioner to allege and prove all facts on which he relies to overturn judgment of conviction.

11. Habeas Corpus ⇐85(1)

In habeas corpus proceeding for petitioner's release from confinement in state penitentiary under sentence imposed by Superior Court on his plea of guilty of fraudulently issuing worthless check, evidence warranted trial court's conclusion that petitioner intelligently and effectively waived his right to counsel and entered such plea without coercion or threat of any kind. Pen.Code, § 476a; West's Ann.Const. art. 1, § 13; U.S.C.A. Const. Amend. 14.

Tyler W. Berry, in pro. per., and Leonard P. Burke, Sacramento, and Keith Lamb, Sacramento, under appointment by the Supreme Court, for petitioner.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Petitioner, an inmate of the State Prison at Folsom, seeks his release on *habeas corpus*. This court issued an order to show cause upon petitioner's claim that the superior court was without jurisdiction to pronounce judgment against him because he was not represented by counsel at the preliminary hearing, and because his plea of guilty, entered in the superior court while he was not represented by counsel, was made as the direct result of a prolonged period of incarceration, during which period he was held incommunicado.

The petition was filed *in propria persona*, and thereafter this court appointed counsel who filed a brief and argued herein on behalf of petitioner. A stipulation of facts has been filed, setting forth the nature of the charges against petitioner and the proceedings culminating in his imprisonment. Affidavits have also been filed in denial of petitioner's claim that he was held incommunicado. No counter-affidavits have been submitted. As the record thus stands, we find no merit in petitioner's challenge of the legality of his confinement.

On July 15, 1952, petitioner was arrested in Santa Rosa for being drunk in violation of a city ordinance. He pleaded guilty and was sentenced to seven and one-half days in the county jail. Some six weeks earlier petitioner had been returned from the Nevada State Penitentiary (where he had been confined for a forgery conviction) to the Sonoma County authorities, pursuant to his waiver of extradition, on a warrant and complaint charging him with the violation of Penal Code, section 476a (issuing a check without sufficient funds or credit, with intent to defraud). The offense was reduced to petty theft. On arraignment, petitioner was advised of and waived his right to counsel; he pleaded guilty and the matter was referred to the probation officer. Then on June 20 he was sentenced to six months in the county jail, sentence was suspended, and he was released on probation for one year, conditioned upon his making restitution, being employed, and avoiding the use of intoxicating liquor.

On July 21, 1952, while serving the above-mentioned jail sentence for being drunk, petitioner was booked for another violation of Penal Code, section 476a. A few days later a complaint was filed against petitioner for the violation of Penal Code, sections 484–488 (theft); petitioner was brought into court on this latter charge; after being informed, he waived his rights and pleaded guilty; but he was never sentenced in view of a dismissal thereafter filed. While this latter theft charge was pending and on August 21, 1952, a complaint was filed against petitioner in the Santa Rosa Recorder's Court on the Penal Code, section 476a violation here involved. Petitioner was arraigned, informed of his rights to counsel, and he signed an "Affidavit Waiving Time and Confessing Guilt." This affidavit recites that the complaint was read to petitioner; that he was advised that he did not have to make any statement in the matter and that he was voluntarily making one; that he was guilty of the offense charged, waived time to prepare for a preliminary examination, and consented to an immediate hearing. It further recites that on July 12, 1952, in Santa Rosa petitioner issued a check for $25, payable to a certain market and against a bank where he had no account and no credit arrangement, as he well knew; that the check was issued with intent to defraud; that he made this statement with knowledge that it would be used, and he consented thereto, as evidence upon a preliminary examination in the pending action; that he had read the statement and its recitals were true. The affidavit was received in evidence, and petitioner was held to answer in the superior court.

On August 22, 1952, the information on this fraudulent check offense was filed in the superior court. Petitioner was arraigned that day. The reporter's transcript of

the proceedings [1] shows that petitioner then, after full instruction by the judge (Hon. Hilliard Comstock, Sonoma County, Superior Court), waived his right to counsel and time to plead, and entered a plea of guilty. Thereupon the matter was referred to the probation officer and continued to August 25, 1952, for report and the imposition of sentence. The reporter's transcript of the proceedings on this latter day [2] shows that

1. "The Court: There has just been filed in this court, Mr. Berry, an information charging you with a violation of Section 476–a of the Penal Code of the State of California. It charges in substance and effect that you issued a bad check and the contents of the information will hereafter be made fully known to you. You are entitled to be represented at all stages of this proceeding by an attorney. Do you have one?

"Mr. Berry: No I don't.

"The Court: Do you have funds to engage one?

"Mr. Berry: No. I would like to waive the attorney. I am fully aware of my rights but I still wish to waive it. I would like to enter my plea at this present time also.

"The Court: All right, in respect to the appointment of an attorney you apparently are fully aware of that but I would like to get it in the record that you have been advised that if you are without funds or credit with which to engage an attorney the court will appoint one for you if you desire to be advised? A. No.

"Q. You are fully aware of that, are you? A. Yes.

"The Court: It is your desire to waive an attorney and just simply represent yourself in the proceeding? A. Yes, then I waive the reading of the information also if I may at this time.

"The Court: Very well, I will respect your wishes in that respect and the court then will proceed, the defendant representing himself in the matter, and apparently is fully aware of his own rights. He appears to me to be a man of intelligence and knows what he is doing, therefore, I will not appoint an attorney against his will. The copy of the information will be handed to the defendant at this time so that he may be made fully aware of it.

"Mr. Murphy (Deputy District Attorney): That has already been done, Your Honor.

"The Court: You acknowledge that has been handed to you, Mr. Berry?

"Mr. Berry: Yes.

"The Court: Are you ready to proceed at this time?

"Mr. Berry: I wish to plead guilty.

"The Court: Enter the plea of guilty, Madam Clerk. The matter is referred to the Probation Officer automatically.

"Mr. Berry: Your Honor, may I request the matter not be referred to the Probation Officer? There are some extenuating circumstances in my case and I believe that I am justified in asking. It so happens that I am on parole now from a prison in Nevada. I am incurably ill, I need hospitalization. The sooner I can get it the better off I will be. The only place I can get it unfortunately is in San Quentin. It is impossible in the county jail, in any county in the state to get it because they are not set up in the county to even give me temporary aid and I need extensive medical and surgical care. The place I can get it—

"The Court: Would you mind stating—

"Mr. Berry: Rheumatic arthritis and rheumatic fever.

"The Court: Now, Mr. Berry, I do want some sort of a report of the Probation Officer on your matter setting out these facts and I will refer the matter to him and direct him to immediately after a conference with you get a report on file and that will not delay the matter of any judgment that may be pronounced in court in a matter of a couple of days.

"Mr. Berry: I would like to be sentenced as soon as possible.

"The Court: I understand the request and I understand the reasons for it. I would, however, like to get a written record on the matter, and you will, therefore, Mr. Bathurst—Mr. Bathurst is the Assistant Probation Officer who usually handles adult probation matters—at the request of the defendant then that the matter be handled with all dispatch I will continue the matter until Monday morning at 10:00 a. m. At that time I will pronounce judgment and with the understanding that is your request.

"Mr. Berry: Yes, that is.

"The Court: To have a formal report of the Probation Officer on hand at that time or you make a written record of what you wish to tell me.

"Mr. Berry: Thank you, Your Honor."

2. "The Court: The People of the State of California versus Tyler W. Berry, defendant.

"Mr. Luckhardt (Deputy District Attorney): Ready for the People, Your Honor.

"The Court: And the probation office is represented by Mr. Bathurst, present in

probation was denied and petitioner was sentenced to imprisonment for the term prescribed by law. No appeal was taken.

[1, 2] Petitioner premises his first argument for relief on the proposition that he was not represented by counsel at the preliminary hearing and yet the magistrate accepted his plea and waiver of preliminary examination contrary to sections 859 and 860 of the Penal Code. He argues that these irregularities deprived the superior court of jurisdiction to proceed in the matter. However, both the docket of the committing magistrate and the "Affidavit Waiving Time and Confessing Guilt" disclose on their face that petitioner was fully advised of his constitutional rights prior to signing the latter document in open court. He had full opportunity to object to any of the proceedings at that time; he had the right to request the appointment of counsel in his behalf and to contest the validity of the charge. Petitioner was familiar with this type of proceeding, having a few weeks previously been prosecuted on a like charge, when he adopted the same procedure of waiving his right to counsel, pleaded guilty to the offense as reduced to petty theft and was fulfilling his one-year probation term when he was charged with the present fraudulent check offense. Pen.Code, § 476a. He voluntarily made his written confession or statement before the magistrate, acknowledging commission of the offense, consented to the statement's use as evidence in the proceedings, and expressed his desire for an "immediate hearing." This was competent and sufficient evidence upon which to hold petitioner to answer. It was not necessary to swear witnesses to prove facts which the accused voluntarily confessed. People v. Cokahnour, 120 Cal. 253, 254, 52 P. 505; In re Stroff, 132 Cal.App. 351, 353, 22 P.2d 770. Such proceedings satisfied the constitutional requirement of a preliminary examination. Const. Art. I, § 8.

[3] The magistrate's order at the conclusion of petitioner's preliminary arraignment did not purport to be a certification to the superior court as upon a plea of guilty from a defendant not represented by counsel, Pen.Code §§ 859a–860, but was simply "a holding of" petitioner "to answer, followed by the filing of an information." People v. Nation, 108 Cal.App.2d 829, 831, 239 P.2d 891, 892. The filing of the information gave the superior court jurisdiction to proceed in the matter. Ex parte McConnell, 83 Cal. 558, 23 P. 1119.

court, and the Court notes that the defendant is in court. This is a case in which, upon arraignment, the defendant waived the formal reading of the information and was furnished with a copy of the information and acknowledged its contents and requested he be not furnished an attorney and desired to represent himself, and desired to plead guilty at once, and he requested also that the matter be not referred to the probation officer and that he be at once sentenced for the offense with which he is charged. The Court desired to have a record in the form of a report from the probation officer and very little delay was involved in having that done and thereafter the matter was referred to the Probation Officer and he is now ready to file his report, is that correct?

"Mr. Bathurst: That's correct, Your Honor.

"The Court: Let the report be filed and has a copy of the report been furnished the defendant?

"Mr. Bathurst: It has, Your Honor, and he has read it.

"The Court: Have you had an opportunity to read it?

"Defendant: Yes.

"The Court: Is there anything about the report upon which you desire to make any comment?

"Defendant: No, it is satisfactory.

"The Court: And it is still your desire, Mr. Berry, under all the circumstances of your case to waive time for pronouncing judgment and have judgment pronounced at once?

"Defendant: It is.

"The Court: Very well. The Court feels that Mr. Berry is an intelligent man and understands the complications of his case and has his own good reasons for the request, and, therefore, it will be the order of this court that probation be denied and that the defendant be committed to the Director of Corrections of the State of California at San Quentin, California, for the term prescribed by law for the offense to which he has pleaded guilty; namely, violation of Section 476–a of the Penal Code of the State of California, as charged in the information."

[4, 5] Moreover, having failed to object to the proceedings and having failed to move to set aside the information under the provisions of section 995 of the Penal Code (the exclusive method provided by law for challenging the legality of the commitment), the irregularity of proceedings before the magistrate and the insufficiency of the evidence at a preliminary hearing are waived. Such alleged defects or irregularities may not be raised for the first time upon *habeas corpus*. Pen.Code, § 996; Ex parte McConnell, supra, 83 Cal. 558, 23 P. 1119; In re Tedford, 31 Cal.2d 693, 694, 192 P.2d 3; In re Razutis, 35 Cal.2d 532, 534–535, 219 P.2d 15; In re Basham, 24 Cal.App.2d 285, 286, 74 P.2d 781.

[6, 7] As further ground for relief, petitioner contends that he was denied his constitutional right to representation by counsel, U.S.Const. Fourteenth Amend.; Cal.Const. Art. I, § 13; that this denial was the direct and prejudicial cause of his conviction, which was based upon his plea of guilty in the superior court; and that any apparent waiver of his right to counsel may not be regarded as an effective waiver because it was the direct result of thirty-six days of incarceration, during which time he was denied an opportunity to consult with counsel. Accordingly, petitioner cites the established rule that a prisoner held on a criminal charge has a constitutional right to the aid of counsel, and that *habeas corpus* may be used to assure private consultation with counsel. In re Snyder, 62 Cal.App. 697, 699–700, 217 P. 777. Refusal to grant a prisoner's request for counsel prior to arraignment and a plea of guilty constitutes a denial of "fundamental civil rights." In re McCoy, 32 Cal.2d 73, 76, 194 P.2d 531, 533.

[8] Petitioner claims that during the period of his incarceration on this offense, thirty-six days in the county jail—July 21 to August 25, 1952—he was held incommunicado; that during such confinement his many requests for permission to contact an attorney were repeatedly denied or ignored by the officers in charge; and that finally after some five weeks of frustrated efforts to communicate with an attorney and in desperation because of a crippling rheumatoid arthritic condition, which was causing him great physical pain, he sent for the assistant district attorney and agreed, despite his alleged innocence, to plead guilty so that he could be given an immediate court hearing. He was taken to court the next day, August 21, the preliminary hearing was held, and then followed the superior court proceeding culminating in his conviction and sentence on August 25, 1952.

However, the record contains no evidence which would support petitioner's claims. Rather, the showing is all to the contrary. At the time of argument before this court, the People submitted affidavits in direct refutation of petitioner's allegations. One was by the Assistant Probation Officer of Sonoma County, attesting that during the period in question he visited petitioner several times in connection with making a report on petitioner's violation of the terms of his probation, and that at no time did petitioner ask for an attorney or complain of any refusal of permission by the jailors to telephone or communicate with relatives or friends. Another affidavit was by the head jailor of the Sonoma County jail, attesting that at no time did he refuse to admit an attorney to see and counsel with petitioner; that petitioner at all times was permitted reasonable access to the telephone; that during his confinement petitioner was taken to the Sonoma County Hospital for treatment; and that at no time did affiant, or anyone in affiant's presence, threaten petitioner or in any way offer to petitioner any inducement to cause petitioner to enter a plea of guilty to any offenses with which petitioner was charged. A third affidavit was by the Chief Criminal Deputy Sheriff of Sonoma County, attesting to the same effect that at no time in affiant's presence were any threats or coercive statements made to petitioner; that petitioner was always allowed reasonable use of the telephone; and that petitioner never complained that he was being refused any reasonable request. Petitioner has not produced any counter-affidavits contravening this specific showing by the People. Moreover, it appears from the record of the proceedings, and petitioner does not claim

otherwise, that petitioner at no time during his appearances in court made any complaint there with respect to having been deprived of any legal rights.

Petitioner's prolonged incarceration during the period in question appears to have been related not only to the fraudulent check offense here involved, but also to other criminal charges then pending against him, as above recited. Also there was the consideration of his having violated the terms of his probation in connection with a previous conviction in the Santa Rosa court, as well as the possibility of the Nevada State Prison authorities demanding his return because of parole violations. In these circumstances, petitioner's claim of having been improperly held in jail for an unnecessarily extended period is without merit.

[9–11] The record furnishes substantial basis for the conclusion that petitioner was fully aware of the nature of the proceedings, and that the waiver of his right to counsel and his plea of guilty, coupled with his request for immediate sentence, were made by one who had an intelligent conception of the consequences of his act. Cf. In re Jingles, 27 Cal.2d 496, 498, 165 P.2d 12; In re Tedford, supra, 31 Cal.2d 693, 695, 192 P.2d 3. Petitioner's past experience with court proceedings on various criminal charges shows his familiarity with judicial procedure in such matters. After having been fully instructed by the trial court as to his rights to counsel and told that if without funds, counsel would be procured for him, petitioner elected to waive his right to counsel and proceeded to enter his plea. While the right of a prisoner to counsel will be protected, it is a right which may be waived. In re Connor, 16 Cal.2d 701, 706, 709–710, 108 P.2d 10. The record clearly shows that petitioner did so waive this right of his own volition and with full knowledge of what he was doing. Cf. People v. Chessman, 38 Cal.2d 166, 174, 238 P.2d 1001. In this proceeding in *habeas corpus* petitioner has the burden of alleging and proving all the facts upon which he relies to overturn the judgment of conviction. In re Dixon, 41 Cal.2d 756, 760, 264 P.2d 513. He has not met this burden, but rather it appears that the trial court correctly concluded that petitioner intelligently and effectively waived his right to counsel and, without coercion or threat of any kind, entered his plea of guilty.

The order to show cause is discharged, and the writ is denied.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



44 Cal.2d 1

Matter of the Application of Caryl CHESSMAN for a Writ of Habeas Corpus.

PEOPLE of the State of California, Petitioner,

v.

SUPERIOR COURT and Caryl Chessman, Real Party in Interest, Respondents.

Cr. 5591,

S. F. 19158.

Supreme Court of California.
In Bank.

Feb. 1, 1955.

Rehearing Denied March 3, 1955.

Proceeding on petition for writ of habeas corpus by prisoner seeking relief from allegedly illegal conditions of imprisonment which assertedly interfered with his representing himself in regard to appeal from seventeen judgments of conviction previously rendered against him. The Superior Court, Marin County, Thomas F. Keating, J., granted relief sought and People filed appeal and petition for writ of review. The District Court of Appeal issued writ, and the matters were transferred. Petitioner moved to dismiss. The Supreme Court, Schauer, J., held that where petition sought relief allowing prisoner immediate access by mail to courts, allowing him to retain personal legal books and papers for use in prosecuting his appeal, and allowing him to privately consult with attorneys of his own choosing, but it appeared that prisoner was not being deprived of any such right at time of issuance of order, it was

error for trial court to grant relief requested.

Petitioner's motions denied; habeas corpus order reversed and remanded.

Carter, J., dissented.

Opinion, 273 P.2d 936, vacated.

1. Habeas Corpus ⇐1

Function of writ of habeas corpus is solely to effect discharge from unlawful restraint, though illegality in respect to which discharge from restraint is sought may not go to fact of continued detention but may be simply as to circumstances under which prisoner is held. Pen. Code, § 1506.

2. Habeas Corpus ⇐113(3)

Even though habeas corpus order was not one discharging prisoner from custody, such order was appealable, where order directed that prisoner be granted relief short of ordering his release. Pen.Code, § 1506.

3. Habeas Corpus ⇐113(4)

Even though People were not named as respondents in petition for habeas corpus, appeal from order granting relief sought could be taken by People. Pen.Code, § 1506.

4. Habeas Corpus ⇐114

Where remedy of appeal was available to People in habeas corpus proceeding, writ of certiorari would not lie, and having been inadvertently issued, would be discharged and proceeding dismissed. West's Ann. Code Civ.Proc. § 1068.

5. Habeas Corpus ⇐25(1)

Prisoner is entitled to, and habeas corpus is available to enforce, right to file in any court petition or other document which purports to seek some remedy or relief relating to offense for which he is imprisoned, as well as right, at reasonable times, to consult privately with his counsel in preparation for trial.

6. Prisons ⇐4

Decision of convicted prisoner to represent himself does not entitle him to greater privileges than other prisoners.

7. Prisons ⇐4

Prisoners have right to prompt and timely access to mails for purpose of transmitting to court statements of fact which attempt to show any ground for relief, but they have no legally enforceable rights to engage in legal research. Pen.Code, §§ 2600–2602.

8. Habeas Corpus ⇐112

Where habeas corpus petition by convicted prisoner sought relief allowing him immediate access by mail to courts, allowing him to retain personal legal books and papers for use in prosecuting his appeal, and allowing him to privately consult with attorneys of his own choosing, but it appeared that prisoner was not being deprived of any such rights at time of issuance of order, it was error for trial court to grant relief requested. Pen.Code, § 1506.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Charles E. McClung, Deputy Atty. Gen., San Francisco, for appellant and petitioner.

Caryl Chessman, in pro. per.

Rosalie Asher, Sacramento, for respondent and real party in interest.

SCHAUER, Justice.

By a petition for a writ of habeas corpus filed on October 17, 1951, Caryl Chessman, an inmate of San Quentin State Prison whose appeal from 17 judgments of conviction was pending, sought relief from allegedly illegal conditions of imprisonment which assertedly interfered with his representation of himself.[1] On December 18, 1951 this court affirmed the judgments, two of which imposed the death penalty. (People v. Chessman, 38 Cal.2d 166, 238 P.2d 1001.) The subject matter of Chessman's petition for habeas corpus has no relevancy whatsoever to the proceedings at the trial which resulted in his conviction or to the legality of the judgments which were imposed and affirmed and under which

1. Petitioner continued to represent himself in these proceedings until November 8, 1954, when Mr. Berwyn Rice was appointed to represent him. On November 24, at Chessman's request, the appointment of Mr. Rice was terminated. At oral argument Miss Rosalie Asher appeared for Chessman.

he is now confined and awaiting execution; it relates solely to a matter of prison administration. After the judgments had been affirmed the superior court, in the habeas corpus proceeding, ordered that Chessman "continue to be allowed the free exercise" of asserted rights in connection with his representation of himself. The attorney general filed with the District Court of Appeal a notice of appeal from the superior court order; also, uncertain whether the People could appeal from the order, the attorney general filed with the District Court of Appeal a petition for a writ of review. The District Court of Appeal issued the writ of review. The matters have been transferred to this court, and Chessman has filed notices of motion to dismiss the review proceeding and the appeal. We have concluded, for reasons hereinafter stated, that the order appealed from should be reversed with directions to the superior court to dismiss the habeas corpus proceeding, and that the review proceeding should be dismissed.

Appealability of the Habeas Corpus Order

The principal ground of Chessman's motion to dismiss the appeal is that the superior court order is not appealable. The People have asked that this court pass on the question whether they can appeal from an order on habeas corpus which directs that a petitioner be granted relief but which does not order his release from custody.

In accord with the view that "The right of appeal is derived from our constitution or statutes" (Gale v. Tuolumne County Water Co. (1914), 169 Cal. 46, 52, 145 P. 532), prior to the enactment of section 1506 of the Penal Code in 1927 it was held that no orders on habeas corpus were appealable. (Matter of Perkins (1852), 2 Cal. 424, 430; People v. Schuster (1871), 40 Cal. 627; Matter of Hughes (1911), 159 Cal. 360, 363, 113 P. 684; Matter of Zany (1913), 164 Cal. 724, 727, 130 P. 710; France v. Superior Court (1927), 201 Cal. 122, 127, 255 P. 815, 52 A.L.R. 869; Ex parte White (1906), 2 Cal.App. 726, 727, 84 P. 242.) Section 1506 of the Penal Code, as enacted in 1927, provided insofar as is here material that "An appeal may be taken * * * by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant after his conviction, in all criminal cases prosecuted by indictment or information in a court of record * * *." There followed a series of cases which announced that the People could appeal only in those cases which came within the precise wording of the statute and refused to allow an appeal where the habeas corpus order was not made after conviction in a criminal case prosecuted by indictment or information. (In re Alpine (1928), 203 Cal. 731, 745, 265 P. 947, 58 A.L.R. 1500; In re Bruegger (1928), 204 Cal. 169, 170, 267 P. 101; Thuesen v. Superior Court (1932), 215 Cal. 572, 576, 12 P.2d 8; Loustalot v. Superior Court (1947), 30 Cal.2d 905, 913, 186 P.2d 673; In re Merwin (1930), 108 Cal.App. 31, 32, 290 P. 1076; In re Dutton (1931), 119 Cal. App. 447, 448, 6 P.2d 558.)

Although in the last cited cases the court would not allow an appeal by the People except where there was literal compliance with statutory requirements that there be "conviction" in a case prosecuted "by indictment or information," a liberal view as to the meaning of the word "discharging" in section 1506 was taken in In re Larabee (1933), 131 Cal.App. 261, 264, 21 P.2d 132. There an inmate of San Quentin, confined pursuant to a judgment of conviction in Los Angeles County, sought habeas corpus in Marin County. By the superior court order in the habeas corpus proceeding petitioner was "remanded to the custody of the Sheriff of Los Angeles County." The People appealed. Petitioner moved to dismiss the appeal on the ground that the order was not, in the language of section 1506 of the Penal Code, one "discharging" him. In denying the motion to dismiss, the appellate court said that the effect of the order was to discharge the petitioner from the custody of the warden, and the fact that the superior court also ordered petitioner remanded to the custody of the sheriff "did not have the effect of depriving the state of its right of appeal, for the reason that in the face of a valid commitment the trial court was without power to make such order."

[1, 2] In 1951 section 1506 of the Penal Code was amended to provide that "An appeal may be taken * * * by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant after his conviction in all criminal cases * * *." It is Chessman's position that the order here is not appealable because it is not one "discharging" him. The People argue that as the uses of habeas corpus have been extended by judicial decision to the granting to prisoners of rights short of effecting their release from illegal custody, there should be a concomitant extension of appealability to orders effecting these new uses of the writ. The function of a writ of habeas corpus is solely to effect "discharge" from unlawful restraint, though the illegality in respect to which the discharge from restraint is sought may not go to the fact of continued detention but may be simply as to the circumstances under which the prisoner is held, as, for example, where he questions the propriety of his detention as an habitual criminal (In re McVickers (1946), 29 Cal.2d 264, 176 P.2d 40; In re Seeley (1946), 29 Cal.2d 294, 299, 176 P.2d 24; In re Harincar (1946), 29 Cal.2d 403, 176 P.2d 58; In re Wolfson (1947), 30 Cal.2d 20, 180 P.2d 326; In re Pearson (1947), 30 Cal.2d 871, 186 P.2d 401) or where he questions the construction of the judgment of conviction under which he is held (In re Bramble (1947), 31 Cal.2d 43, 46, 51, 187 P.2d 411). "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." (Pen. Code, § 1473.) The scope of inquiry at the hearing on the writ includes consideration of "any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge" (Pen. Code, § 1484) and "If no legal cause is shown for such imprisonment or restraint, or for the continuation thereof, * * * [the] court or judge must discharge such party from the custody or restraint under which he is held" (Pen.Code, § 1485), which means that the prisoner may be discharged from illegal conditions of restraint although not from all restraint. Since this is the function and scope of habeas corpus, we conclude that it is proper and desirable to interpret section 1506 of the Penal Code in its use of the word "discharging" as being fully as broad as the scope of the writ itself.

The People as Parties to the Appeal

[3] It is Chessman's position that the appeal should be dismissed because the People are not parties who can maintain such appeal. The People are not named as respondents in the petition for habeas corpus; the respondents there named are the warden, two assistant wardens, and the chief custody officer of San Quentin. However, authority for an appeal in the name of the People is found in section 1506 of the Penal Code which since its enactment has provided that an appeal may be taken "by the people" from certain orders on habeas corpus.

Availability of Certiorari to Review Superior Court Habeas Corpus Order

[4] In support of his motion to dismiss the writ of certiorari Chessman contends that such writ will not lie to annul an order of the Superior court on habeas corpus, no matter how erroneous it may be, if the superior court had "jurisdiction," citing Matter of Hughes (1911) supra, 159 Cal. 360, 363, 113 P. 684. (See also Rose v. Superior Court (1948), 86 Cal.App.2d 173, 176, 194 P.2d 568.) However, we need not at this time re-examine the rationale of the Hughes case, or otherwise consider the grounds of dismissal urged by Chessman, because it follows as a matter of law from our conclusion that the remedy of appeal is available, that the writ of certiorari will not lie (Code Civ.Proc. § 1068), and, having been inadvertently issued, it will be discharged and the proceeding will be dismissed (see Matter of Hughes (1911), supra, 159 Cal. 360, 366, 113 P. 684; Rose v. Superior Court (1948), supra, 86 Cal. App.2d 173, 178, 194 P.2d 568).

The Merits of the Superior Court Order

The original petition for habeas corpus dated October 3, 1951, alleges in perti-

nent part that Chessman has appeared and desires to continue to appear in his own behalf in his then pending appeal, and that he anticipates unjustifiable punishment, "depriving him of the use of books, typewriter, etc., on the pretext that he has violated a prison rule by helping another man prepare a legal document." A supplement to the petition, dated October 7, 1951, alleges that the warden refused to have the original petition mailed to the superior court for filing; he returned it to Chessman with a notation that "I note that you anticipate that you are to receive some sort of punishment. I do not believe that any of us can look into the future and determine what will happen. I also note that you do not tell the truth throughout the petition." A further supplement, dated October 10, 1951, alleges that Chessman "is now confined in a 'hole' cell," denied the use of "clerical supplies or legal books," and "has only a few sheets of this paper and pen." The petition and the two supplements were filed on October 17, 1951.

The writ issued and pursuant to its command Chessman was produced before the superior court; respondent warden filed a return and moved that the matter be dismissed. Chessman filed a traverse to the return in which he asked that the petition stand as partial traverse and averred that the prison authorities "continue to treat petitioner in such a way * * * as to deprive petitioner of his legal right effectively to litigate his case through the courts."

Chessman, although under sentence of death, personally appeared at six hearings in the superior court between October 26, 1951, and March 7, 1952. The following facts were established: The delay in the filing of the original petition was due to the fact that the warden sent it to the attorney general with a request for advice as to whether he should mail it to the court for filing; the attorney general advised that the warden should permit its filing. On October 9, 1951, the prison disciplinary committee found that Chessman had violated a prison rule by aiding another inmate and punished him by a reprimand; also on October 9, 1951, Chessman created a loud disturbance and for this he was summarily punished by confinement in a "quiet cell," without typewriter, books, or his papers, from October 10 to 15, 1951. On October 16, 1951, the disciplinary committee found Chessman guilty of disorderly conduct and he was punished by confinement to his own cell for 10 days. On October 26, 1951, when Chessman first appeared in the superior court in the habeas corpus matter, the facilities which had been given him in connection with his representation of himself had been restored to him, and he admitted that the question of the deprivation of such facilities "in the abstract * * * is moot."

During the course of the hearings Chessman wrote to Mr. Garry, attorney of record for another prisoner, that he wished to see Mr. Garry; Mr. Garry called at the prison to talk with his client, then asked to see Chessman; an assistant warden informed Mr. Garry that he could not see Chessman because he was not attorney of record for him. Mr. Garry sat with Chessman at the counsel table as "legal advisor" during one of the hearings on the habeas corpus matter.

The superior court ordered that the warden's motion to dismiss be denied and that Chessman "be remanded to the custody of the Warden * * * with directions that the said Petitioner continue to be allowed the free exercise of the following legal and constitutional rights:

"(1) That the said Petitioner be allowed immediate access by mail to the courts of this State and of the United States at all times;

"(2) That the said Petitioner be allowed to make all reasonably necessary legal research for, and to prepare and file with any such court, any document he deems necessary to the maintenance *of* protection of his civil rights or to the effective representation of himself on appeal from, or in collaterally attacking, any or all of those judgments of conviction under which the Respondent Warden derives his legal authority to hold the said Petitioner in custody.

"(3) That the said Petitioner be allowed to retain his personal legal papers and books at all times during which he may

reasonably make use of them for the purposes hereinabove set forth.

"(4) That while so representing himself on appeal or in collaterally attacking any or all of those said judgments of conviction, the said Petitioner should be allowed privately to consult with attorneys of his own choosing and to consult and communicate with other responsible persons, so long as the said Petitioner and those who confer with him at the prison or communicate with him upon legal matters comply with the Rules and Regulations of the Prison respecting such activities."

[5] The writ of habeas corpus has been allowed to one lawfully in custody as a means of enforcing rights to which, in his confinement, he is entitled. It has been held that a prisoner is entitled to, and habeas corpus is available to enforce, "the right to file in any court a petition or other document which purports to seek some remedy or relief relating to the offense for which he was imprisoned" (In re Robinson (1952), 112 Cal.App.2d 626, 629, 246 P.2d 982; In re Malone (1952), 112 Cal.App.2d 631, 246 P.2d 984; see Ex parte Hull (1941), 312 U.S. 546, 549, 61 S.Ct. 640, 85 L.Ed. 1034) and petitioner's right, at reasonable times, to consult privately with his counsel in preparation for trial (In re Rider (1920), 50 Cal.App. 797, 799, 195 P. 965; In re Snyder (1923), 62 Cal.App. 697, 699, 217 P. 777; In re Qualls (1943), 58 Cal. App.2d 330, 331, 136 P.2d 341).

[6] The present order cannot be upheld as one enforcing such rights, for at the time of the hearings and the making of the order Chessman was not being deprived of those rights. The petition for habeas corpus had been filed and the delay preceding its filing was no longer a ground for complaint. Aside from the fact that the warden temporarily took the erroneous position that he could refuse to permit the filing of the petition for habeas corpus, no violation of any right to which a prisoner is entitled was made to appear. The temporary separation of Chessman from his papers was shown to have been an incident of punishment for his violation of a reasonable prison rule against the creation of loud disturbances. The refusal to permit him to see Mr. Garry was shown to have been based on the reasonable ground that Mr. Garry was not his attorney. It is manifest from the entire record of this habeas corpus proceeding that Chessman is claiming not rights but special privileges. As the court which tried him and this court have previously had occasion to point out, Chessman's decision to represent himself did not entitle him to greater privileges than other prisoners. (See People v. Chessman (1951), *supra*, 38 Cal.2d 166, 173–174, 176, 238 P.2d 1001.

[7, 8] When it developed at the hearings that Chessman was not then being deprived of rights to which he as a prisoner was entitled, the superior court should have granted the People's motion to dismiss. Instead it made an order which purports to declare that Chessman "continue to be allowed" privileges which are not enforceable rights of prisoners. For example, it would be manifestly impossible to allow prisoners "immediate access by mail to the courts * * * at all times." As indicated above, prisoners have the right to prompt and timely access to the mails for the purpose of transmitting to the courts statements of facts which attempt to show any ground for relief, but they have no legally enforceable rights to engage in legal research.[2] Since it has not been shown that Chessman was being deprived of any rights at the time of the making of the superior court order, and since that order purports to declare that he is to be allowed future privileges to which he is not entitled, the order cannot be upheld.

For the reasons above stated, the motions of Chessman are denied; the writ of review is discharged and the review proceeding is dismissed; the order on habeas cor-

2. "A person sentenced to death is deemed civilly dead during the existence of the death sentence." (Pen.Code, § 2602.) Also, because Chessman is under sentence to life imprisonment he is deemed civilly dead (Pen.Code, § 2601) and because he is under sentence to imprisonment for terms less than life his civil rights are suspended (Pen.Code, § 2600).

pus is reversed and the cause on habeas corpus is remanded to the superior court with directions that the writ be discharged, the petitioner be remanded to the custody of the warden, and the proceeding be dismissed. Let the remittiturs issue forthwith.

GIBSON, C. J., and SHENK and SPENCE, JJ., concur.

EDMONDS and TRAYNOR, JJ., concur in the judgment.

CARTER, Justice.

I dissent.

I see no occasion for reading words into section 1506 of the Penal Code which makes appealable only an order of the superior court which *discharges* petitioner from custody. It has been held repeatedly that in only those situations expressly covered by section 1506 was an order in habeas corpus proceedings appealable because the rule prior to its enactment had been that the state could not appeal. In re Alpine, 203 Cal. 731, 265 P. 947, 58 A.L.R. 1500; In re Bruegger, 204 Cal. 169, 267 P. 101; Thuesen v. Superior Court, 215 Cal. 572, 12 P.2d 8; Loustalot v. Superior Court, 30 Cal.2d 905, 186 P.2d 673; In re Merwin, 108 Cal.App. 31, 290 P. 1076; In re Dutton, 119 Cal.App. 447, 6 P.2d 558. The Bruegger case states the reason for the rule: "The primary purpose of the writ of *habeas corpus* is to provide a *summary and speedy* mode of inquiring into the legality of imprisonment or restraint. * * * the writ would be deprived of its effect if an order made pursuant to the inquiry can be suspended, and the person or parties affected can be compelled to undergo the delay attendant upon an appeal to the higher court." Emphasis added; In re Bruegger, supra, 204 Cal. 169, 171, 267 P. 101, 102. The use of the word "discharge" in section 1506 is plain enough. It can mean only one thing, release from custody. If there is any doubt as to its meaning it is completely dispelled by the remainder of the section which states that in case of *such* appeal defendant shall not be *discharged from custody* where the judgment of conviction has become final pending the appeal; however, defendant may be admitted to bail pending the appeal. If "discharge" is not limited to a release from custody these provisions in the section become meaningless.

Aside from the question of appealability I cannot agree with the majority opinion on the merits. While it is difficult to ascertain precisely what the holding is, the result is a complete reversal of the judgment. That reversal seems to be predicated upon the ground that because petitioner was given the facilities to which the order said he was entitled the question has become moot. In reaching that conclusion the majority ignores the fact that the evidence supports the order of the superior court in that the conduct of the prison authorities was such that it could at least be inferred that they would continue to withhold the facilities from petitioner unless a court ordered otherwise. It is similar to a case in which an injunction is sought, and there is a showing of threatened injury by defendant, but after the injunction is ordered he says he will be a "good boy." His belated repentance furnishes no basis for reversing the judgment granting the injunction. The majority opinion purports to decide the question anew in spite of its being bound on appeal by the conclusion of the trial court on conflicting evidence.

The evidence shows that the prison authorities delayed for 14 days in permitting petitioner to have access to the courts; that despite the advice of the attorney general petitioner was deprived of such access; that petitioner was deprived of his personal books and papers and prevented from working on his case; indeed, this is admitted by the warden and he insisted on his right to do so; that the warden refused to permit petitioner to consult with an attorney whom petitioner had requested to call at the prison and consult with him and the warden testified that if petitioner asked to see that attorney *again*, "I am not prepared to say whether or not we would approve it." All of these things justified the superior court in concluding that there existed a real danger that the prison authorities would continue to deny the rights

to which petitioner was entitled. It is of little significance that at the time of the hearing petitioner was not being deprived of his rights. That constituted nothing more than a conflict in the evidence on the question of what the warden's future conduct would be. Or it might be viewed as a confession that they had been wrong in their action and, in effect, a stipulation that the order made by the trial court should be made. Judicial protection of the rights of a prisoner would indeed be a mockery if the courts would always accept the pious protestations of the prison authorities that the rights would be accorded and then blithely disregard them the next day, leaving the prisoner to commence again his weary journey through the court process toward a chimerical goal. Such conditions are intolerable in a civilized society, yet this court now espouses them.

In mandamus proceedings it has been held that the writ is proper where the conduct of the officers indicates they do not intend to perform their duty. In Imperial Mut. Life Ins. Co. v. Caminetti, 59 Cal. App.2d 494, 497, 139 P.2d 693, 695, the court said: "[T]he general rule is that the act sought to be compelled by mandamus must be one to the performance of which the party is entitled at the time the proceeding in mandate is instituted * * * but that rule is subject to a kindred rule that mandate may be resorted to when it appears from the conduct or declarations of the officer or board, that they do not intend to comply with their obligation * * * when the time for such action arrives. * * * To insist in an equitable proceeding such as mandate is, and under the facts and circumstances here present, that petitioner should have been compelled to file a petition for renewal of its license for the few days between June 15th and June 30th, 1941, and then, subsequent to July 1st, file another petition for the ensuing fiscal year ending June 30, 1942, would do violence to the rule enunciated in section 3532 of the Civil Code, which reads 'The law neither does nor requires idle acts.' Equity will also consider the fact that there is no showing of prejudice to appellant commissioner by reason of the time when the action herein was filed. * * * Equity does not look with favor upon litigation by piece-meal, and whenever possible will dispose of the entire controversy between the parties, will grant complete relief and whenever possible will settle and determine all differences between the parties in the one action, leaving nothing for further litigation between the same parties and upon the same subject-matter."

With reference to injunctions the rule has been stated to be: "However, the mere cessation by defendant of the alleged acts or conduct, before or after the beginning of a suit for injunction, has been held not a bar to the issuance of an injunction, and in a proper case, as where there is a reasonable ground to believe that there will be a resumption of such activities, a court of equity may issue an injunction." 43 C.J.S., Injunctions, § 22(d); see, also, Boggs v. North American Bond, etc., Co., 6 Cal.2d 523, 58 P.2d 918.

The rights assured to petitioner by the order of the superior court are important and any impairment thereof must be carefully scrutinized. It is said in Ex parte Hull, 312 U.S. 546, 549, 61 S.Ct. 640, 642, 85 L.Ed. 1034: "[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine." The court said in In re Rider, 50 Cal.App. 797, 799, 195 P. 965: "The right of an accused, confined in jail or other place of detention * * * to have an opportunity to consult freely with his counsel without any third person, whose presence is objectionable to the accused, being present to hear what passes between the accused and his counsel, is one of the fundamental rights guaranteed by the American criminal law—a right that no Legislature or court can ignore or violate. In this state, the right of an accused to consult with his counsel is guaranteed by the Constitution, which, in section 13 of article 1, expressly declares that 'in criminal prosecutions, in any court whatever, the party

accused shall have the right to * * * appear and defend, in person and with counsel.' This clause of the Constitution unquestionably was adopted to secure to the accused person all the benefits which may flow from the employment of counsel to conduct his defense. To afford him those benefits it is essential that he should be allowed to consult with his counsel, not only during the actual trial, but prior thereto, in order to prepare for his defense. The privilege of the presence of counsel upon the trial would be a poor concession, if the right of consultation with such counsel prior to the trial were denied. It is equally essential to the enjoyment of this constitutional guaranty that the accused should have the right to a *private* consultation with his counsel. As said by the Oklahoma Criminal Court of Appeals: 'It would be a cheap subterfuge of and a shameless mockery upon justice for the state to put a man on trial in its courts, charged with an offense which involved his life, liberty, or character, and then place him in such a position that he could not prepare to make his defense. It would be just as reasonable to place shackles upon a man's limbs, and then tell him that it is his right and duty to defend himself against an impending physical assault. If the right of defense exists, it includes and carries with it the right of such freedom of action as is essential and necessary to make such defense complete. In fact, there can be no such thing as a legal trial, unless both parties are allowed a reasonable opportunity to prepare to vindicate their rights. * * * It therefore necessarily follows that it is the absolute right of parties charged with crime to consult privately with their attorneys, and that it is an illegal abridgment of this right for a sheriff, jailer, or other officer to deny to a defendant the right to consult his attorneys, except in the presence of such officer. * * * It is the duty of officers having the custody of persons charged with crime to afford them a reasonable opportunity to privately consult with their attorneys, without having other persons present, taking such precautions as may be necessary, according to the circumstances of each case, to prevent the escape of such prisoner.'" See, also, In re Robinson, 112 Cal.App.2d 626, 246 P.2d 982. There is no basis whatsoever for the statement in the majority opinion that petitioner is seeking or sought or was granted "special privileges." The rights sought by petitioner and granted by the trial court are the rights which must be accorded to all prisoners if the concept of "equal justice under law" is to have any significance whatever.

The majority states that prisoners have a right to prompt and timely access to the mails "for the purpose of transmitting to the courts" facts which show ground for relief but they "have no legally enforceable rights to engage in legal research." For that conclusion it cites the code sections to the effect that petitioner is civilly dead. What bearing that has on a prisoner's right to defend himself does not appear. If he may transmit "facts" to the courts in an attempt to obtain relief he should also be entitled to transmit legal propositions. To do either requires reasonable opportunity to prepare the facts and the law. If that requires legal research then a reasonable opportunity therefor should be given. The order of the trial court here did not go beyond the bounds of reason. Certainly it cannot be said its order is so unreasonable that it abused its discretion.

The majority decision here is another, in a long line of decisions by this court, in which this petitioner has been denied his constitutional rights. See People v. Chessman, 35 Cal.2d 455, 218 P.2d 769, 19 A.L.R.2d 1084; People v. Chessman, 38 Cal.2d 166, 238 P.2d 1001; Application of Chessman, 43 Cal.2d 391, 274 P.2d 645.

I would affirm the order here under review.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.

44 Cal.2d 77

The PEOPLE of the State of California, Plaintiff-Appellant,

v.

Dewey SMITH, Defendant-Respondent.

Cr. 5665.

Supreme Court of California.
In Bank.
Feb. 4, 1955.

Defendant was charged with pimping. The Superior Court, San Diego County, John A. Hewicker, J., entered an order setting aside the information, and the state appealed. The Supreme Court, Spence, J., held that under portion of Penal Code § 266h, making one who solicits or receives compensation for soliciting for a prostitute guilty of pimping, the offense could be committed either by receiving compensation or by soliciting compensation for soliciting for a prostitute, but not by merely soliciting a customer for a prostitute.

Order affirmed.

Prior opinion, 274 P.2d 458.

1. Prostitution ⇐1

Statute making it a felony to solicit or receive compensation for soliciting for a prostitute did not proscribe the mere solicitation of a customer for a prostitute. Pen.Code, § 266h.

2. Criminal Law ⇐238

Evidence at preliminary hearing that defendant had solicited a customer for a woman known to be a prostitute did not show probable cause for holding defendant to answer charge of pimping, in absence of evidence that defendant either solicited compensation or received compensation for the solicitation of any customer. Pen.Code §§ 266h, 318, 995.

3. Statutes ⇐197

The word "or" is ordinarily used in a statute as a disjunctive conjunction to mark an alternative generally corresponding to "either".

See publication Words and Phrases, for other judicial constructions and definitions of "Or".

4. Statutes ⇐241(1)

Defendant is entitled to the benefit of every reasonable doubt as to true interpretation of words, or construction of language used in a penal statute, and where such language is reasonably susceptible of two constructions, ordinarily that construction which is more favorable to the offender will be adopted.

5. Prostitution ⇐1

Under statute making one who solicits or receives compensation for soliciting for a prostitute guilty of "pimping", the offense may be committed either by receiving compensation or by soliciting compensation for soliciting for a prostitute, but not by merely soliciting a customer for a prostitute. Pen. Code §§ 266h, 318.

See publication Words and Phrases, for other judicial constructions and definitions of "Pimping".

6. Prostitution ⇐1

Statute making offense of pimping a felony was designed to discourage any male person from soliciting or receiving material gain from the practice of prostitution. Pen.Code §§ 266h.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., Los Angeles, for appellant.

Edgar G. Langford, San Diego, and J. Perry Langford, Los Angeles, for respondent.

SPENCE, Justice.

This is an appeal from an order setting aside an information charging defendant with pimping, a violation of section 266h of the Penal Code.

The evidence at the preliminary hearing showed that defendant had solicited a customer for a woman who was known to defendant to be a prostitute, but there was no evidence to show that defendant either solicited compensation or received compensation for the solicitation of any customer. Upon arraignment in the superior court, defendant moved to set aside the information, Pen.Code, § 995, and the motion was granted. The People appeal from the order granting the motion.

The pertinent part of section 266h reads: "Any male person who, knowing a female person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of her prostitution, or from money loaned or advanced to or charged against her by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, *or who solicits or receives compensation for soliciting for her,* is guilty of pimping, a felony, * * *." (Emphasis added.)

[1, 2] The sole question presented by this appeal is one of statutory construction. Does section 266h of the Penal Code proscribe the mere solicitation of a customer for a prostitute? It is our conclusion that it does not, and that therefore the order setting aside the information must be affirmed, as no probable cause existed for holding defendant to answer for the offense charged in the information.

[3] We are concerned here only with the interpretation of that portion of the section which provides that a male person who knows a female is a prostitute is guilty of the felony of pimping if he "solicits or receives compensation for soliciting for her, * * *." The verbs "solicits" and "receives" are separated by the word "or," which ordinarily is used as a disjunctive conjunction, the function of which is to mark an alternative generally corresponding to "either," as "'"either this or that."'" Barker Bros., Inc., v. City of Los Angeles, 10 Cal.2d 603, 606, 76 P.2d 97, 99; Dodd v. Independence Stove & Furnace Co., 330 Mo. 662, 51 S.W.2d 114, 118; State v. McGee, 336 Mo. 1082, 83 S.W.2d 98, 110. The People and defendant are in agreement as to this. As a result, they both agree that the language here under consideration indicates that the offense of pimping may be committed in either of two ways. Moreover, they both agree that one of these ways is by the receipt of compensation for soliciting for a prostitute. However, they are in disagreement as to the other.

The People take the position that the two verbs, thus separated by the word "or," refer to different objects; that is, "solicits" refers to an unstated object "customers," while "receives" refers to the stated object "compensation." Defendant's position is that both verbs refer to the same stated object; that is, both refer to "compensation." Defendant's position appears to be more in conformity with ordinary rules of grammar and punctuation; but in any event, the least that can be said is that the section as written and punctuated is reasonably susceptible of the construction for which defendant contends.

[4, 5] "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction whch is more favorable to the offender will be adopted." People v. Ralph, 24 Cal.2d 575, 581, 150 P.2d 401, 404; People v. Valentine, 28 Cal.2d 121, 143, 169 P. 2d 1. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute. Ex parte Rosenheim, 83 Cal. 388, 391, 23 P. 372; People v. Ralph, supra, 24 Cal.2d 575, 581, 150 P.2d 401; People v. Valentine, supra, 28 Cal.2d 121, 143, 169 P.2d 1. The adoption of the construction for which the People contend would do violence to these established rules. It therefore follows that under the proper interpretation of the disputed language of the section, the second way in which the offense may be committed is by soliciting compensation for soliciting for a prostitute, and not by merely soliciting a customer.

[6] Moreover, the prevailing construction is more in conformity with the nature of the other proscribed acts, which are defined in the section as the offense of pimping, and thus it is consistent with the section's apparent purpose. The section proscribes living or deriving support in whole or in part (1) from earnings or proceeds of the prostitution of the female, or (2) from money loaned to her, advanced to her, or charged against her by any one of three specified persons. It also proscribes soliciting or receiving compensation for soliciting for the prostitute. It is clear therefore that the section as a whole is designed to discourage any male person

from soliciting or receiving material gain from the practice of prostitution. This purpose is effected if defendant's interpretation is accepted.

Moreover, the general pattern of the several penal code sections relating to the subject of prostitution indicates that the Legislature did not intend by the language of section 266h to make it a felony for a male person merely to solicit a customer for a prostitute. Many of the ordinary offenses connected with the practice of prostitution have been classed as misdemeanors. Thus, being a common prostitute, Pen.Code, § 647, residing in a house of prostitution, Pen.Code, § 315, keeping a house of prostitution, Pen.Code, § 316, and prevailing upon a person to visit a place of prostitution, Pen.Code, § 318, have been made misdemeanors rather than felonies. Certain offenses, which the Legislature apparently deemed more serious, were classed as felonies. See e.g., Pen.Code, §§ 266, 266a, 266e, 267; and some of these felonies, including those acts covered by section 266h, relate only to the acts of a "male person." See e.g., Pen.Code, § 266g.

The mere act of soliciting a customer for a prostitute would seem to be a less serious offense than any of the acts declared to be felonies by the above-mentioned sections. Furthermore, no good reason is apparent for making such mere solicitation by a "male person" a greater offense than similar solicitation for a prostitute by one of her own sex. Such an act of mere solicitation by a person of either sex was no doubt intended to be classed as a misdemeanor under section 318 of the Penal Code, which provides: "Whoever, through invitation or device, prevails upon any person to visit any room, building, or other places kept for the purpose of * * * prostitution, is guilty of a misdemeanor * *." It is therefore reasonable to assume that only those acts which are of a more serious nature that the mere solicitation of a customer were intended to be declared felonies by section 266h.

The cases cited by the People do not require a contrary interpretation. People v. Phillips, 70 Cal.App.2d 449, 160 P.2d 872; People v. Giambone, 119 Cal.App.2d 338, 259 P.2d 10; People v. Severino, 122 Cal.App.2d 172, 264 P.2d 656. In each of said cases, the evidence showed that the defendant did receive compensation. Any language in any of these cases which indicates that section 266h of the Penal Code proscribes the mere solicitation of a customer is dictum and is hereby disapproved.

The order setting aside the information is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR and SCHAUER, JJ., concur.



43 Cal.2d 815

TIDE WATER ASSOCIATED OIL COMPANY, a corporation, Petitioner,

v.

The SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
Porter Sesnon et al., Real Parties in Interest.

PACIFIC LIGHTING GAS SUPPLY COMPANY, a corporation, Petitioner,

v.

The SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
Porter Sesnon et al., Real Parties in Interest.

Carlton BEAL et al., Petitioners,

v.

The SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
Porter Sesnon et al., Real Parties in Interest.

L. A. 23262, 23263, 23264.

Supreme Court of California,
In Bank.
Jan. 25, 1955.
Rehearing Denied in No. 23264,
Feb. 24, 1955.

Proceedings on an application for a peremptory writ restraining the Superior Court from taking any further steps based upon allegations of cross complaint filed in a special proceeding by the Attorney General to enjoin the wastage of natural gas. The Supreme Court, Gibson, C. J., held that the suit by the Attorney General was an "action" and not a "special proceed-

ing", so as to authorize the filing of cross complaint by operator against other operators for wastage, and that even if the suit were held a "special proceeding" trial of the issues raised by the cross complaint would not be an excess of the court's jurisdiction so as to authorize a writ of prohibition.

Alternative writ discharged and peremptory writ denied.

Prior opinion 270 P.2d 568.

1. Prohibition ⇐3(5)

Where the state sought to enjoin unreasonable waste of gas, and certain defendants by cross-complaint sought to enjoin other defendants from wasting gas and to recover damages, rulings of the trial court overruling demurrers to the cross-complaint and denying motions to strike were not immediately reviewable by appeal because not appealable, and appeal from final judgment would not constitute a plain, speedy and adequate remedy which would preclude resort to prohibition by cross-defendants, particularly in view of fact that issue of damages raised solely by the cross-complaint might require a long and complicated trial.

2. Prohibition ⇐10(1)

The term "jurisdiction" has a broader meaning when used in considering the availability of prohibition to review an order than when used in determining whether a court lacks powers in the fundamental sense such as whether it has jurisdiction over the subject matter and the parties.

See publication Words and Phrases, for other judicial constructions and definitions of "Jurisdiction".

3. Prohibition ⇐9

Any acts which exceed the power of a court whether defined by statute or rules developed and followed under the doctrine of stare decisis, may be restrained by prohibition.

4. Action ⇐20

Generally a "special proceeding" is confined to the type of case which was not under the common law or equity practice either an action at law or a suit in equity.

See publication Words and Phrases, for other judicial constructions and definitions of "Special Proceeding".

5. Mines and Minerals ⇐92.63

A proceeding brought by the attorney general pursuant to statutory authorization to prevent the wastage of natural gas is one "to enjoin" the unreasonable waste of gas and injunction is a well known equitable remedy. Public Resources Code, §§ 3300, 3302 et seq., 3310.

6. Prohibition ⇐11

In suit by the state to enjoin unreasonable waste of gas where there was no complaint that cross complaint by operator against other operators for wastage failed to comply with the statute an erroneous determination in such respect would not relate to the jurisdiction of the court authorizing the grant of prohibition. Public Resources Code, § 3302 et seq.; West's Ann. Code Civ.Proc. §§ 22, 23, 442.

7. Mines and Minerals ⇐92.63

The statutes authorizing the people to obtain an injunction against unreasonable waste of gas is designed not only to protect the interests of the public but also to preserve the rights of the owners and operators. Public Resources Code, § 3302 et seq.

8. Mines and Minerals ⇐92.63

A suit by the people to obtain an injunction against the unreasonable waste of gas is an "action" and not a "special proceeding", as respects right of an operator to file a cross-complaint against other operators for wastage. Public Resources Code, § 3302; West's Ann.Code Civ.Proc. §§ 22, 23, 442.

See publication Words and Phrases, for other judicial constructions and definitions of "Action".

9. Mines and Minerals ⇐92.63

In suit by the state to enjoin the wastage of natural gas where neither the Public Resources Code nor the injunction provisions to which it referred expressly prohibited the use of a cross-complaint, cross-complaint by operator against other operators in such proceeding was authorized. Public Resources Code, §§ 3310–3313; West's Ann.Code Civ.Proc. §§ 442, 525–534.

10. Mines and Minerals ⇐92.63

While the statute respecting procedure to enjoin wastage of natural gas evinces a

legislative intent that administrative hearing should be handled expeditiously it does not manifest the legislative intent that the judicial proceedings were intended to be summary in character or otherwise essentially different from an ordinary suit for injunctive relief. Public Resources Code, § 3302 et seq.

11. Action ⇐66

Courts have inherent power as well as power under the Code of Civil Procedure to adopt any suitable method of practice both in the ordinary actions and special proceedings if the procedure is not specified by the statute, or by rules adopted by the judicial counsel. West's Ann.Code Civ.Proc. § 187.

12. Mines and Minerals ⇐92.63
Prohibition ⇐10(2)

In suit by the state to enjoin the wastage of natural gas where there was no statute prohibiting the use of a cross complaint in such a suit even if the suit were held to be a "special proceeding" the courts still would have power to pass upon the question whether the application of the statute permitting the filing of a cross-complaint, would be in harmony with the suit and an erroneous determination would not be in excess of the court's jurisdiction as respects right to prohibition. Public Resources Code, §§ 3300, 3302; West's Ann.Code Civ.Proc. § 442.

13. Prohibition ⇐11

In suit by state to enjoin the wastage of natural gas wherein operator filed cross-complaint against other operators for wastage prohibition would not lie to prevent the superior court from further proceeding because the cross-complainants failed to exhaust their administrative remedies before the director of Natural Resources where under the circumstances the filing of a petition for an administrative hearing would have been an idle act. Public Resources Code, § 3302.

14. Mines and Minerals ⇐92.63

In suit by the state to prevent the wastage of the natural gas cross-complaint by operator against other operators for wastage under the statute penalizing the unreasonable waste of gas by lessor, lessee or operator, failed to state a cause of action against the purchaser of gas from other defendants. Public Resources Code, §§ 3300, 3302.

15. Courts ⇐2

Failure to state facts sufficient to constitute a cause of action did not deprive the court of power to hear and determine the controversy if it has jurisdiction of the parties and the subject matter.

16. Torts ⇐22

Where there is a common plan or design to commit a tort, all who participate are jointly liable whether or not they do the wrongful acts.

17. Prohibition ⇐10(2)

In suit by the state to enjoin the wastage of natural gas, where operator filed a cross-complaint against other operators for wastage and the superior court had jurisdiction in the fundamental sense and it did not appear that a cross-complaint against an operator not a lessor or lessee could not be amended to state a cause of action and the operator could be liable to the cross-complainants if it was a joint tort-feasor, prohibition to prevent further proceedings on the cross-complaint would be denied. Public Resources Code, § 3300.

Herbert W. Clark, William F. Kiessig, Robert D. Raven, Scott L. Harrington, Morrison, Hohfeld, Foerster, Shuman & Clark, San Francisco, Oscar C. Sattinger, Los Angeles, Twitchell & Rice, Santa Maria, Overton, Lyman, Prince & Vermille and Donald H. Ford, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel and John B. Anson, Deputy County Counsel, Los Angeles, for respondent.

Edmund G. Brown, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., as amicus curiae on behalf of respondent.

Everett S. Layman, Kenneth S. Carey, Lawrence W. Jordan, Jr., James M. Dennis and Everett S. Layman, Jr., Menlo Park, for real parties in interest.

GIBSON, Chief Justice.

Each of these three cases arises out of a suit brought by the state to enjoin unreasonable waste of gas, and each involves the question whether certain defendants are entitled to a writ of prohibition to prevent the trial of issues raised by a cross-complaint filed by other defendants.

Following a complaint by some of the operators in an oil field that there was an unreasonable waste of gas contrary to the provisions of section 3300 of the Public Resources Code,[1] the State Oil and Gas Supervisor held hearings pursuant to section 3302 et seq., determined that gas was being wastefully produced and ordered all operators in the field to cease production of gas in excess of a specified rate. Appeal was taken to the board of oil and gas commissioners for the district, and the findings and order of the supervisor were adopted with slight modifications. A suit was then brought by the People pursuant to sections 3310[2] and 3312[3] of the Public Resources Code to enjoin unreasonable waste of gas. Certain defendants filed a cross-complaint seeking to enjoin the other defendants from wasting gas and to recover damages from all but one of them for past waste. Demurrers to the cross-complaint were overruled, and motions to strike it were denied. Petitioners then sought prohibition, claiming that respondent court has no power to consider a cross-complaint in this type of suit. The availability of the writ depends upon whether petitioners have any other plain, speedy and adequate remedy, and whether respondent court, in trying the issues raised by the cross-complaint, would be acting without or in excess of its jurisdiction.

[1] When the trial court overruled the demurrers and denied the motions to strike, it in effect ordered the case to trial upon the cross-complaint as well as upon the complaint. These rulings are not immediately reviewable by appeal, since they are not final judgments and do not otherwise come within the appealable orders enumerated in section 963 of the Code of Civil Procedure. Although the propriety of the court's action may, of course, be reviewed upon appeal from a final judgment in the case, this would not constitute a plain, speedy or adequate remedy because petitioners would be required to undergo the delay and expense of a complicated, lengthy trial upon the question of damages. Tomales Bay Oyster Corp. v. Superior Court, 35 Cal.2d 389, 392, 217 P.2d 968; Providence Baptist Church v. Superior Court, 40 Cal.2d 55, 60, 251 P.2d 10. The matter of damages is not presented by the complaint but only by the cross-complaint and, unlike the injunction issues, may be subject to jury trial. Under these circumstances prohibition would appear to be the only adequate remedy available to petition-

1. Section 3300 of the Public Resources Code provides as follows: "The unreasonable waste of natural gas by the act, omission, sufferance, or instance of the lessor, lessee or operator of any land containing oil or gas, or both, whether before or after the removal of gasoline from the gas, is opposed to the public interest and is unlawful. The blowing, release, or escape of gas into the air shall be prima facie evidence of unreasonable waste."

2. Section 3310 of the Public Resources Code provides in part as follows: "When the decision of the supervisor that there is an unreasonable waste of gas occurring or threatened, has become final, a certified copy thereof, or, if modified by the order of the board of district commissioners, then a certified copy of the order as modified, shall be filed with the director. The director, unless the order is complied with voluntarily, shall have proceedings instituted in the name of the people of the State of California to enjoin the unreasonable waste of gas."

3. Section 3312 of the Public Resources Code provides in part as follows: "Whenever it appears to the director that the owners, lessors, lessees, or operators of any well or wells producing oil and gas or oil or gas are causing or permitting an unreasonable waste of gas, he may institute, or have proceedings instituted, in the name of the people of the State of California, to enjoin the unreasonable waste of gas regardless of whether proceedings have or have not been instituted under sections 3302 to 3305, and regardless of whether an order has or has not been made therein."

ers to test the jurisdiction of the court to try the issues raised by the cross-complaint.

[2, 3] The term jurisdiction has a broader meaning when used in considering the availability of prohibition to review an order than when used in determining whether a court lacks power in the fundamental sense, i. e., whether it has jurisdiction over the subject matter and the parties. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 287–291, 109 P.2d 942, 132 A.L.R. 715; see also Rescue Army v. Municipal Court, 28 Cal.2d 460, 463–464, 171 P.2d 8. Any acts which exceed the power of a court, whether defined by statute or by rules developed and followed under the doctrine of stare decisis, may be restrained by prohibition. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 287–291, 109 P.2d 942. We must, therefore, examine the applicable statutes and case law to determine whether a cross-complaint may be used by one defendant against another in a suit brought by the People, pursuant to the provisions of the Public Resources Code, to enjoin the unreasonable waste of gas.

Section 442 of the Code of Civil Procedure provides, "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the *action* is brought, or affecting the property to which the *action* relates, he may, in addition to his answer, file * * * a cross-complaint. * * *" (Italics added.) An action is defined as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Code Civ.Proc., § 22. "Every other remedy is a special proceeding." Code Civ.Proc., § 23. Section 442 is a general provision which, in the absence of a specific statute to the contrary, is sufficiently broad to permit the use of a cross-complaint in any "action." It does not, however, on its face authorize the use of a cross-complaint in a "special proceeding."

[4–7] The first question to be determined is whether this suit falls within the classification of an "action" or whether it is a "special proceeding."[4] As a general rule, a special proceeding is confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit in equity. In re Sutter-Butte By-Pass Assessment, etc., 190 Cal. 532, 537, 213 P. 974; In re Central Irr. Dist., 117 Cal. 382, 387, 49 P. 354. The suit authorized by statute in the present case is one "to enjoin" the unreasonable waste of gas, and an injunction, of course, is a well known equitable remedy. See Pomeroy, Equity Jurisprudence [5th ed. 1941], §§ 110, 112, pp. 141–142, 145. In County of Yuba v. North American etc. Min. Co., 12 Cal. App. 223, 225, 107 P. 139, it was held that a suit by a county to enjoin defendants from depositing mining debris in a river to the injury of plaintiff's property was an action and not a special proceeding within the meaning of sections 22 and 23 of the Code of Civil Procedure. In Van Bibber v. Hilton, 84 Cal. 585, 587 et seq., 24 P. 308, 598, the plaintiff sought to enjoin the diversion of the waters of a stream, and the court referred to the suit as an action and held that the asserted claims of defendants to water rights were properly set forth by way of cross-complaint under section 442 of the Code of Civil Procedure. The legislation authorizing the People to obtain an injunction against the unreasonable waste of gas is designed not only to protect the interests of the public but also to preserve the rights of owners and operators. See Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 21–22, 52 S.Ct. 103, 108, 76 L.Ed. 136; Bandini Petroleum Co. v. Superior

4. There is no claim that the cross-complaint fails to comply with the requirement of section 442 that the relief sought relate to the same "contract, transaction, matter, happening or accident" or affect the "property" referred to in the complaint. An erroneous determination in this respect, as distinguished from a ruling requiring a party to proceed to trial on a cross-complaint where no such pleading is permitted, would not relate to the jurisdiction of the court. Lichtenstein v. Superior Court, 85 Cal.App. 2d 486, 193 P.2d 508.

Court, 110 Cal.App. 123, 134–138, 293 P. 899; People v. Associated Oil Co., 212 Cal. 76, 80–81, 297 P. 536; Bernstein v. Bush, 29 Cal.2d 773, 780, 177 P.2d 913. It is provided that, with certain exceptions not relevant here, the practice is to be governed by the provisions of the Code of Civil Procedure relating to injunctions. Pub. Resources Code, §§ 3310–3313; Code Civ. Proc., §§ 525–534. This suit is essentially the same as any other action in equity in which the remedy of injunction may be used. It is a suit by which the People are prosecuting other parties for the enforcement or protection of a right and the prevention of a wrong. Accordingly, it is an "action" and not a "special proceeding."

Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761, relied on by petitioners in support of their contention that the present suit is a special proceeding, is distinguishable. In that case the State Insurance Commissioner, acting pursuant to the provisions of the Insurance Code, petitioned the superior court for an order affirming a plan which he proposed for the rehabilitation of an insolvent insurance company. This court, in holding that a special proceeding and not an action was involved, pointed out that the commissioner was not prosecuting another party for the declaration, enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense,—that it was not a proceeding in which one "party is prosecuting another party at all." 10 Cal.2d 307, 327, 74 P.2d 761, 773.

[8] Petitioners assert that section 442 relating to cross-complaints, although applicable generally to actions, may not be used in a suit to enjoin waste of gas because, they argue, the reference in sections 3311 and 3313 of the Public Resources Code to the injunction provisions of the Code of Civil Procedure, together with the failure to mention other sections of that code such as section 442, discloses a legislative intent to prohibit the use of the other sections. However, neither the Public Resources Code nor the injunction provisions to which it refers expressly prohibit use of a cross-complaint, and, by reason of the direct language of section 442 permitting a defendant to file a cross-complaint in an action, there is no room for the rule of statutory construction urged by petitioners. Moreover, the rules of practice set forth in the injunction provisions referred to do not purport to be complete in themselves but assume that other provisions of the Code of Civil Procedure shall apply insofar as they are consistent with the sections relating to injunctions. In accord with these views are a number of decisions which, without discussion of the problem, applied various sections of the Code of Civil Procedure to suits brought under the statutes involved here as they existed prior to codification in the Public Resources Code. Superior Oil Co. v. Superior Court, 6 Cal.2d 113, 116–119, 56 P.2d 950 [holding that § 583 required dismissal of state's action]; People v. Associated Oil Co., 212 Cal. 76, 78, 297 P. 536 [permitting the taking of additional evidence on appeal under § 956a]; People v. Associated Oil Co., 211 Cal. 348, 349, 296 P. 273 [same]; Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 671, 284 P. 445 [applying § 389, which authorized the court to bring in additional parties].

[9, 10] The cases holding that cross-pleading is not permissible in unlawful detainer proceedings are clearly not in point. See Cheney v. Trauzettel, 9 Cal.2d 158, 159–161, 69 P.2d 832; Schubert v. Lowe, 193 Cal. 291, 294–295, 223 P. 550; Arnold v. Krigbaum, 169 Cal. 143, 145–146, 146 P. 423; Rydell v. Beverly Hills P. & P. Co., 88 Cal.App. 216, 219, 262 P. 818; Smith v. Whyers, 64 Cal.App. 193, 194–195, 221 P. 387; Knight v. Black, 19 Cal.App. 518, 527–528, 126 P. 512; see Brawner v. Wilson, 126 Cal.App.2d 381, 271 P.2d 937; Lakeside Park Ass'n v. Keithly, 43 Cal.App.2d 418, 422, 110 P.2d 1055; Bekins v. Trull, 69 Cal. App. 40, 45–46, 230 P. 24. The Legislature has specifically designated unlawful detainer as a special proceeding, and, accordingly, it does not fall within the terms of section 442, which, as we have seen, does not purport to apply to special proceedings. The unlawful detainer statutes, of course, could have made section 442 applicable, but instead they provide that a defendant may

file an answer or demurrer, and this has been construed as limiting a defendant to those pleadings and as excluding the use of a cross-complaint.[5] Schubert v. Lowe, 193 Cal. 291, 294–295, 223 P. 550. Moreover, an unlawful detainer proceeding is summary in character, and some of the decisions have pointed out that the use of a cross-complaint in such a case would frustrate the remedy and render it inadequate. The same factors are not present in a suit brought to enjoin the waste of gas pursuant to the provisions of the Public Resources Code. While the statute, in specifying brief periods within which different steps may be taken before the administrative officers, evidences a legislative intent that the administrative hearings should be handled expeditiously, there is nothing which indicates that the judicial proceeding was intended to be summary in character or otherwise essentially different from an ordinary suit for injunctive relief. The interests of the public may be protected immediately upon filing the suit through the issuance of a preliminary injunction, as was done in the present case; and the owners and operators in the field, by the use of a cross-complaint, may protect their interests and obtain a complete settlement of the entire controversy in one action, thus avoiding unnecessary piecemeal litigation.

[11, 12] Although our determination that that a cross-complaint is permissible is based upon the conclusion that the suit is an action within the meaning of section 442 of the Code of Civil Procedure, we should point out that even if the suit were held to be a special proceeding, as contended by petitioners, it would not follow that a trial of the issues raised by the cross-complaint would be in excess of the court's jurisdiction. Courts have inherent power, as well as power under section 187 of the Code of Civil Procedure,[6] to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council. It is not only proper but at times may be necessary for a court to follow provisions of the Code of Civil Procedure which are harmonious with the objects and purposes of the proceeding although those provisions are not specifically made applicable by the statute which creates the proceeding. As we have seen, there is no statute prohibiting use of a cross-complaint in a suit to enjoin waste of gas. Further, the rules of practice which are expressly made applicable to such a suit do not purport to be complete in themselves, and there is, therefore, no basis for an implication that those rules were intended to be exclusive. In addition, there are no rules developed under the doctrine of stare decisis which would bar use of a cross-pleading in the present situation. Accordingly, even if the suit were held to be a special proceeding, it would be within the power of the court to pass upon the question whether application of section 442 would be in harmony with the purposes of the particular type of suit, and an erroneous determination would be within and not in excess of the court's jurisdiction, as that term is used in prohibition cases. See Abelleira v. District Court of Appeal, 17 Cal.2d 280, 287–291, 109 P.2d 942, 132 A.L.R. 715.

[13] It is further contended that, regardless of whether a cross-complaint is permissible in a suit of this kind, prohibition will lie here because, it is asserted, cross-

5. In eminent domain, which has likewise been classified as a special proceeding, it has been held that a cross-complaint is proper. People ex rel. Dept. of Public Works v. Buellton Development Co., 58 Cal.App.2d 178, 185 et seq., 136 P.2d 793. This holding, however, is not inconsistent with the unlawful detainer cases because, as pointed out in the Buellton case, the eminent domain statutes authorize the use of a cross-complaint.

6. Section 187 of the Code of Civil Procedure provides: "When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

complainants failed to exhaust their administrative remedies in that they did not petition the Director of Natural Resources for a hearing on the issue of gas wastage pursuant to section 3302 of the Public Resources Code,[7] which provides for a hearing upon complaint by any person operating in the field. See Abelleira v. District Court of Appeal, 17 Cal.2d 280, 291–293, 109 P.2d 942 [jurisdictional effect of failure to exhaust administrative remedy]. Such a proceeding was commenced by other operators, and cross-complainants were parties to it and participated both in the hearing before the supervisor and in the subsequent appeal to the board of oil and gas commissioners for the district. Under these circumstances, the filing by cross-complainants of a petition for an administrative hearing would have been an idle act, which the law does not require. Moreover, it is obvious that cross-complainants had no administrative remedy with respect to damages.

[14] Pacific Lighting Gas Supply Company advances a contention, applicable only to it, in support of its claim that the court lacks jurisdiction to try the issues raised by the cross-complaint. The statute making the unreasonable waste of gas unlawful refers specifically to waste by a lessor, lessee or operator. Pub. Resources Code, § 3300. Pacific asserts that it is a purchaser of gas from other defendants, that it is not a lessor, lessee or operator and that for this reason the cross-complaint does not and cannot state a cause of action against it. The only allegation appearing in the cross-complaint which purports to connect Pacific with any alleged wrongful act is that "cross-defendant Carlton Beal has an obligation to the Sesnon group not to produce waster wells" and "all of the cross-defendants other than Carlton Beal had notice of his obligation and that it arose from a trust." The cross-complaint, therefore, does not state a cause of action against Pacific.

[15–17] It is the general rule that the failure to state facts sufficient to constitute a cause of action does not deprive a court of the power to hear and determine a controversy if it has jurisdiction of the parties and the subject matter. Athearn v. Nicol, 187 Cal. 86, 93–94, 200 P. 942; Sutter Butte Canal Co. v. Superior Court, 183 Cal. 321, 324–325, 191 P. 529; Woodworth v. Superior Court, 153 Cal. 38, 94 P. 232; Bishop v. Superior Court, 87 Cal. 226, 230–233, 25 P. 435; Felton Water Co. v. Superior Court, 82 Cal.App. 382, 388, 256 P. 255; Yolo Water & Power Co. v. Superior Court, 43 Cal.App. 332, 337 et seq., 185 P. 195; cf. 1 Witkin, California Procedure [1954], 380 et seq. Respondent court has jurisdiction of Pacific as a party, and it also has jurisdiction of the type of case involved; it, therefore, has jurisdiction in the fundamental sense. Pacific appears to take the position that, in view of the broader meaning given to the term jurisdiction when used in considering the availability of prohibition, a court should be restrained from proceeding against a defendant in an action arising from an act made wrongful by statute where the pleading fails to state a cause of action and the defect cannot be cured by amendment. Cf. Redlands High School Dist. v. Superior Court, 20 Cal.2d 348, 360, 125 P.2d 490. We are not faced with this question, however, since it does not appear that the cross-pleading cannot be amended to state a cause of action. Even though a person is not a lessor, lessee or operator in the field, he may under some circumstances be liable for the waste of gas. It is settled that where there is a common plan or design to commit a tort, all who participate are jointly liable whether or not they do the wrongful acts. Mary Pickford Co. v. Bayly

7. Section 3302 of the Public Resources Code provides: "Upon complaint being made to the director by any person operating in any oil field that there is occurring or threatened an unreasonable waste of gas in any field or fields, and when a petition is filed with the director requesting that a hearing be held to consider whether such waste is occurring or threatened, if it appears to the director that there is probable cause for such complaint, he shall order the supervisor to hold such a hearing and to fix a time and place therefor. A hearing may also be ordered by the director on the application of the supervisor."

Bros., Inc., 12 Cal.2d 501, 515, 86 P.2d 102; Revert v. Hesse, 184 Cal. 295, 301, 303, 193 P. 943; see also Rest., Torts, § 867; Prosser on Torts [1941], pp. 1094–1096. Pacific, therefore, could be liable to cross-complainants if it was a joint tort feasor, even though it was not a lessor, lessee or operator, and cross-complainants claim that they can amend their pleading to state a cause of action on this theory.

The alternative writ is discharged, and the peremptory writ is denied.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



43 Cal.2d 871

Pearl K. LONG, and Barbara Joan Long, also known as Barbara J. Long, also known as Joanne P. Long, Clarice Claudette Long, also known as Claudette M. Long, Robert H. Long, and William F. Long, by Pearl K. Long, their Guardian ad litem, Plaintiffs and Appellants,

v.

CALIFORNIA-WESTERN STATES LIFE INSURANCE COMPANY, a corporation, Defendant and Respondent.

L. A. 23318.

Supreme Court of California.
In Bank.
Feb. 1, 1955.

Principal and alternate beneficiaries of life policies brought action against insurer on the policies, and insurer set up defense that insured committed suicide. The Superior Court of San Luis Obispo County, Henry G. Jorgensen, J., entered judgment adverse to beneficiaries, and they appealed. The Supreme Court, Spence, J., held that where principal beneficiary, who was insured's widow, testified on cross examination that she and insured had had a happy married life, unmarred by any serious quarrels, and that no previous suicide threat had ever been made by him, Superior Court properly admitted testimony for purpose of impeachment of widow, that about three years before death of insured he had threatened suicide.

Affirmed.

Prior opinion 271 P.2d 883.

1. Evidence ⇐577

The phrase "out of the jurisdiction" as used in provision of the Code of Civil Procedure that testimony of a witness "out of the jurisdiction," given in a former action between the same parties and relating to the same matter, may be given in subsequent action, means without the state. Code Civ.Proc. § 1870, subd. 8.

See publication Words and Phrases, for other judicial constructions and definitions of "Out Of The Jurisdiction".

2. Appeal and Error ⇐1051(1)

Where evidence, which had been given by absent witness at prior trial, was mainly cumulative, alleged error in the admission of such evidence at subsequent trial on ground that witness was not shown to have been out of the jurisdiction or unable to testify in person, was not prejudicial. Code Civ.Proc. § 1870, subd. 8.

3. Evidence ⇐581

Sufficiency of showing of absence of a witness to justify admission of his testimony given at a former trial is within discretion of trial court. Code Civ.Proc. § 1870, subd. 8.

4. Evidence ⇐581

Where counsel testified that subpoena for witness at former trial had been returned by the constable unserved, and that he had been informed that witness was in a foreign state, and there was no suggestion that information was unreliable or in any way subject to question, trial court did not abuse its discretion in permitting introduction of the testimony of the witness in subsequent trial. Code Civ.Proc. § 1870, subd. 8.

5. Witnesses ⇐331½

In action on life policies, wherein insurer set up defense that insured committed suicide, and wherein insured's widow and principal beneficiary testified that

she and insured had had a happy married life, unmarred by any serious quarrels, and that no previous suicide threat had ever been made by insured, insurer was properly permitted to introduce evidence, for purpose of impeaching widow, that about three years before insured's death he had made a suicide threat.

6. Evidence ⇐141

In action on life policies, wherein insurer set up defense of suicide, and wherein there was no evidence indicating that gun found in hand of deceased insured at time of death was discharged as result of his carelessness in handling the gun, it was not error to exclude evidence of previous accidents of insured through his carelessness in handling guns.

7. Evidence ⇐263(2)

Where part of a conversation is put in evidence, adverse party is ordinarily entitled to introduce the remainder of the conversation. Code Civ.Proc. § 1854.

8. Appeal and Error ⇐1048(6)

Where there was abundant evidence of physical facts in record as to nature of death of insured and relevant testimony of various persons who visited insured's premises and observed surrounding conditions after insured shot himself, and it was apparent, because insured's brother never saw insured's body following shooting, that whatever brother might have had to say in action on life policies as to cause of death would be pure conjecture, error in refusing to permit brother to be cross-examined concerning statement that he believed that insured had not committed suicide, though statement was part of same conversation concerning which the brother had testified, was not prejudicial error. Code Civ.Proc. § 1854.

9. Evidence ⇐557

In action on life policies, wherein insurer set up defense that insured committed suicide, when he shot himself in the head, court properly excluded testimony of ballistic expert that he had conducted 30 to 45 tests of tripping and falling, and that tests demonstrated that if insured tripped and fell and accidentally wounded himself in the head, entrance of bullet would be in insured's forehead and exit would be in his temple, since the matter was not a proper subject of expert testimony. Code Civ.Proc. § 1870, subd. 9.

10. Evidence ⇐557

Experiments, which can be made without special knowledge or training, and which are largely based on speculation or conjecture, are not properly the subject of expert testimony. Code Civ.Proc. § 1870, subd. 9.

11. Insurance ⇐669(11)

In action on life policies, wherein insurer set up defense that insured committed suicide, instructions concerning pertinent suicide provisions of policies and that if jury found by a preponderance of the evidence and was satisfied from the evidence that insured committed suicide, finding must be for insurer, were not erroneous.

12. Insurance ⇐665(6)

In action on life policies, wherein insurer set defense that insured committed suicide, evidence established that insured committed suicide.

13. Appeal and Error ⇐1078(1)

Grounds of appeal not mentioned in briefs by appellants would be deemed to have been abandoned.

T. R. Claflin, Bakersfield, Renetzky & Davis, Paul W. Davis, San Luis Obispo, for appellants.

A. H. Brazil, San Luis Obispo, for respondent.

SPENCE, Justice.

Clarence R. Long died July 7, 1949, as the result of a gunshot wound. At that time three policies of life insurance issued by defendant company on his life were in effect. One of the policies, issued in 1941, provided for double indemnity in the event of death by accidental means. The other two policies, issued in 1948, had a two-year incontestable clause, and for that period did not insure against self-destruction. Defendant paid the face value of the 1941

policy but refused payment of double indemnity under that policy or any payment under the 1948 policies, except the total amount of the premiums paid thereon, claiming that the deceased had taken his own life. The surviving wife and children, the principal and alternate beneficiaries respectively, commenced this action on the policies, seeking recovery of the money which would be payable if the death resulted from an accident.

Upon the first trial the verdict and judgment were in favor of plaintiffs. Thereafter the trial court granted defendant's motion for a new trial on the ground that the evidence was insufficient to justify the verdict, and this ruling was upheld. Long v. California-Western States Life Ins. Co., 111 Cal.App.2d 254, 244 P.2d 488. Upon the second trial the verdict and judgment were for defendant, and plaintiffs appeal. As grounds for reversal, plaintiffs contend that the court committed prejudicial error, citing these particular matters: (1) allowance of the reading of the testimony of Katherine Ross and John Ross given on the former trial; (2) admission in evidence of a threat of suicide made by the deceased three years before his death; (3) exclusion of evidence of prior accidents suffered by deceased in carrying guns; (4) limitation of the cross-examination of defendant's witness, Charles Long; (5) refusal of expert testimony of a ballistics expert; and (6) instructions on the suicide phase of the policies.

Mr. and Mrs. Long, their two sons (ages 4 and 5) and his two daughters (ages 13 and 15) by a prior marriage resided on a ranch near Paso Robles. Mr. Long was a robust man, in good health and prosperous. On the evening of July 6, 1949, Mr. and Mrs. Long and the two boys had dinner at a restaurant with a Mr. Augustus and his son. It was a social occasion, with some moderate drinking, and the Longs departed for home about 1:00 a. m. The ride home took some 15 to 20 minutes, with Mrs. Long starting to drive and then Mr. Long taking the wheel for the remainder of the way. A quarrel ensued during the drive and continued after they arrived home. The two girls were then in bed. Mr. Long went to his bedroom and undressed. Mrs. Long put the two boys to bed, and then went into the bedroom where Mr. Long was. He wanted her to come to bed with him, but she said that she was tired, that she had to arise at 5:30 o'clock that morning to cook breakfast for the harvest hands, and that she was taking some bedding and was going to sleep on a couch in the living room. Mr. Long became angry, they passed a few words, he accused her of "being a hell of a wife" and she replied that she thought that she was a good wife and mother.

After a short interval Mrs. Long, who had gone to sleep in the living-room, was awakened when she heard Mr. Long talking to her in the room and at the same time heard the dogs barking outside. He mumbled something about "not bothering" her any more, and that she would not see him again, and then he slammed the door as he went out on the porch. A few seconds later she heard a shot. She ran outside and found Mr. Long outstretched in the front yard, lying parallel to the porch, face downward with his hands under his body. The girls ran for the hired man. Upon arriving at the scene, the hired man helped Mrs. Long turn Mr. Long on his back, and he removed the gun which the deceased was holding in his right hand. Mrs. Long kept repeatedly crying "Oh, Busty, why did you do this to me," expressing herself in a manner indicating that she believed he had committed suicide and stating that he had "no rhyme or reason" for doing so. Two wounds, produced by one bullet, were found in the deceased's head, one in the center of the forehead and one at his right temple.

It was plaintiffs' theory that the deceased had arisen from bed in response to the barking of the dogs, that as he went on the porch to investigate, he stumbled over a chair or tripped on an outstretched string, and in falling the gun which he was carrying was accidentally discharged, with the bullet entering his forehead. Several witnesses testified that after the shooting they found a chair overturned in the vicinity of where the deceased fell and a string tied

between the leg of a chair and a porch post near the front door of the house; and there was testimony that one of the little boys had put the string there during play that day. Other witnesses testified that they saw no string.

It was defendant's theory that the deceased intentionally shot himself in the temple as the result of the bedtime quarrel with his wife. It seems to be conceded that the entrance hole caused by a bullet would be smaller than the exit hole. The parties apparently agree that if the wound in the forehead were the smaller, it would mark the point of entry and indicate the death was accidental; but if the contrary were true and the smaller hole was that in the right temple, suicide would be indicated.

A doctor who had seen the deceased's body immediately after death testified that he had made a superficial examination of the deceased, observed the two wounds in the head, noted powder marks or burns appearing in a darkened area around a small opening in the forehead but did not examine the wound in the temple around the right ear. The doctor's examination was made about 3 o'clock in the morning, when it was dark. The mortician, who likewise arrived at the scene shortly after the deceased's death, testified that upon observing the two bullet holes in the deceased's head, he noticed that the one in the forehead had a darkened area around it, toward the center, and the surrounding tissue was slightly speckled, having the appearance of powder marks or burns. He further stated that his examination was casual, and that he merely glanced at the deceased's body, having determined that it was suicide. Plaintiffs rely on these witnesses to support their theory of the deceased's death through accident.

Two other doctors testified that, with an autopsy surgeon, they had examined the deceased's body when it was exhumed some three and a half years after death, and that it was their opinion that the deceased had shot himself in the temple. They limited their examination to an external observation of the wounds as required by the court order permitting the exhumation of the deceased's body. Both doctors had performed numerous autopsies. They gave the measurements they had made of the two wounds, showing that the forehead wound was considerably larger than the one above the right ear. In further support of their opinion as to the deceased's commission of suicide, they described the bone structure to be noted in distinguishing between an "entrance" or "puncture wound," which will splinter the bone and drive fragments inward, and an "exit" or "explosive wound," where the explosive forces of the bullet and the fluid or solid material behind it are ejected, splintering the bone and driving the fragments outward. According to their notes made at the time of examination, they testified that in the forehead wound a piece of bone appeared to have been driven outward into the subcutaneous tissue, that this wound was beveled outward, the outside being wider than the inside, and there was some bone missing; that the bones at the temporal wound gave the impression of being bent inward; that there were numerous fractures of the skull, a "burst effect"; and that the right temporal region was shattered.

The extent of these doctors' examination was restricted under the court's order but their observations were as thorough as the circumstances would permit, in view of the then decomposed condition of the deceased's body. If the bone structure at the wound in the temple was pressed inward and beveled as described by these doctors, if there was bone missing at the forehead wound, which was the larger, and a piece of bone forced outward, and if the bone there was beveled so that the outer surface was larger than the inner, the wound in the temple above the right ear was undoubtedly the entry point of the bullet. The parties seem further to agree that it would be virtually impossible for the deceased, a right-handed man, to have intentionally fired a shot into his forehead that would emerge above and in front of the right ear—as the two head wounds were located.

The issue was thus sharply defined for the jury's evaluation of the physical evidence in determining whether the bullet en-

tered the forehead consistent with plaintiffs' theory of accidental death or entered at the temple consistent with defendant's theory of suicide. The jury's verdict for defendant establishes that it rejected plaintiffs' theory and accredited defendant's theory, which was premised on the findings of the two doctors and their "considered opinion" that the temple wound was the entry point and the forehead wound marked the exit of the bullet.

Other factors in evidence sustain the jury's finding in accord with defendant's suicide theory. When a person trips, the normal movement is to throw out the hands to break the impending fall, and the fingers will be extended. Also, in tripping, the person falls in the direction in which he is traveling. Yet here the deceased's body was found face down with both hands under his chest, and lying not at right angles to, but parallel to, the front porch, which deceased was crossing as he emerged from the house. Furthermore, there was abundant evidence from witnesses for both plaintiffs and defendant that the deceased's last words to Mrs. Long were to the effect that he would not bother her any more and this would be the last time that he would bother her; that when Mrs. Long ran outside after hearing the shot and found the deceased lying in the front yard, she kept repeatedly crying "Oh, Busty, why did you do this to me" and stating that he had "no rhyme or reason" for doing it. In fact, the record indicates that it was only after Mrs. Long had spoken to two of the deceased's brothers about the terms of the insurance policies that the death was correlated with an accident rather than suicide. The brothers arrived at the deceased's ranch about 9:30 in the morning of July 7. At that time Mrs. Long told them that it looked like the deceased had committed suicide. They thereupon stated that if those were the facts, "her insurance wasn't any good" and referred to the two-year suicide clauses. When Mrs. Long then appeared shocked and asked if they were certain about it, they assured her that they were because of previous inquiry they had made about the insurance terms. Moreover, the matter was first reported to the local newspaper as a suicide and subsequently the story was changed, allegedly to save the feelings of the family. In the light of this record, plaintiffs' claims of error must be examined.

[1] Plaintiffs' objection to the reading of the testimony of Mr. and Mrs. Ross given at the former trial was overruled. They contend that this ruling was incorrect because there was not a sufficient showing that either Mr. or Mrs. Ross was out of the jurisdiction. Code Civ.Proc. § 1870, subd. 8. In construing this section, "out of the jurisdiction" means without the state. Meyer v. Roth, 51 Cal. 582, 583; Gordon v. Nichols, 86 Cal.App.2d 571, 576, 195 P.2d 444. Defendant's counsel testified that a subpoena for the witnesses had been returned by the constable unserved, and that he had been informed by an attorney in Paso Robles that Mrs. Ross was living in Santa Cruz, California, and Mr. Ross was in The Dalles, Oregon. Upon cross-examination, defendant's counsel admitted that he knew that the Rosses had a daughter living in the Paso Robles area, and stated that he had referred this matter to the constable for investigation before the subpoena was returned. The court then granted the request of defendant's counsel for permission to read the testimony in question, and plaintiffs' counsel stated: "Well, go ahead as to Katherine Ross. May I make an objection as to the testimony of Mr. Ross outside the presence of the jury, Your Honor?"

[2] Whether this amounted to a waiver of objection to Mrs. Ross' testimony or, as plaintiffs claim, was merely a suggested sequence for the reading of the testimony need not be decided. Granting that Mrs. Ross was not shown to have been "out of the jurisdiction" or unable to testify in person, it does not appear that the allowance of her testimony from the former trial worked any prejudice to plaintiffs' case. Her testimony was in the main cumulative: that she was called to the Long residence the morning of Mr. Long's death; that she did not remember discussing with Mrs. Long anything about string tied to the chair; and that Mrs. Long briefly reviewed the night's happenings, including her

"slight argument" with Mr. Long on the way home; her going into the living room to sleep; Mr. Long's entry into the room and saying that he would not bother her any more, by which Mrs. Long thought that he meant that he was going back to bed. Mrs. Ross also testified that after a discussion with Mrs. Long, who appeared to be concerned over the effect the suicide statement in the local newspaper might have on the children and the deceased's mother, she, Mrs. Ross, was able to arrange for the story to be changed so as to report Mr. Long's death as an accident. Plaintiffs argue that from this latter testimony it might be inferred that Mrs. Long was actuated by improper motives in giving a false account of the death. However, earlier in the trial in the examination of Mrs. Long, defendant's counsel elicited from her that on the morning of the death she had discussed with one of the deceased's brothers the suicide clauses in the policies. Mention was then made of her arranging to have the newspaper story "changed to accident at the outset, so that his parents wouldn't feel badly about it," and plaintiffs' counsel stated: "I have no objection to your going into that." After such concession, plaintiffs are in no position to argue a possible unfavorable inference which might be drawn from the similar testimony given by Mrs. Ross.

[3, 4] With respect to the admission of the testimony of Mr. Ross in view of his alleged absence from the state, there was no suggestion that the information of defendant's counsel was unreliable or in any way subject to question. Plaintiffs' main objection now to that testimony stems from the fact that in the former trial, Mr. Ross was not subjected to cross-examination, a circumstance noted in the argument of defendant's counsel to the jury and from which unfavorable inferences might be drawn. Plaintiffs' procedure in the first trial in evaluating any detrimental effect which Mr. Ross' testimony might have in their case and the wisdom of undertaking his cross-examination were matters for plaintiffs' counsel to decide at that time, but they have no bearing on the propriety of admitting that testimony into evidence in the present trial. The sufficiency of the showing of the absence of a witness justifying the admission of his testimony given at a former trial is within the discretion of the trial court, and no abuse thereof appears in the present record. 20 Am.Jur. §§ 705–706, pp. 592–594; Cameron v. Ah Quong, 175 Cal. 377, 384, 165 P. 961; Weaver v. Shell Company, 34 Cal.App.2d 713, 721, 94 P.2d 364.

Plaintiffs next contend that it was prejudicial error for the trial court to admit in evidence testimony that three years before his death, the deceased had threatened to commit suicide. On this point the record shows that in cross-examination, Mrs. Long was asked whether after the funeral she had not told Mr. Long's sister that Mr. Long said that he was going to kill himself. Mrs. Long denied this and added that she did not remember Mr. Long "ever saying that he was going to kill himself." The court then asked: "You say you never heard your husband ever say he was going to commit suicide at any time?" and she answered: "I never did." Questioned further whether Mr. Long had threatened suicide some three years previously, Mrs. Long recounted an incident when Mr. Long had traded an automobile for an army ambulance, a transaction which she considered a poor business deal and caused her to cry. The court questioned: "Well, did he say anything about committing suicide then?" and she replied, "No." Plaintiffs made no objection to these queries as improper cross-examination.

Throughout her testimony Mrs. Long was attempting to establish that she and Mr. Long were a happy married couple at all times; that there had been no serious quarrels between them; that Mr. Long was a jovial man; and that he had never threatened to commit suicide. To refute these claims, defendant called George Long, decedent's brother, who gave the following testimony over plaintiffs' objection: In 1946, late one night, he went to the deceased's home after a party. As he approached the door, it opened and the deceased came out of the house with his wife. They seemed to be having an argu-

ment, and the deceased had a revolver in his hand. The deceased was "pretty drunk," and talked of committing suicide. He, the witness, got the gun from the deceased and put him to bed.

[5] It may be conceded that if this testimony as to the deceased's threat of suicide, made some three years before death, and under dissimilar conditions, had been offered by defendant as affirmative independent evidence, it should have been rejected as too remote in point of time and too speculative in import by reason of the altered circumstances. Jenkin v. Pacific etc. Ins. Co., 131 Cal. 121, 123, 63 P. 180; Hale v. Life Indemnity & Investment Co., 65 Minn. 548, 68 N.W. 182, 183. But as above mentioned, this testimony was offered to rebut the testimony of Mrs. Long, on cross-examination, where she was persisting in her claim of a happy married life with the deceased, unmarred by any serious quarrels. In short, she opened the door to further inquiry after she, in support of her claims of marital happiness with the deceased, positively denied that any previous suicide threat had ever been made by him. To impeach her statements and to show that she and the deceased at least on one occasion during their married life had a violent quarrel, wherein deceased did threaten suicide, defendant introduced the challenged testimony. Under the circumstances, there appears to be no error in its admission as rebuttal testimony.

[6] Nor was it error to exclude evidence of previous accidents of the deceased through his carelessness in handling guns. There were no facts in evidence which indicated that the gun which was found in the deceased's hand at the time of death was discharged as a result of his carelessness in handling it.

[7] Plaintiffs next complain of the limitation of the cross-examination of defendant's witness, Charles Long. On direct examination this witness testified to the effect that after the funeral, he and Mrs. Long had discussed the cause of the deceased's death and they had agreed that it was suicide. Then on cross-examination, plaintiffs sought to prove as part of the same conversation, the fact that this witness had actually expressed a contrary opinion in stating his belief that the deceased had not committed suicide. It is well settled that where part of a conversation is put in evidence, the adverse party is ordinarily entitled to introduce the remainder of the conversation. Code Civ. Proc. § 1854; 10 Cal.Jur. § 320, p. 1080; 20 Am.Jur. § 275, p. 262; Risdon v. Yates, 145 Cal. 210, 215, 78 P. 641. However, it does not appear reasonable to conclude that this error in ruling caused any prejudice to plaintiffs' case.

[8] In the course of the examination of the witness Charles Long, it was shown that he lived near Bakersfield, over 100 miles from the scene of deceased's death on a ranch near Paso Robles; that he did not go to the deceased's home following the death but stayed in Bakersfield with his and the deceased's mother; that consequently he never saw the body following the shooting but only at the time of the funeral in Bakersfield; and that it was only late in the afternoon of the funeral that he had occasion to talk to the deceased's wife about the matter. Under these circumstances it is apparent that what he might have had to say as to the cause of death would be pure conjecture. In view of the abundant evidence of physical facts in the record as to the nature of the death and relevant testimony of various persons who visited the premises and observed the surrounding conditions, it does not seem that the jury would be likely to attach any significance to this witness' opinion. Accordingly, the error in question may not be deemed prejudicial.

There was no error in the court's refusal of certain expert testimony offered by plaintiffs relative to proof of their theory on the manner of the deceased's death. The challenged ruling concerns a ballistic expert who was questioned whether he had made tests by tripping and falling to determine how he could produce wounds such as those inflicted upon the deceased. Defendant objected, primarily upon the ground that the tests were not conducted on the deceased's ranch, and that they should be

made under similar conditions. The objection was sustained upon the court's holding that the matter was not a proper subject of expert testimony. Plaintiffs then offered to prove that the witness "* * * conducted 30 to 45 tests of tripping and falling, and that the tests demonstrate that the entrance wound of the bullet would be in the forehead, and the exit wound would be in the temple * * *."

[9, 10] The court's ruling excluding such testimony was correct. This is not a situation comparable to the opinion of a qualified physician relative to the means which might have been employed to produce a given injury, a subject on which he would have peculiar knowledge by reason of experience and study. 10 Cal.Jur. § 256, p. 997; People v. Sampo, 17 Cal.App. 135, 150, 118 P. 957. Experiments which can be made without special knowledge or training and which are largely based upon speculation or conjecture are not properly the subject of expert testimony. Cf. Code Civ. Proc. § 1870, subd. 9. Moreover, a ballistics expert called by defendant earlier in the case had already testified on cross-examination that conceivably a man holding a pistol might fall so that it would strike the ground butt first and remain pointed toward him; and that the fall would have a tendency to press the finger on the trigger. Thus, it is clear that plaintiffs' theory of the manner of deceased's death was a consideration submitted to the jury, and nothing material along that line could have been developed through plaintiffs' proffered expert testimony.

[11, 12] Finally, there was no error in the instructions to the jury as to the pertinent suicide provisions of the insurance policies, and that if the jury found "by a preponderance of the evidence" and was satisfied from the evidence that the deceased committed suicide, the finding must be for defendant. See Wilkinson v. Standard Acc. Ins. Co., 180 Cal. 252, 255–257, 180 P. 607. The facts here reviewed—showing that deceased rushed out of the house in the middle of the night clad only in his undershirt and shorts, after declaring to his wife that he would not bother her any more; that immediately thereafter the shot was fired and within a matter of seconds, his wife found him lying motionless in the yard with his hands under his chest and parallel to the porch; and then her repeated cries of why did he do such a thing when there was "no rhyme or reason" for it—make it almost impossible for a reasonable mind to reach any other conclusion than that the deceased committed suicide. See Frankel v. New York Life Ins. Co., 10 Cir., 51 F.2d 933, 935; Burkett v. New York Life Ins. Co., 5 Cir., 56 F.2d 105, 107–108; Travelers Ins. Co. v. Miller, 7 Cir., 62 F.2d 910, 913.

[13] The appeal was taken also from an order denying plaintiffs' motion to strike the judgment and enter a new judgment and from an order taxing costs. Plaintiffs do not mention these grounds of appeal in their briefs and they will be deemed to have been abandoned.

The judgment and the orders appealed from are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

130 Cal.App.2d 493

Della GOLDSMITH, Plaintiff and Respondent,

v.

Robert MILLS and Ivan Goldsmith, Individually and as copartners doing business as The Ideal, and The Ideal, a copartnership, Defendants and Appellants.

Civ. 16244.

District Court of Appeal, First District, Division 2, California.

Jan. 28, 1955.

Action to recover for personal injuries sustained by plaintiff as result of a fall in defendants' store. The Superior Court, City and County of San Francisco, William F. Traverso, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Dooling, J., held that evidence on issue of cause of plaintiff's fall was sufficient to support jury verdict for plaintiff.

Judgment affirmed.

1. Appeal and Error ⚖930(1)

On appeal, evidence must be viewed in light most favorable to respondent.

2. Negligence ⚖32(1), 52

Duty of care owed to business visitor is to keep premises in reasonably safe condition or to warn of danger, and such duty is not limited to conditions known to be dangerous but extends to those which might have been found dangerous by exercise of ordinary care.

3. Negligence ⚖32(1)

Store owner must use ordinary care to keep aisles and passageways in reasonably safe condition so as not to unnecessarily expose business visitors to danger or accident.

4. Negligence ⚖134(11)

In personal injury action brought by business invitee, evidence on issue of cause of plaintiff's fall was sufficient to support jury finding that fall resulted from loose papers lying on floor of defendant's store.

5. Negligence ⚖44

Storekeeper's failure to place all papers in receptacle provided, and allowing them to fall on floor of store aisle, violated duty owed to business visitor and constituted active negligence.

6. Negligence ⚖141(3)

In personal injury action, instruction that invitee, in absence of appearances that caution him or would caution reasonably prudent person in like position to contrary, had right to assume that premises he was invited to enter were reasonably safe for purposes for which invitation was extended and to act on that assumption, was not subject to objection of failing to make it clear that only person free from negligence could indulge in such assumption.

7. Trial ⚖296(3)

In personal injury action, instruction relating to duty of storekeeper to business visitors, that attention of persons ordinarily visiting public stores is attracted by display of wares, and that this factor should be kept in mind when applying standard of care to facts of case, was not subject to objection that it was so broad in language that jury would apply it even if it found plaintiff to be licensee, where instructions as to licensees were given prior to instruction on business visitors and duty owed them was set out with particularity.

Barfield & Barfield, San Francisco, for appellants.

Belli, Ashe & Pinney, Caroline D. Rose, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff-respondent Della Goldsmith brought an action to recover damages for personal injuries received as the result of a fall in defendant-appellants' store. Judgment was entered on a jury verdict in favor of plaintiff for $6,000 and this appeal was taken therefrom.

Respondent, a woman of 85 years of age at the time of the accident, is the mother of Ivan Goldsmith, one of the appellants in this action. The other appellant is Robert Mills, who is a business partner of Ivan. On December 15, 1951 respondent was driven by her sister-in-law down to her son's store for the purpose of doing some Christmas shopping. A cash register was located

on a counter at the east side of the store. One or the other of the proprietors presided over the cash register to which sale slips and merchandise sold were taken, the cash registered and the merchandise then wrapped and delivered to the purchaser. During this process inspection sales slips from lingerie boxes and tissue paper from the hosiery were removed and deposited in a waste paper basket. The sales slips were about two inches by two inches and the tissue paper approximately 8 inches by 15 inches. On busy occasions some of these papers would fall to the floor in the vicinity of the cash register and remain there until picked up and placed in the waste paper basket or swept out in the morning by one of the proprietors.

Respondent was wearing old walking shoes with low rubber heels. She proceeded to the back of the store where she removed her hat and placed it in the space provided for those working in the store. She then walked toward the front of the store and fell while standing in front of the counter on which the cash register was located. She was looking at the merchandise displayed on the counters and therefore does not know the cause of her fall. She did not notice the floor after the fall either, but such failure is explained by the severe pain resulting from her injury. Her hip was broken and eleven months passed before she recovered sufficiently to return to her own home.

Mrs. Henderix, an employee of appellants at the time of the accident, testified that the floor in front of the cash register was "littered with papers" at the time respondent entered the store. The litter consisted of inspection sales slips from the lingerie boxes and tissue paper from the hosiery. She did not see Mrs. Goldsmith actually fall but immediately thereafter she noticed her sitting on the floor. She was located "right below the counter where the cash register was", which was approximately where the papers were scattered.

Appellants contend the following: (1) there is not sufficient evidence to support the judgment; (2) some of the instructions are erroneous.

[1] Although respondent stated that she had only gone to the store to pay a social visit when she was interviewed by a claims adjuster immediately after the accident, she testified at the trial that she had gone there to do some Christmas shopping. For purposes of appeal the evidence must be viewed in the light most favorable to respondent and therefore she must be regarded as a business visitor, a fact that appellants concede.

[2] In general the duty of care owed to a business visitor is to keep the premises in a reasonably safe condition or to warn of danger, and the duty is not limited to conditions known to be dangerous but extends to those which might have been found dangerous by the exercise of reasonable care. Raber v. Tumin, 36 Cal.2d 654, 658, 226 P.2d 574.

[3] Applying this rule specifically to store passageways the store owner must use ordinary care to keep the aisles and passageways in a reasonably safe condition so as not to unnecessarily expose the business visitor to danger or accident. Neel v. Mannings, Inc., 19 Cal.2d 647, 652, 122 P.2d 576.

[4, 5] Since Mrs. Goldsmith did not know what caused her fall, it is necessary to determine the cause by drawing inferences from the evidence presented. Mrs. Henderix testified that there were papers littered on the floor in approximately the same spot where respondent fell a few minutes prior to the accident. She also observed the papers there immediately after the accident. It is logical to infer that the papers made the footing more slippery than the normal floor surface, thereby causing the fall. Although not on all fours factually, Sanders v. MacFarlane's Candies, 119 Cal.App.2d 497, 259 P.2d 1010 supports the view that the jury could logically have concluded the fall resulted from the loose papers. In the MacFarlane case plaintiff fell and immediately afterward felt a sticky substance on her hands. This court held that a jury could draw the inference that the fall was caused by an excess amount of wax, and it was error to grant a nonsuit. Cf. Sokolow v. City of Hope, 41 Cal. 2d 668, 670–672, 262 P.2d 841. Mrs. Henderix' actual knowledge as an employee of

the presence of the papers on the floor is properly imputed to appellants. Likewise their own failure to place all papers in the receptacle, and thus allowing them to fall on the floor of the aisle, violated the duty owed to respondent and was active negligence.

Appellants cite cases where the courts found no liability for injury resulting from falls on stairs, but they are readily distinguishable. In those cases the evidence consisted solely of a person falling on a stairway with no showing of any defect or dangerous condition or in some there was a failure to establish the element of proximate cause.

Appellants argue that the following instruction is erroneous: "You are instructed that an invitee in the absence of appearances that caution him, or would caution a reasonably prudent person in a like position to the contrary, has the right to assume that the premises he was invited to enter are reasonably safe for the purposes for which the invitation was extended and to act on that assumption."

[6] Appellants' objection is that the instruction does not state that only a person free from negligence may indulge in such an assumption. See Larson v. Holland, 118 Cal.App.2d 520, 524, 257 P.2d 1014. The instruction does not use the express words "a person free from negligence", but in effect says the same thing by stating, "an invitee in the absence of appearances that caution him, or would caution a *reasonably prudent person* in a like position to the contrary."

Another objection is that an instruction adopted from BAJI contained the word "each" which preceded the words "the invitee and the invitor", but "each" was not included in the instruction as read to the jury. Therefore, the instruction, which set forth another assumption, was susceptible of the construction that the qualifications following referred to the invitor only because he came second in the order of the sentence. The instruction cannot reasonably bear that construction.

[7] Another argument equally devoid of merit is that an instruction relating to business visitors was so broad in its language that the jury would apply it even if it found respondent to be a licensee. The instruction, paraphrased, states that the attention of persons ordinarily visiting public stores is attracted by the display of wares, and that this should be kept in mind when applying the standard of care to the facts. The instructions on licensees were given prior to instructions on business visitors, and the duty owed them was set out with particularity. There is no possibility that the instruction complained of would cause the jury to reach a verdict for the plaintiff even if it found her to be a licensee.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.



130 Cal.App.2d 376

Paul D. LIEB, Plaintiff and Appellant,

v.

Floyd C. DAY et al., Defendants and Respondents.

Civ. 5022.

District Court of Appeal, Fourth District, California.

Jan. 25, 1955.

Rehearing Denied Feb. 23, 1955.

Action by purported owner of oil and gas leases to quiet his title thereto. The Superior Court, Orange County, John Shea, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that Revenue and Taxation Code provision limiting time in which seizure and sale of leasehold estates for production of gas and oil could be made, is mandatory and not merely directory, and is not subject to Revenue and Taxation Code section providing that no act in any proceedings for raising revenue by taxation shall be illegal on account of in-

formality or because not completed within required time.

Judgment affirmed.

1. Taxation ⇐656

Fact that legislature, in providing that in event of delinquency in payment of any installment of taxes on leasehold estates for production of gas and oil, they shall be subject to seizure and sale in same manner as provided for seizure and sale of property for taxes on unsecured roll by certain numbered sections of Revenue and Taxation Code, did not include reference to section which placed certain limitations on right of seizure and sale for taxes on unsecured roll, did not indicate that legislature intended not to make any such limitation, where reference to such numbered sections was immediately followed by express provision limiting right to make any such seizure and sale to time within one year after delinquency. Revenue and Taxation Code, §§ 107, 2914 to 2919, 2921

2. Taxation ⇐734(2)

Section of Revenue and Taxation Code providing that no act in any proceedings for raising revenue by taxation is illegal on account of informality or because not completed within required time is rule of construction, and does not apply when substantial right of taxpayer is injuriously affected. Revenue and Taxation Code, § 24.

3. Taxation ⇐656

Provision in Revenue and Taxation Code for one year period within which seizure and sale of leasehold estates for production of gas and oil could be made was not enacted merely to assist in orderly conduct of business in connection with levying and collection of taxes, but was one which was intended for benefit of taxpayer. Revenue and Taxation Code, §§ 24, 107.

4. Taxation ⇐656

Revenue and Taxation Code provision limiting time in which seizure and sale of leasehold estates for production of gas and oil can be made, is mandatory and not merely directory, and is not subject to Revenue and Taxation Code section providing that no act in any proceedings for raising revenue by taxation shall be illegal on account of informality or because not completed within required time. Revenue and Taxation Code, §§ 24, 107.

5. Taxation ⇐788

Revenue and Taxation Code section regarding conclusiveness of tax deed as evidence refers only to compliance with article dealing with procedure for tax sales of land, and deed resulting from such procedure, and is not applicable to seizure and sale of leasehold estates for production of gas and oil. Revenue and Taxation Code, §§ 107, 3552.22.

Monroe & Chula, Santa Ana, for appellant.

Mize, Kroese, Larsh & Mize, Marjorie Mize, Santa Ana, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment declaring that a purported bill of sale issued by the tax collector of Orange County is void, and quieting title to certain property in the defendants.

On July 13, 1946, the Days executed a lease to Robert Tanguay giving him the right to explore for and develop oil and gas on certain real property. Taxes on the leasehold interest of Tanguay were assessed to him in March, 1949, and were placed on the secured roll. On November 10, 1949, shortly after these taxes became due, Tanguay quitclaimed his interest in the property back to the lessors. These taxes became delinquent on December 10, 1949. On April 8, 1952, the tax collector posted notice of sale, describing this leasehold interest, for nonpayment of the taxes assessed for 1949–1950. On April 16, 1952, the tax collector sold this leasehold interest to M. M. Prescott, and issued a bill of sale to him which was recorded the next day. On November 10, 1953, Prescott conveyed whatever interest he had in the property to the plaintiff Lieb by grant deed, which was recorded on November 12, 1953.

On November 27, 1953, Lieb brought this action seeking to quiet his title to this leasehold interest as against the defendants. The defendants answered and filed a cross-

complaint seeking to quiet their title to the real property described in the original lease. The court found that title to the real property in question is vested in the defendants Day as the owners in fee; that the plaintiff claimed ownership of a leasehold estate in this property under assignment from Prescott; that the purported bill of sale issued by the tax collector to Prescott and recorded on April 17, 1952, is void; and that the plaintiff has no right, title or interest whatsoever in, to or under this real property nor any leasehold interest in said property or any part thereof. Judgment was entered decreeing that the purported bill of sale issued by the tax collector to Prescott is void, and quieting title to this real property in the cross-complainants. This appeal followed.

All statutory references herein are to the Revenue and Taxation Code. Section 107, after defining "possessory interests" (which would otherwise include an oil and gas lease) provides as an exception that leasehold estates for the production of gas and oil are sufficient security for the payment of taxes levied thereon, and that such leasehold estates shall not be classified as possessory interests but shall be placed on the secured roll. It then provides:

> "In the event of delinquency in the payment of any installment of taxes on such leasehold estates or rights, they shall be subject to seizure and sale in the same manner as provided for the seizure and sale of possessory interests in Sections 2914 to 2919, inclusive, at any time within one year after the delinquency. Suit may be brought against an assessee of such taxes in the event of delinquency in the payment thereof."

This section thus definitely provides special and different methods for the collection of the taxes levied on such leasehold estates, in the event of a delinquency in the payment of such taxes. These methods are in the alternative: such leasehold interest may be sold at any time within one year of the delinquency, or suit may be brought against the one to whom such taxes were assessed.

[1] The appellant argues that the fact that the legislature did not include section 2921 (which places certain limitations on the right of seizure and sale for taxes on the unsecured roll) among the sections relating to the sale as mentioned in section 107, indicates that it was intended not to provide any such limitation. The sections thus referred to in section 107 (2914 to 2919) relate only to the manner of seizure and sale. The reference to those sections is immediately followed by an express provision limiting the right to make any such seizure and sale to a time within one year after the delinquency.

[2–4] The appellant further argues that the provision in section 107 for a one-year period within which a seizure and sale shall be made, is obviously one for the benefit of the State and not for the benefit of the person assessed; and that the curative provisions of section 24 are applicable and prevent the raising of any such irregularity as the failure to sell within that time limit as a challenge to the bill of sale here issued. Section 24 provides "No act in all the proceedings for raising revenue by taxation is illegal on account of informality or because not completed within the required time." Section 24 is a rule of construction, and as indicated in such cases as Ryan v. Byram, 4 Cal.2d 596, 51 P.2d 872 and Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531, it does not apply when a substantial right of a taxpayer is injuriously affected. This provision of section 107, limiting the time in which a seizure and sale may be made, is not one enacted merely to assist in the orderly conduct of business in connection with the levying and collection of taxes, but is one which clearly appears to be intended for the benefit of the taxpayer. This is especially applicable to the situation here, since long before this sale was made the leasehold interest had been quitclaimed back to the title holders. Under the rules announced in Ryan v. Byram, 4 Cal.2d 596, 51 P.2d 872, this provision of section 107 is mandatory and not merely directory, and the provisions of section 24 are not applicable.

[5] It further appears that section 3552.-22, relied on by the appellant, is in no way applicable here. That section refers to compliance with the Article of which it is a part, which deals only with the procedure

for tax sales of land and to the deed resulting from that procedure.

It follows that the tax collector of Orange County had no authority under the statutes to sell this leasehold estate. The matter was jurisdictional, due process is involved, and the owner of the property could not thus be arbitrarily deprived of such a substantial right by a procedure not authorized by the statutes. We find no curative act which would restore validity to this purported bill of sale, which was void from the beginning.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



130 Cal.App.2d 330

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jack K. WILKERSON, Defendant and Appellant.

Cr. 3044.

District Court of Appeal, First District, Division 2, California.

Jan. 24, 1955.

Defendant was convicted of robbery in the second degree on two counts. The Superior Court, County of Alameda, James R. Agee, J., entered judgment on the verdict and an order denying a new trial, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained convictions.

Judgment and order affirmed.

1. Criminal Law ⇐1168(2)

Where witnesses in robbery prosecution did not identify defendant by hat or coat he was wearing, failure of prosecution to put hat and coat in evidence was not prejudicial.

2. Criminal Law ⇐1159(3)

Where evidence in criminal prosecution is conflicting, and there is substantial evidence to sustain verdict, reviewing court will not disturb verdict.

3. Robbery ⇐24(1)

Evidence sustained second-degree robbery convictions.

4. Witnesses ⇐337(6)

Prior conviction of defendant for violation of the Dyer Act when he was seventeen years old was a conviction of a felony, and evidence thereof was properly admitted in robbery prosecution for purpose of impeachment of defendant.

5. Criminal Law ⇐1170½(1)

Where there was much stronger evidence to impeach defendant in robbery prosecution than evidence concerning a prior conviction for violation of the Dyer Act, alleged error in admission of evidence concerning that conviction was not prejudicial.

6. Criminal Law ⇐1035(3)

Where defendant had same counsel in previous trial, which resulted in failure of jury to convict, and defendant did not discharge counsel, and at no time during second trial did defendant complain to trial court of acts of his counsel, defendant could not, after conviction, complain on appeal that counsel was incompetent.

Jack K. Wilkerson, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant was charged with two counts of robbery and a prior felony conviction. In the first jury trial the jury failed to agree on a verdict. On the second he was found guilty of robbery in the second degree on both counts. Motion for new trial was denied. Defendant appeals from the judgment and from the order denying a new trial.

Two gas stations in Berkeley were robbed on the night of January 29, 1954. In the first robbery the owner, Tony Cianciarulo, was accosted by a man with a gun

who forced him to open the cash box and to hand over $10 from his own wallet, netting the robber approximately $92. The man then forced Mr. Cianciarulo to walk a short distance down a side street and left him. Mr. Cianciarulo returned to the gas station and asked a customer, who had just driven up, to go after the robber whom he saw getting into a car. The customer gave chase but lost the car. He did not get the license number but saw the car well enough to describe it as a 1951 or 1952 two-door Chrysler, which appeared gray in color. His description fitted that of appellant's car except that the car was two-toned with an off-white bottom and bright blue top. Appellant also claims that the description of the location of the license plate did not coincide with the one on the rear of his car.

The second robbery occurred shortly after the first by a man dressed the same as the perpetrator of the first theft. He obtained approximately $25 from the attendant of the second gas station.

Both victims identified appellant as the man who had held them up, first picking him out of a group of photographs and later identifying him in a line up.

Appellant, who appeals in propria persona, makes no clear cut presentation of his grounds for reversal. However, it appears that his main contentions are:

(1) Insufficiency of the evidence to sustain the judgment.

(2) Error in admission of evidence resulting in the denial of a fair trial.

(3) Incompetence and negligence of his counsel and failure of the trial court to inform him of his right to personally take part in court proceedings under Article I, section 13 of the Constitution and section 686, Penal Code.

[1] Other points do not merit consideration. The objection that the prosecution withheld from evidence a coat and hat taken from appellant's home is without merit. The witnesses did not identify appellant by the hat or the coat he was wearing, hence the failure of the prosecution to put them in evidence was not prejudicial.

(1) In his argument as to the insufficiency of the evidence appellant refers to statements made by witnesses in describing appellant's car and appellant which did not fit. He also charges his counsel with incompetence for failing to bring out these discrepancies before the jury in order to discredit the prosecution witnesses. As further evidence of his innocence appellant quotes the testimony of defense witnesses to show he was at his home on a ranch near Salinas and could not have been in Berkeley at the time the robberies took place. These witnesses were his wife who testified that the two of them went to bed about 9:00 p. m.; his mother-in-law who testified that when she went to see her daughter at 9:45 p. m. the house was dark, that she did not go in but saw appellant's Chrysler parked in front of the house; his employer who saw the Chrysler parked in front of the house at 6:30 p. m.

[2, 3] As opposed to this testimony we have the testimony of the two witnesses who identified appellant as the man who robbed the service stations. Thus we have a conflict in the evidence and it is a well settled rule that where the evidence is conflicting the appellate court will not disturb the verdict when there is substantial evidence to sustain it.

[4, 5] (2) Appellant charged the District Attorney created gross prejudice against him in the minds of the jurors by bringing out the facts of a prior conviction not charged in the indictment, and not admissible in evidence as a prior felony conviction. The District Attorney questioned appellant regarding a conviction for violation of the Dyer Act, a federal offense, in 1941, which appellant admitted. Defense counsel objected to the question on the ground that he doubted if it were a proper prior conviction because of the age of the appellant, who at that time was 17. The judge ruled it was permissible for purposes of impeachment if at the place the offense was committed it was a felony. Under the reasoning and holding of the court in People v. Theodore, 121 Cal.App.2d 17, 29, 262 P.2d 630, appellant's conviction of the Dyer Act constituted a felony. However, if the admission of this

evidence for purposes of impeachment had been error it was not prejudicial error requiring reversal for there was so much stronger evidence against appellant that this particular admission could have had little effect in the determination of the jury.

[6] (3) Incompetence of his counsel cannot be a ground for reversal. Appellant had had the same counsel in his previous trial which resulted in a failure to convict; he could have discharged him and secured another one if he had thought him incompetent; at no time during the second trial did he complain to the court of the acts of his attorney, and thus, after an adverse judgment, he can not now do so. People v. Youders, 96 Cal.App.2d 562, 569, 215 P.2d 743.

Order and judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.



130 Cal.App.2d 379

Perry HENDRIX, Plaintiff and Respondent,

v.

Evelyn Irene HENDRIX, Defendant and Appellant.

Civ. 5038.

District Court of Appeal, Fourth District, California.

Jan. 25, 1955.

Child custody proceeding by divorced husband against divorced wife. The Superior Court, Riverside County, John G. Gabbert, J., entered orders adverse to divorced wife, and divorced wife appealed. The District Court of Appeal, Mussell, J., held that evidence was not sufficient to establish that trial court's denial of divorced wife's motion to set aside default judgment constituted an abuse of discretion.

Orders affirmed.

1. Appeal and Error ⇐957(1)
Judgment ⇐139

Motions for relief from default are addressed to trial court's sound discretion, and exercise thereof will not be interfered with by an appellate tribunal in absence of showing of abuse thereof. West's Ann. Code Civ.Proc. § 473.

2. Judgment ⇐139

Every case should be heard on its merits, and trial court's discretion is to be exercised in conformity with the law and in manner to subserve, not impede, or defeat, ends of substantial justice.

3. Judgment ⇐162(4)

In action by divorced husband against divorced wife for custody of parties' two minor children, evidence was not sufficient to establish that trial court's denial of divorced wife's motion to set aside default judgment constituted an abuse of discretion. West's Ann.Code Civ.Proc. § 473.

4. Divorce ⇐223

In child custody proceeding by divorced husband against divorced wife, mode of compensation of divorced wife's attorneys would be left to agreement, express or implied, of parties, and, therefore, denial of allowance of attorney's fees to wife did not constitute an abuse of trial court's discretion. Rules on Appeal, rule 19(a); West's Ann.Code Civ.Proc. § 1021; West's Ann. Civ.Code, §§ 137.3, 137.5.

5. Costs ⇐172

Except where attorney's fees are specifically allowed by statute or by parties' contract, such fees are not recoverable by a successful litigant as costs or otherwise. Rules on Appeal, rule 19(a); West's Ann. Code Civ.Proc. § 1021; West's Ann.Civ. Code, §§ 137.3, 137.5.

6. Judgment ⇐346

Court has inherent power, apart from statute, to correct its records by vacating judgment which is void on its face, since such judgment is a nullity and may be ignored.

Charles H. Carter, Corona, for appellant.

Best, Best & Krieger and Enos C. Reid, Riverside, for respondent.

MUSSELL, Justice.

This is an action for the custody of two minor children of plaintiff and defendant. Plaintiff and the children resided in Riverside county when the action was filed and defendant was personally served with summons in said county on November 27, 1953. She did not appear in the action and plaintiff's attorneys received no request for continuance or other stipulation and defendant's default was entered on December 10, 1953. On that day a hearing was had and the court, after hearing the evidence, awarded plaintiff the exclusive care, custody and control of the two children involved. On February 15, 1954, defendant filed an affidavit in support of a motion to set aside her default, stating therein, among other things, that by divorce decree in the state of Washington she had been awarded the custody of said minor children; that she left the children with plaintiff in Riverside in July, 1953, and upon returning to the state of Washington, was served with summons in the instant action; that she came to Riverside on or about November 27, 1953, for the purpose of regaining custody of the children and on that date consulted an attorney in Riverside who advised her that he was quite busy but that he would be able to see her on the following Monday; that while she was in this attorney's office she was served with a restraining order prohibiting her from taking the children out of the jurisdiction of the Superior Court of Riverside county; that upon considering the orders served upon her, she became convinced such orders were in error since she then had the custody and possession of the children; that thereupon she returned to Seattle, Washington, with the two children; that on or about December 15, 1953, she and the children were taken into custody in Seattle, Washington; that the children were there given to plaintiff and he returned to Riverside with them; that she consulted attorneys in Seattle and was advised by them that she would have no standing in the Riverside court because she had violated the said restraining order; that this advise made her apprehensive of returning to Riverside to attempt to contest the hearing in the matter and that for this reason she did not appear at the trial and did not employ an attorney to appear for her. In an amendment to this affidavit defendant stated that the attorneys in Seattle advised her that she need not return to California and that since she was physically present in the state of Washington with the children, her custody of them could not be disturbed.

Plaintiff Perry Hendrix filed an affidavit in opposition to the motion to set aside the judgment in which he stated that during July, 1953, defendant, while in Riverside with the children, agreed that plaintiff should have their permanent custody; that plaintiff took the third child of the parties (whose custody is not here involved) and proceeded to Seattle, leaving the other children with him; that on October 21, 1953, plaintiff filed the instant action in Riverside and defendant was served with summons therein both in the state of Washington and in Riverside county and was also served with a restraining order issued in Riverside county, which order defendant disobeyed by taking the two children involved to Seattle; that thereafter defendant was found to be in contempt and a warrant for her arrest was issued; that plaintiff then went to Seattle and there instituted an action for custody of the children and obtained a judgment awarding their custody to him.

A hearing was had in the Riverside superior court on the motion to vacate and set aside the default judgment and the court, on March 25, 1954, entered its order denying the motion. The order further provided that the order to show cause (issued therein) re attorney's fees was granted in the sum of $75.00, which plaintiff was ordered to pay to counsel for defendant.

[1–3] Defendant appealed from the order denying her motion to vacate and set aside the default judgment, contending that there was an abuse of discretion in denying her motion. We find no merit in this contention. It is a settled principle of law that motions for relief from default under the remedial provisions of section 473 of the Code of Civil Procedure are addressed to the sound discretion of the trial court, and the exercise of that discretion, in the absence of a clear showing of abuse, will

not be interfered with by an appellate tribunal. McNeil v. Blumenthal, 11 Cal.2d 566, 567, 81 P.2d 566; Tearney v. Riddle, 64 Cal.App.2d 783, 787, 149 P.2d 387. While it is the policy of the law that every case should be heard on its merits and the discretion of the trial court is to be exercised in conformity with the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice, DeMello v. DeMello, 124 Cal.App.2d 135, 139, 268 P.2d 26, it appears from the affidavit of plaintiff Perry Hendrix that on December 16, 1953 the superior court of King County, State of Washington, after a full hearing at which both plaintiff and defendant were present and represented by counsel found that the decree and order of the California court was made and entered by a court of general jurisdiction having full and complete jurisdiction of the subject matter of the instant action and of the parties thereto, including said children. The King county court then ratified, approved and confirmed in all particulars the order of the California court and further ordered that the defendant Evelyn Irene Hendrix should be deprived of the care, custody and control of said minor children.

The sole reason given by defendant for her failure to appear in and contest the present action is that she was "apprehensive of returning to Riverside" because she had been advised that she had no standing in the Riverside court due to the fact that she had violated its restraining order. The facts shown by the record are not sufficient to show a clear abuse of discretion on the part of the trial court in denying defendant's motion to set aside the default judgment upon the basis of the facts stated by her.

[4–6] Plaintiff Perry Hendrix appealed from that part of the order of the trial court made on March 25, 1954, granting the order to show cause re attorney's fees and ordering plaintiff to pay to counsel for defendant the sum of $75. However, this appeal was abandoned on May 4, 1954, by an "Abandonment of Appeal" filed with the county clerk of Riverside county and jurisdiction of this matter was thereby restored to the superior court. Rules on Appeal, rule 19(a). The trial court then reconsidered its order of March 25, 1954, and by order dated May 4, 1954, decreed that the order of March 25, 1954, granting attorney's fees in the sum of $75 was void and set it aside. Defendant then appealed from the order of May 4, 1954, setting aside the order granting attorney's fees in the sum of $75, contending that the court abused its discretion in denying the allowance of attorney's fees to defendant. This contention is likewise without merit. The instant action was brought to obtain the custody of two of the minor children of the parties. It is not one of the actions specified in sections 137.3 and 137.5 of the Civil Code in which attorney's fees are allowed. Since there is no statutory provision for the allowance of attorney's fees in the present action, the mode of compensation is left to the agreement, express or implied, of the parties. Section 1021, Code Civ.Proc. As was said in Murphy v. Murphy, 71 Cal.App. 389, 392, 235 P. 653, 654: "Except where attorney's fees are specifically allowed by statute, or by contract of the parties, they are not recoverable by a successful litigant as costs or otherwise." The trial court by its order of May 4, 1954, declared its prior order of March 25, 1954, granting attorney's fees to be void and properly set it aside since the order was void on its face. In Olivera v. Grace, 19 Cal.2d 570, 574, 122 P.2d 564, 140 A.L.R. 1328, it is held that a court has inherent power, apart from statute, to correct its records by vacating a judgment which is void on its face, for such judgment is a nullity and may be ignored. The trial court properly denied defendant's motion for attorney's fees to defend against the plaintiff's appeal since that appeal was abandoned by him.

The orders appealed from are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

130 Cal.App.2d 416

In the Matter of the ESTATE of John C. BODGER, Deceased.

Security-First National Bank of Los Angeles, a National Banking Association, Petitioner and Appellant.

Civ. 20458.

District Court of Appeal, Second District, Division 2, California.

Jan. 26, 1955.

Proceeding in the matter of the estate of deceased testator. The Superior Court of Los Angeles County, Paul Nourse, J., entered an order adversed to trustee, and the trustee appealed. The District Court of Appeal, McComb, J., held that where testator in will specified exact and definite percentage formula for compensating his testamentary trustee, and decree of distribution, which had become final, set out percentage formula verbatim as a term of trust, Probate Court, in settling trustee's account, could not establish a new and different measure for compensating trustee.

Order reversed.

1. Trusts ⇐315(2)

Where testator in will specified exact and definite percentage formula for compensating his testamentary trustee, and decree of distribution, which had become final, set out percentage formula verbatim as a term of trust, probate court, in settling trustee's account, could not establish a new and different measure for compensating trustee. Probate Code, § 1120; West's Ann.Civ. Code, §§ 2218, 2274.

2. Executors and Administrators ⇐315(6)

Final decree of distribution under will creating trust is a conclusive judgment, and probate court has no power to change terms of trust established by the decree. Probate Code, § 1120.

3. Executors and Administrators ⇐315(6)

Where decree of distribution of testamentary trust has become final, it is as conclusive and final as any other judgment entered by a court of competent jurisdiction. Probate Code, § 1120.

4. Trusts ⇐298

The probate court, acting under section of the Probate Code dealing with jurisdiction of probate court after final distribution of testamentary trust, is exercising a limited jurisdiction, which does not include the general equity powers of the superior court sitting as a court of equity. Probate Code, § 1120.

5. Trusts ⇐298

Jurisdiction, which probate court retains over testamentary trusts by reason of provisions of section of the Probate Code dealing with jurisdiction of probate court after final distribution of testamentary trust, is only a special and limited jurisdiction, which does not include right of probate court, on its own motion or otherwise, to enter order changing or contradicting a final judgment theretofore entered. Probate Code, § 1120.

6. Trusts ⇐298

Function of probate court under section of the Probate Code dealing with jurisdiction of probate court after final distribution of testamentary trust, is to settle accounts of trustee in accordance with decree of distribution and not otherwise. Probate Code, § 1120.

7. Trusts ⇐298

It is not for probate court acting under section of the Probate Code dealing with jurisdiction of probate court after final distribution of testamentary trust, to enter a series of new decrees of distribution, and its sole function is to implement, in exercise of its limited jurisdiction, the final decree of distribution theretofore rendered. Probate Code, § 1120.

8. Trusts ⇐315(2)

When a testator clearly specifies in his will compensation to be paid his trustee, probate court and all interested parties are bound thereby, and the direction of the testator provides the law of the case.

9. Trusts ⇐315(2)

Section of the Probate Code providing that on settlement of account of trustee, probate court shall allow trustee his proper expenses and such compensation for serv-

ices as probate court may deem just and reasonable, is operative only where testamentary trust does not specify compensation to be paid trustee. Probate Code, § 1122.

10. Trusts ⇐315(2)

Section of Civil Code providing that when declaration of trust specifies amount of compensation of trustee, he is entitled to amount thus specified and no more, is operative where declaration of trust, whether inter vivos or testamentary, declares the compensation to be paid to the trustee. West's Ann.Civ.Code, § 2274.

11. Trusts ⇐315(2)

Section of the Probate Code that on settlement of account of trustee, probate court shall allow trustee his proper expenses and such reasonable compensation for services as court may deem just and reasonable, and section of the Civil Code providing that if declaration of trust specifies amount of compensation of trustee, he is entitled to the amount thus specified and no more, are not contradictory but are complementary. Probate Code, § 1122; West's Ann.Civ.Code, § 2274.

12. Trusts ⇐315(2)

Where instrument by which a trust is created fixes compensation of trustee, trustee cannot claim a larger sum, but is entitled to amount specified, and no more. West's Ann.Civ.Code, § 2274.

13. Trusts ⇐315(2)

Section of the Civil Code providing that if declaration of trust specifies amount of compensation of trustee, he is entitled to amount thus specified and no more, is applicable to testamentary as well as to inter vivos trusts. West's Ann.Civ.Code, § 2274.

14. Trusts ⇐315(2)

Testator has right to specify compensation to be paid trustee performing services on his behalf, and, if testator does so, it is not within power of probate court to change, alter, or modify such provisions, or to substitute its predilection for the expressed instruction of the testator. West's Ann.Civ.Code, § 2274.

15. Trusts ⇐112

Probate court has no power to alter terms of contract of trust between testator and his testamentary trustee by omitting terms and adding terms of the probate court's own composition.

16. Trusts ⇐1

A declaration of trust constitutes a contract between trustor and trustee for the benefit of the third party, and the mutual consent of the parties to the express declaration of trust constitutes a contract between them, each having rights and obligations, which may be enforced by the other and by the beneficiary designated in the contract. West's Ann.Civ.Code, § 2218.

17. Trusts ⇐1

In legal contemplation, a declaration of trust is nothing more than a third party beneficiary contract.

18. Contracts ⇐143

It is not the province of a court to alter a contract by construction or to make a new contract for the parties, and its duty is confined to interpretation of the contract which the parties have made for themselves, and, in absence of any ground for denying enforcement, to enforce or give effect to the contract as made.

19. Contracts ⇐147(2)

In absence of fraud or mistake, intention of parties to contract, as expressed in contract, is controlling, and courts are not empowered, under guise of construction or explanation, to depart from plain meaning of the contract and to insert a term or limitation not found therein.

Denio, Hart, Taubman & Simpson, Long Beach, for appellant.

John F. McCarthy, Long Beach, amicus curiae.

McCOMB, Justice.

Decedent's will created a testamentary trust. It provided that the trustee should be paid an annual fee for its usual and ordinary services of ¾ of 1% of the reasonable value of the corpus of the trust, payable out of income or principal at the dis-

cretion of the trustee. The decree of distribution, from which no appeal was taken and which is final, contains a like provision.

In an annual account the trustee took credit for an annual fee computed according to the formula set forth in the will and decree of distribution. In passing on the account, the trial court investigated the nature and amount of services performed by the trustee and concluded that an annual fee of ¾ of 1% exceeded a reasonable compensation for the services performed. On its own motion the court ordered that in ensuing years the trustee would be allowed only a just and reasonable compensation for services actually rendered.

The trustee was not content with that part of the order providing for just and reasonable compensation in future years, and has appealed from that part of the order so limiting its fees.

[1] The question presented is this: *Where a testator in his will specifies an exact and definite percentage formula for compensating his testamentary trustee, and where the decree of distribution which has become final sets out the said percentage formula verbatim as a term of the testamentary trust, may the probate court in settling a trustee's account establish a new and different measure for compensating the trustee?*

This question must be answered in the negative for the following reasons:

First

[2] The final decree of distribution is a conclusive judgment and the probate court has no power to change the terms of the testamentary trust established by the decree.

These propositions must be borne in mind:

[3] (1) A decree of distribution which has become final is as conclusive and final as any other judgment entered by a court of competent jurisdiction; and

[4] (2) The probate court acting under the provisions of Probate Code, section 1120[1] is exercising a limited jurisdiction which does not include the general equity powers of the superior court sitting as a court of equity.

The probate judge in the instant proceeding, on his own motion, elected to delete from the decree of distribution a portion of its explicit terms and to substitute therefor a term of the court's own choosing. In so doing the court acted in direct contravention of section 2274 of the California Civil Code and contrary to the decisions of the appellate courts of this state which declare the terms of a trust set out in a decree of distribution which is final to be inviolable.

1. Section 1120 of the Probate Code reads: "Jurisdiction of court after final distribution: Accounting by trustee: Notice of rendering account. When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that such determination is not concluded by the decree of distribution, of settling the accounts and passing upon the acts of the trustee and for the other purposes hereinafter set forth. Any trustee appointed by will, or appointed to execute a trust created by will, may, from time to time pending the execution of his trust, or at the termination thereof, render for settlement his accounts and report his acts as such trustee, before the superior court in which the will was probated. For that purpose, the trustee, or, in case of his death, his legal representatives, shall present to the court his verified account and report, setting forth his accounts in detail, reporting his acts as trustee, and showing the condition of the trust estate, and giving the names and postoffice addresses, if known, of the beneficiaries. The trustee may also petition such court, from time to time, for instructions as to the administration of the trust. The clerk shall set the account and report or petition for settlement or hearing by the court and give notice thereof for the period and in the manner required by Section 1200 of this code. The trustee shall cause notice of the hearing to be mailed to the beneficiaries at their last known addresses, as provided in said Section 1200, whether they have requested special notice or given notice of appearance or not."

In Goad v. Montgomery, 119 Cal. 552, 51 P. 681, the question before the court was the extent of the power of sale of a testamentary trustee. Appellants therein sought to have the court interpret the will of the testator in a manner different from the import of the decree of distribution. At page 558 of 119 Cal., at page 683 of 51 P. the court said: "If the plaintiffs herein had felt that the decree of distribution was erroneous or defective in not giving to them the powers which, in their opinion, the terms of the will authorized to be conferred upon them, they could have appealed therefrom, and had the decree corrected; but, by their failure to appeal, the decree has become conclusive upon them, and they can no longer contend for a different construction than such as its terms import."

In the cited case, in addition to holding the terms of a trust to be conclusively determined by a final decree of distribution setting them out, the court also held that the testator was deemed to have created the trust in the precise terms used in the decree.

Seymour v. McAvoy, 121 Cal. 438, 53 P. 946, 41 L.R.A. 544, is a case wherein creditors sought to reach the interest of beneficiaries in trust property in satisfaction of a judgment. The final decree of distribution rendered therein had distributed the estate of decedent to testamentary trustees to be held in accordance with the terms and provisions of the will. The court held the creditors could not reach the income accumulated for the beneficiaries even if the trust were invalid for the reason that the terms of the trust as set out in the decree of distribution were controlling and conclusive.

In Keating v. Smith, 154 Cal. 186, 97 P. 300, the question whether a beneficiary had a contingent or vested interest in a trust created by a decree of distribution was presented. The court held that the interest of the beneficiary was vested, saying at page 191 of 154 Cal., at page 302 of 97 P.: "And (the Decree of Distribution) is equally conclusive as an ascertainment and adjudication of the terms of the trust, and of the rights of all parties claiming any legal or equitable interest under the will."

In Re Estate of Loring, 29 Cal.2d 423, 175 P.2d 524, in discussing the jurisdiction of the probate court under section 1120 of the Probate Code and the conclusiveness of the decree of distribution, the court said at page 427 of 29 Cal.2d, at page 527 of 175 P.2d: "It is settled, and the Lorings concede, that a decree of distribution that has become final is a conclusive determination of the terms and validity of a testamentary trust and of the rights of all parties thereunder." Again, 29 Cal.2d at page 432, 175 P.2d at page 529, "It is settled, however, that, once final, an erroneous decree of distribution, like any other erroneous judgment, is as conclusive as a decree that contains no error."

The limited jurisdiction of the probate court under section 1120 is thus stated in Re Estate of Loring, supra, 29 Cal.2d at page 433, 175 P.2d at page 530: "Section 1120 itself contemplates that the exercise of the court's equity jurisdiction is so limited, for it provides that the court may determine to whom the property shall pass upon the termination of the trust, 'To the extent that such determination is not concluded by the decree of distribution.'"

In Re Estate of Van Deusen, 30 Cal.2d 285, 182 P.2d 565, in considering an order of the probate court permitting an invasion of the trust corpus contrary to the express terms of the decree of distribution and of the will, it was said at page 290 of 30 Cal. 2d, at page 570 of 182 P.2d: "A decree of distribution is a final and conclusive construction of the will as against all interested parties, including beneficiaries of a testamentary trust."

[5] It thus appears that the jurisdiction which the probate court retains over testamentary trusts by reason of the provisions of section 1120 of the Probate Code is only a special and limited jurisdiction which does not include the right of the court on its own motion or otherwise to enter an order changing or contradicting a final judgment theretofore entered. (In re Estate of Smead, 12 Cal.2d 20, 24 [3], 82 P.2d 182.)

Were the probate court to have power to change the terms of a decree of distribution stability would depart from final judg-

ments; there would be no finality to probate proceedings. In the present case when the probate court entered its decree of distribution it reproduced verbatim the terms of the testator's will providing a percentage formula for compensating the trustee. That provision is as much a term of the testamentary trust as the terms thereof controlling the distribution of income. If the probate court has the right to delete the term respecting compensation and to substitute therefor a new provision of its own composition, the stability of the trust is destroyed and vested rights become subject to divestment by arbitrary action.

[6, 7] The function of the probate court under section 1120 of the Probate Code under the present circumstances is to settle the accounts of the trustee in accordance with the decree of distribution and not otherwise. It is not for the probate court acting under section 1120 of the Probate Code to enter a series of new decrees of distribution. Its sole function is to implement in the exercise of its limited jurisdiction the final decree of distribution theretofore rendered.

The case at bar is an excellent example of the dangers inherent in the factual circumstances presented in that the court entered the order appealed from on its own motion. The trustee presented its account and computed its fees in strict accordance with the terms of the decree of distribution. All of the beneficiaries of the subject trust had notice provided by law of the terms of the account and petition. None of them appeared in the probate court to object to the computation of fees in accordance with the terms of the decree. No issue was presented to the probate court concerning the fees of the testamentary trustee, nor concerning the validity or invalidity of the terms of the decree of distribution, nor providing a compensation formula for compensating the trustee. The court, without the issue's being presented, of its own motion entered an order which on its face is a diametric contradiction of the terms of final distribution and in derogation thereof.

Second

The probate court suggested that its action in entering the order appealed from could be sustained under the power given it under section 1122[2] of the Probate Code.

[8] When a testator clearly specifies in his will the compensation to be paid to his trustee, the probate court and all interested parties are bound thereby and the direction of the testator provides the law of the case. The testator here in his will declared that the testamentary trustee in this matter should be paid for its ordinary and usual duties as such ¾ of 1% per annum, payable quarterly, of the reasonable value of the trust estate.

The decree of distribution specifically provided that the testamentary trustee should be paid for its ordinary and usual duties as such ¾ of 1% per annum, payable quarterly, of the reasonable value of the trust estate.

In Matter of Estate of Hanson, 159 Cal. 401, 114 P. 810, the testamentary trust created by the will of the decedent specified the compensation to be paid to the testamentary trustee for a period of five years from and after the date of the entry of the decree. By reason of circumstances the trustees acted for a period in excess of five years. The court specifically held that the trustees were entitled to the compensation specified in the will for the period therein specified and that only further or additional compensation beyond that specified in the will would be based upon the court's determination of the value of services.

Section 2274 of the Civil Code provides as follows:

"Except as provided in section 1122 of the Probate Code, when a declaration of trust is silent upon the subject of compen-

2. Section 1122 of the Probate Code reads: "On the settlement of each such account the court shall allow the trustee his proper expenses and such compensation for services as the court may deem just and reasonable. Where there are several trustees it shall apportion the compensation among them according to the respective services rendered. It may, in its discretion, fix a yearly compensation for the trustee or trustees, to continue as long as the court may deem proper."

sation the trustee is entitled to the same compensation as an executor. If it specifies the amount of his compensation, he is entitled to the amount thus specified and no more. If it directs that he shall be allowed a compensation, but does not specify the rate or amount, he is entitled to such compensation as may be reasonable under the circumstances. If there are two or more trustees the compensation shall be apportioned among the trustees according to the services rendered by them respectively."

The foregoing section is explicit in its terms that where a declaration of trust specifies the amount of compensation to be paid to the trustee, the trustee is entitled to the amount thus specified. It is also clear that the trustee is not entitled to more than the amount specified but this in no wise limits the express provision that the trustee is entitled to the compensation specified in the instrument.

Thus, construing the provisions of Civil Code, section 2274, to apply to testamentary trusts as well as inter vivos trusts does not do violence to or render unnecessary the provision set out in section 1122 of the Probate Code.

[9] Section 1122 of the Probate Code is operative where the testamentary trust does not specify the compensation to be paid to the trustee.

[10, 11] Section 2274 of the Civil Code is operative where the declaration of trust, whether inter vivos or testamentary, does declare the compensation to be paid to the trustee. These sections are not contradictory, they are complementary.

That the Legislature was mindful of section 1122 of the Probate Code is apparent on the face of section 2274 of the Civil Code, since section 1122 of the Probate Code is specifically mentioned in the first sentence of section 2274 of the Civil Code. Such first sentence has no application to the present case, nevertheless it indicates that the Legislature intended section 2274 to apply to testamentary as well as to inter vivos trusts.

[12] In the case of In re Whitney's Estate, 78 Cal.App. 638, 248 P. 754, section 2274 of the Civil Code was held to apply to testamentary trusts, the court saying at page 649 of 78 Cal.App., at page 759 of 248 P.: "The order of the court allowing respondents an additional sum, was therefore without authority. Where an instrument by which a trust is created fixes the compensation of the trustees they cannot claim a larger sum. They are entitled to the amount specified, and no more. Civ. Code, § 2274; In re Estate of Runyon, 125 Cal. 195, 57 P. 783."

In this case the appellate court reversed an order of the lower court because it had disregarded the explicit terms of the will creating the trust, 78 Cal.App. at page 650, 248 P. at page 759 it is said: "However this may be, the will having limited the amount which respondents should receive as compensation for their services, both as executors and trustees, and they having accepted their trust, they are bound thereby, and the order of the court allowing them a greater amount is without authority."

It is thus seen that in the Whitney case the appellate court applied section 2274 of the Civil Code and held specifically that the trial court had no alternative but to follow the express provisions of the instrument creating the trust in allowing fees to the trustees.

In re Shaw's Estate, 96 Cal.App. 637, 274 P. 612, the principle heretofore announced in the Whitney case was applied, the court saying, 96 Cal.App. at page 639, 274 P. at page 613: "She entered upon her trusteeship upon stepping out of her office as executrix, and is entitled to the compensation fixed by the will therefor."

In re Barton's Estate, 96 Cal.App.2d 234, 214 P.2d 857, the beneficiaries appealed from a decree settling the account of the testamentary trustee and allowing him the sum of $3,000 for his services. The issue involved in the Barton case was actually a matter of interpreting the terms of the decree of distribution as a matter of construction. Nevertheless, the court recognized the applicability of Civil Code section 2274 and the principle of the Whitney case. It said at page 236 [2] of 96 Cal.App.2d, at page 858 of 214 P.2d: "It is true that when an instrument by which a trust is created

specifically fixes and determines the compensation of the trustee he is entitled to that amount and to no more. Civ.Code, § 2274; In re Estate of Whitney, 78 Cal.App. 638, 248 P. 754."

For similar cases from other jurisdictions recognizing the same principles see Bogert on Trusts and Trustees, Vol. 4, part 2, section 975 et seq., page 371.

[13] It thus appears from the provisions of section 2274, Civil Code, and particularly the second sentence thereof, and appellate decisions of this state, that the section is applicable to testamentary as well as to inter vivos trusts. This is appropriate since section 1122 of the Probate Code governs those cases where a testamentary trust does not specify the compensation to be paid the trustee, whereas section 2274 of the Civil Code applies to the situation where the testamentary declaration of trust specifies such compensation.

[14] The testator has the right to specify the compensation to be paid a trustee performing services on his behalf and if he does so it is not within the power of the court to change, alter or modify such provisions, or to substitute its predilection for the expressed instruction of the testator. It has never been doubted that the testator has the right to specify compensation for a testamentary trustee and where he does so, section 1122 of the Probate Code has no application. Particularly is this true since section 2274 of the Civil Code specifically and properly recognizes the right of a testator to specify the compensation to be paid out of the trust estate to his trustee.

Third

[15] The court below had no power to alter the terms of the contract of trust between the testator and his testamentary trustee by omitting terms and adding terms of its own composition.

[16] A declaration of trust constitutes a contract between the trustor and the trustee for the benefit of a third party. The trustor declares that he will transfer certain property to a trustee if the trustee agrees to use and dispose of the property and its proceeds in a manner designated by the trustor for the benefit of third parties. There is in this situation an offer by the trustor and an acceptance by the trustee. The mutual consent of the parties to the express declaration of trust constitutes a contract between them, each having rights and obligations which may be enforced by the other and by the beneficiary designated in the contract.

This legal situation is recognized by section 2218 of the Civil Code which reads as follows:

"*Parties to the contract.* The person whose confidence creates a trust is called a trustor; the person in whom the confidence is reposed is called the trustee; and the person for whose benefit the trust is created is called the beneficiary."

[17] In legal contemplation a declaration of trust is nothing other than a third party beneficiary contract. This principle was recognized in the case of In re Guasti's Estate, 117 Cal.App.2d 612, 256 P.2d 629, where a testamentary trust was involved and the same was interpreted as involving a contract between the trustor and the trustee.

In re Whitney's Estate, 78 Cal.App. 638, 248 P. 754, also recognized the testamentary trust as constituting a contract. 78 Cal. App. at page 649, 248 P. at page 759 the court said: "Their [the trustees] acceptance of the trust will be held as an agreement to receive such compensation as the instrument directs."

[18] It thus appears that the following principle set forth in 17 C.J.S., (1939), Contracts, § 296, page 702 is applicable:

"It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, and, in the absence of any ground for denying enforcement, to enforcing or giving effect to the contract as made, that is, to enforce or give effect to the contract as made without regard to its wisdom or folly, to the apparent unreasonableness of the terms, or to the fact that the rights of the parties are not carefully guarded, as the court cannot supply material stipulations or read into

the contract words which it does not contain so as to change the meaning of words contained in the contract."

[19] Likewise applicable is the statement of our Supreme Court in Tanner v. Title Insurance & Trust Co., 20 Cal.2d 814, at page 824, 129 P.2d 383, at page 389, where it is said:

"But in the absence of fraud or mistake, the intention of the parties as expressed in the agreement is controlling, and courts are not empowered under the guise of construction or explanation to depart from the plain meaning of the writing and insert a term or limitation not found therein."

The portion of the court's order settling first and final account from which an appeal has been taken is reversed.

MOORE, P. J., and FOX, J., concur.



130 Cal.App.2d 867

In the Matter of the ESTATE of Walter BODGER, Deceased.

Security-First National Bank of Los Angeles, a National Banking Association, Petitioner and Appellant.

Civ. 20457.

District Court of Appeal, Second District, Division 2, California.

Jan. 26, 1955.

Appeal from the Superior Court of Los Angeles County, Paul Nourse, Judge.

See also Cal.App., 276 P.2d 83.

Denio, Hart, Taubman & Simpson, Long Beach, for appellant.

John F. McCarthy, Long Beach, amicus curiae.

PER CURIAM.

The precise question presented on this appeal was decided in the Matter of Estate of Bodger, Cal.App., 279 P.2d 61.

For the reasons therein stated the portion of the Court's order settling first and final account from which an appeal has been taken is reversed.



130 Cal.App.2d 595

Marie ARTHUR, Plaintiff and Respondent,

v.

CITY OF LOS ANGELES, a municipal corporation, Defendant and Appellant.

Civ. 20482.

District Court of Appeal, Second District, Division 2, California.

Feb. 4, 1955.

Bus passenger's action against city for injuries sustained in collision between bus and city's police automobile. The Superior Court, Los Angeles County, Henry M. Willis, J., granted plaintiff's motion for new trial after verdict and judgment for city, and city appealed. The District Court of Appeal, Fox, J., held that where there was evidence, from which trier of facts could infer that driver of automobile had been negligent, trial court did not abuse its discretion in granting passenger's motion.

Order affirmed.

1. Automobiles ⇐245(19, 50)

In action by bus passenger against city for injuries sustained in collision between bus and city's police car, evidence whether driver of city's automobile had negligently cut in front of bus, proximately causing accident and injuries, presented issue for trier of fact.

2. New Trial ⇐68

Where there was evidence, in bus passenger's action against city for injuries sustained in collision between bus and city's automobile, from which trier of facts could infer that driver of automobile had been negligent, trial court did not abuse its discretion in granting passenger's motion for new trial after verdict and judgment for city. Vehicle Code, § 400.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Edwin F. Shinn and Weldon L. Weber, Los Angeles, Deputy City Attys., for appellant.

Marie Arthur, in pro. per.

FOX, Justice.

The sole issue on this appeal is whether the trial court abused its discretion in granting plaintiff's motion for a new trial after verdict and judgment thereon for the City. The motion was "granted upon the ground of insufficiency of the evidence to justify the verdict and judgment." It is the City's position that "there is no evidence from which any inference may be drawn that there was any negligence in the operation of the police car" involved in this accident. The record does not sustain the City's position.

Plaintiff, while a passenger on a westbound Transit Lines bus, occupied the first space near the front door on a seat running lengthwise. She was on the right or north side of the bus facing south. Because of a sudden stop, plaintiff struck the right side of her forehead against a metal post adjacent to her seat and received injuries for which she seeks damages from the City. She executed and delivered to the Transit Lines a covenant not to sue, for which she received $810.

The accident occurred at approximately 7:00 p. m. on December 12, 1950. The bus in which plaintiff was riding was traveling west on Melrose Avenue in Los Angeles. It stopped at the intersection of Madison Avenue and Melrose to load and unload passengers. When the bus started up it proceeded westward on Melrose in the lane of traffic "nearest the curb." When the bus was some 50 to 100 feet beyond Madison Avenue, witness Meyer, who was seated alongside the plaintiff, facing south, observed an automobile "cut quite sharply in front of the bus; that is, moving from left to right * * * Towards the north curb." The collision took place an instant later "in the lane closest to the north curb," which was "the lane the bus had been proceeding along from the very beginning." The witness left the bus in a moment or two and saw the car in front of the bus. That this was the car that cut in front of the bus is made clear from the following questions and answers on cross-examination:

"Q. Did you see the car which you saw cut in front of the bus at any time prior to the time the bus driver applied the brakes on the bus? A. Yes.

"Q. Where was the car when you had seen it prior to the time the bus driver applied the brakes? A. It was in the process of passing the bus on its left lane and cutting in front of the bus towards the north curb; that is, toward the lane on the inside, near the north curb. * * *

"Q. Did you see any other automobile besides the one that was stopped in front of the bus that you saw after the collision? A. No.

"Q. The only automobile you saw, to your best recollection, now, was the bus in which you were riding as a passenger and the automobile which was stopped in front of the bus after the collision; is that correct? A. Yes."

On redirect the following transpired:

"Q. Mr. Meyer, did you look at any time after the bus started out from this stop out the window directly across from you, that is, in the direction you were facing? A. Yes.

"Q. Did you observe at any time between the time the bus started on and the time of the collision any cars coming from a general southerly direction onto Melrose Avenue? A. I did not.

"Q. That is, coming from the south and heading north? A. I couldn't say that I noticed any. I did not."

The plaintiff, after testifying that she was "sitting up near the front of the bus on the right side directly behind the door * * * facing the opposite side of the bus," stated that after the bus crossed Madison Avenue and proceeded on westward on Melrose she observed a car which "seemed * * * to come from the rear of the bus." It seemed to her "to be dangerously close to the bus." That is what

caused her "attention to focus on it." She could see the top of the car through the window on the left side of the bus. She watched the car because "it seemed to be getting closer to the bus, and * * * that it was much too close—about a foot away." She observed the car until the front of its top was up where the bus driver was sitting—opposite him. The car then disappeared from her view. The collision happened "almost immediately" after she last saw the automobile. "The impact and the application of the brakes seemed to be almost simultaneous." The stop was sudden, throwing her forward against a metal upright post and causing her injury. When plaintiff got out of the bus the passenger car was "directly in front of" and "very close" to the bus. While it appeared there had been contact between the two vehicles, they were not then touching.

The passenger car was owned by the City of Los Angeles and was occupied by two police officers in civilian clothes, one of whom was driving. It was equipped with a stoplight of the type approved by the California Highway Patrol. The officers were not on any emergency duty. The City is liable, however, for any damage caused by the negligent operation of one of its motor vehicles by an officer, agent or employee—when acting within the scope of his office, agency or employment. Veh. Code, sec. 400. This section is the basis for the asserted liability of the City in this case.

It is unnecessary, of course, to recite defendant's version of this collision since the action of the trial court in granting plaintiff's motion for a new trial must be sustained if there is any evidence from which a reasonable inference may be drawn that the police officers were negligent in the operation of the City's automobile, and that such negligence was a proximate cause of plaintiff's injury. Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465.

[1, 2] We must accept as true the foregoing testimony for the purpose of testing the correctness of the court's ruling. It thus appears that as the City's vehicle passed the center of the bus it was dangerously close and seemed to get nearer as it reached the front of the bus; that it cut quite sharply in front of the bus moving toward the north curb; that the collision took place an instant later in the traffic lane nearest the curb in which the bus had been traveling since it stopped to load and unload passengers at the intersection of Madison and Melrose Avenues; and that no other motor vehicles were seen in the immediate vicinity by these witnesses. From this evidence the trier of the facts could reasonably draw an inference that the driver of the City's automobile negligently cut in front of the bus and that such negligence was a proximate cause of the accident and plaintiff's injuries. It was not, therefore, an abuse of the trial court's discretion to grant plaintiff's motion for a new trial. Ballard v. Pacific Greyhound Lines, supra.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.



130 Cal.App.2d 390

H. Glenn LAWLER, Individually and doing business under the trade name and style of Lawler Hay & Grain Co., Plaintiff and Appellant,

v.

H. P. GLEASON, Sheriff of the County of Alameda, State of California, Defendant and Respondent,

Max E. Manig, Ernest K. Manig, and Paul O. Manig, Defendants.

Civ. 15933.

District Court of Appeal, First District, Division 1, California.

Jan. 26, 1955.

Action by judgment creditor, who had redeemed realty from execution purchaser, for declaratory relief, to quiet title

to realty involved, and for writ of mandate to compel sheriff to make and record sheriff's deed to realty and deliver it to plaintiff. The Superior Court, Alameda County, Cecil Mosbacher, J., sustained defendant sheriff's demurrer to complaint and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that complaint raising question of legality of sheriff's action in accepting redemption payment by purported successor in interest to judgment debtor, was sufficient, even if it later appeared that such successor in interest had right to redemption by way of assignment from judgment debtor, where complaint showed that amount tendered by purported successor and accepted by sheriff was not computed by method required by law.

Judgment reversed.

1. Parties ⇐25

Under statutory provisions relating to joinder of defendants, it is not necessary that named defendants be interested or affected by all of relief requested or in every cause of action set forth in complaint. Code Civ.Proc. §§ 379–379c, 430, subds. 4, 5.

2. Declaratory Judgment ⇐300

In action by judgment creditor, who had redeemed realty from execution purchaser, for declaratory relief, to quiet title to realty involved, and for writ of mandate to compel sheriff to make and record sheriff's deed to realty and deliver it to plaintiff, holder of record title as of date of execution sale, his purported successor in interest, and sheriff were either necessary or proper parties in declaratory relief action, and fact that sheriff made no claim to property and was not directly interested in quiet title action did not constitute basis for objection to complaint on ground that sheriff was improperly joined as defendant, since determinations as to quiet title action would directly affect mandamus action. Code Civ.Proc. §§ 379–379c, 430, subds. 4, 5.

3. Action ⇐50(1)

Statutory provisions relating to joinder of parties enlarge old rules of joinder of causes of action, so that causes may be joined when they meet test of sections on joinder of parties, and all causes do not have to affect all parties to action. Code Civ.Proc. §§ 379c, 430, subds. 4, 5.

4. Execution ⇐293

Where claim of purported successor in interest to judgment debtor's right of redemption was based on unrecorded deed executed prior to date of execution sale, such purported successor had no legal right to redeem. Code Civ.Proc. § 701.

5. Execution ⇐293

One claiming under deeds executed and delivered prior to execution sale is not successor in interest of right of redemption of judgment creditor because when that deed was executed grantor was not judgment debtor. Code. Civ.Proc. § 701.

6. Deeds ⇐79

Recordation is device to establish priority, but has nothing to do with conveying title.

7. Execution ⇐293

Right of redemption does not arise and cannot be transferred until date of execution sale.

8. Execution ⇐293

Judgment debtor's right of redemption after execution sale may be assigned independently of any transfer of property.

9. Execution ⇐300

Complaint raising question of legality of sheriff's action in receiving redemption payment from purported successor in interest of judgment debtor, which alleged that no judgment debtor or his successor in interest redeemed within statutory period, was sufficient, and was not subject to objection that only judgment debtor and not redemptioner from execution purchaser could raise question of the legality of sheriff's actions.

10. Execution ⇐300

Complaint raising question of legality of sheriff's action in accepting redemption payment by purported successor in interest of judgment debtor was sufficient, even if it later appeared that such successor in interest had right of redemption by way of assignment from judgment debtor,

where complaint showed that amount tendered by purported successor and accepted by sheriff was not computed by method required by law.

11. Execution ⇐299

Where judgment creditor redeemed real property from execution purchaser, judgment debtor, or one standing in his shoes, in order to redeem, must pay to such prior redemptioner full amount of all judgment liens held by prior redemption and not merely amount such redemptioner paid to execution purchaser plus statutory penalties.

Benjamin D. Frantz, William E. Dopkins, Sacramento, for appellant.

J. F. Coakley, Dist. Atty. of Alameda County, R. Robert Hunter, Chief Asst. Dist. Atty., Richard H. Klippert, Deputy Dist. Atty., Oakland, for respondent.

PETERS, Presiding Justice.

H. Glenn Lawler filed a complaint containing three counts. The first count is directed against Max and Ernest Manig and Sheriff Gleason. It is an action for declaratory relief seeking a declaration of the rights of the parties under various certificates of redemption issued by the sheriff, to determine whether a tender by Max Manig of $3,660.93 was sufficient to redeem rather than $10,469.05 demanded by plaintiff, and to determine whether Max Manig was legally capable of redeeming. The second cause of action names Max, Ernest and Paul Manig as defendants and seeks to quiet Lawler's title to the real property against the claims of the named defendants. The third cause of action seeks a writ of mandate to compel the sheriff to make and record a sheriff's deed to the property and to deliver it to Lawler.

Max Manig demurred to the complaint, but his demurrer was overruled. The propriety of this ruling is not involved on this appeal. Sheriff Gleason filed a general demurrer and also specially demurred on the ground of a "misjoinder of parties defendant." The trial court, by general order, sustained the sheriff's demurrer without leave to amend. From the judgment entered on this order plaintiff prosecutes this appeal.

The real property involved in this litigation, and some of the parties, have been before this court on a prior occasion. In Manig v. Bachman, 127 Cal.App.2d 216, 273 P.2d 596, the trial court, subject to redemption rights, quieted title to the property in Lawler against the claims of Max Manig. This judgment was reversed and the cause returned to the trial court for further proceedings. The history of the property is set forth in that opinion and need not again be related in detail. Suffice it to say that recorded title to the property was in Ernest Manig from October 21, 1949, until February 15, 1952. All during this period actual title was in Max Manig who, since May 1, 1947, had an unrecorded deed to the property from Ernest, which he did not record until February 15, 1952.

Lawler's claim to the property is based on the following facts: In 1951 various creditors of Ernest Manig levied on the property. These creditors all secured judgments against Ernest Manig. One Bachman had the first lien, followed in order by Pritchett, Lamondo and then Lawler. Lawler came into the picture on August 9, 1951, when he sued Ernest and attached the property. He secured his judgment for over $6,000 against Ernest on January 4, 1952. All during these periods the real property stood of record in the name of Ernest.

Pritchett instituted an execution sale to collect on his judgment, and purchased the property on December 11, 1951, at that sale, which was conducted by Gleason, the sheriff. Shortly thereafter Lawler purchased the Lamondo judgment. Then on February 8, 1952, Lawler, as a junior encumbrancer, redeemed the property from Pritchett, who also owned the Bachman judgment. Lawler paid $3,362.30 to redeem, which included the amounts of the Bachman and Pritchett judgments.

Pritchett had purchased the property at the execution sale held on December 11,

1951. Thus, the statutory period for redemption by a judgment debtor would have expired December 11, 1952. On December 9, 1952, Lawler transmitted to the sheriff a written statement indicating that he contended that a judgment debtor would have to pay $10,469.05 to redeem the property. This demand included the total of the amounts of the Bachman, Pritchett, Lamondo and Lawler judgments, plus the statutory interest and other statutory charges.

On February 15, 1952, Max Manig had recorded his deed from Earnest by which, on May 1, 1947, Earnest had conveyed to Max the property. On December 10, 1952, one day before the period for redemption by a judgment debtor would have expired, Max Manig purported to redeem the property by paying to the sheriff $3,660.93, and received from the sheriff a certificate of redemption. Lawler refused to accept the $3,660.93, and then brought this present action.

The parties argue several points. The sheriff, as respondent, among other things, argues that the demurrer was properly sustained on the ground that the sheriff was improperly joined as a defendant. One of the grounds of the demurrer was misjoinder of parties. In trying to support the argument that there was a misjoinder of *parties,* respondent seems to argue that there was an improper *uniting of several causes of action.* But respondent did not specially demur on the ground that several causes of action were improperly united as he had the legal right to do, § 430, subd. 5, Code Civ.Proc., but specially demurred on the ground of misjoinder of parties, which is a separate ground for demurrer, § 430, subd. 4, CodeCiv.Proc.

[1, 2] Respondent's argument seems to be that there is a misjoinder unless each named defendant is made a party to each pleaded cause of action. Whatever the law may have been prior to 1927, it is now certain that since the amendments of that year to the sections on joinder of defendants (see §§ 379, 379a, 379b, and 379c of the Code of Civ.Proc.), it is not necessary that the named defendants be interested or affected by all of the relief requested or in every cause of action set forth in the complaint. In fact, even before the amendments of 1927, this was held to be the law in a situation parallel to that presented in the instant case. See Morris v. Judkins, 36 Cal.App. 413, 172 P. 163. It is too clear to require further comment that, under the sections as amended, the Manigs and the sheriff are either necessary or proper parties in the declaratory relief action, that the sheriff makes no claim to the property and so is not directly interested in the quiet title action, but that the determinations as to that cause of action will directly affect the mandamus action. Therefore, the sheriff was not improperly joined as a defendant.

[3] Moreover, even if there had been a demurrer to the uniting of the three causes of action, based on the failure to name all the defendants in each cause of action (there was no such demurrer filed), such demurrer would have been without merit. There is a long line of cases holding that: "Moreover, it has been held that the liberal amended statutes on joinder of parties referred to above enlarged the old rules of joinder of causes of action, so that causes now may be joined when they meet the tests of the sections on joinder of parties, and that all such causes do not have to affect all parties to the action." Shotwell v. Bloom, 60 Cal.App.2d 303, 308, 140 P.2d 728, 732, and cases there cited.

[4] The next contention of appellant is that Max Manig had no legal right to redeem, and that, therefore, regardless of how much Max offered to the sheriff for redemption purposes, such sum ought not to have been accepted. Accepting the allegations of the complaint as true, as we must on this appeal, it seems clear that Max Manig had no legal right to redeem. The complaint, therefore, states a cause of action against the sheriff for a declaration that the sheriff had no legal right to accept Max Manig as a redemptioner.

The complaint alleges that on December 10, 1952, Max Manig attempted to redeem, claiming that he was the assignee of the right of redemption of Ernest Manig be-

cause he was the grantee of the deed from Ernest dated May 1, 1947, and recorded February 15, 1952. The complaint also alleges that Pritchett had purchased the property at his execution sale on December 11, 1951, at a time Ernest Manig appeared as record owner of the property, and that Lawler redeemed from Pritchett. By virtue of these facts it is alleged that the "attempted redemption [by Max Manig] is void and of no force or effect whatsoever because defendant Max E. Manig is not authorized by law to redeem said property."

Of course, neither Max Manig nor the sheriff has filed an answer in this case, and Max Manig is not a party to this appeal. But under the allegations of the complaint it would appear that Max Manig had no legal right to redeem and that, as against the sheriff, appellant is entitled to a declaration to that effect.

[5] From the complaint it appears that Max Manig's claim to the rights of a redemptioner is based on the 1947 deed from Ernest Manig not recorded until February 15, 1952. The execution sale had been held in December, 1951, when the title to the property was in the name of Ernest. Section 701 of the Code of Civil Procedure confers upon "the judgment debtor, *or his successor in interest,*" the right to redeem. A deed executed by the judgment debtor *after* an execution sale undoubtedly would constitute an assignment of the right to redeem, and make the grantee a successor in interest of the judgment debtor. But Max Manig claims through a deed executed long before the execution sale. When that deed was executed no right of redemption existed because no such right came into existence until there had been an execution sale. Thus, one claiming under a deed executed and delivered prior to the execution sale is not the successor in interest of the right of redemption of the judgment debtor because when that deed was executed the grantor was not a judgment debtor. See Southern California Lumber Co. v. McDowell, 105 Cal. 99, 38 P. 627.

[6] Respondent's argument in support of his recognition of Max Manig as the successor in interest of the judgment debtor is that it must be presumed that Ernest Manig intended to transfer both the property and the right of redemption at the time the deed was recorded in February of 1952, which was, of course, after the execution sale. This argument is obviously unsound. Ernest conveyed nothing to Max when the latter recorded his deed. Ernest had conveyed all his interest in the property to Max in 1947. Recordation by Max conveyed nothing to Max from Ernest. Recordation is a device to establish priority, but has nothing to do with conveying title.

[7, 8] Of course, although the right of redemption did not arise and therefore could not be transferred until the date of the execution sale, see Brown v. Timmons, 79 Mont. 246, 256 P. 176, 57 A.L.R. 1122, so interpreting a similar code section, although Ernest had already conveyed title to Max Manig, he still could redeem as the judgment debtor. This right of redemption could have been assigned by Ernest to Max independently of any transfer of property. Big Sespe Oil Co. v. Cochran, 9 Cir., 276 F. 216. If such an assignment was in fact made by Ernest after the date of the execution sale, Max would have the right to redeem. But that can only appear by answer. Under the allegations of the complaint Max claims only through the prior deed, and that is not sufficient.

[9] The respondent sheriff also contends that only the judgment debtor and not the redemptioner from an execution purchaser may raise this question. This point is without merit. The complaint raises the question of the legality of the sheriff's actions, and alleges that no judgment debtor or his successor in interest redeemed within the statutory period. Respondent must prove that he carried out his statutory duty of receiving payment and issuing a certificate of redemption to the correct party The complaint states a good cause of action on this point.

[10] It is also our opinion that the complaint states a cause of action even though it may later appear that Max was the successor in interest of the judgment debtor by way of assignment of the right to redeem, because, in our opinion, the complaint shows

that the amount tendered by Max and accepted by the sheriff was not computed by the method required by law.

The sheriff permitted Max Manig to redeem by paying only the amounts of the Pritchett and Bachman judgments, plus the statutory penalties, which was substantially the amount that Lawler had paid to redeem the property from Pritchett. Lawler contends that, in addition to that sum, Max Manig should have been compelled to pay all of the liens held by Lawler, including the Lamondo judgment which Lawler had purchased. By sustaining the demurrer without leave to amend the trial court must have determined that, as a matter of law, the sheriff's method of computation was correct and that urged by Lawler was incorrect. The difference is material. Computed according to the sheriff's method, the proper amount Max Manig had to pay to redeem was about $3,600, while computed according to Lawler's method the correct amount should have been nearly $10,500.

The legal problem can be stated as follows: When a judgment creditor (Lawler) has redeemed real property from an execution purchaser (Pritchett) may the judgment debtor, or one who stands in his shoes (Max Manig), in order to redeem, pay the prior redemptioner (Lawler) only the amount he paid to the execution purchaser plus the statutory penalties, or must he also pay to such prior redemptioner the full amount of all of the judgment liens held by the prior redemptioner?

The proper answer to this question must turn upon the proper interpretation of the relevant sections of the Code of Civil Procedure relating to who may redeem, and how.

Section 701 of the Code of Civil Procedure provides that the following persons, or their successors in interest, may redeem:

"1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

"2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners."

Section 702 provides the time and manner by which a judgment debtor or a redemptioner must proceed to redeem from an execution purchaser. So far as relevant here, the section provides:

"The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within twelve months after the sale on paying the purchaser the amount of his purchase, [plus certain penalties] * * * and if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which said purchase was made, the amount of such lien with interest. * * *"

Section 703 provides for the manner in which property once redeemed by a redemptioner may be redeemed by another redemptioner. The pertinent provisions of this rather lengthy section follow:

"If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption, [plus certain penalties] * * * and, in addition, the amount of any liens held by such redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. * * *

"The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after last redemption, on paying the sum paid on the past previous redemption, [plus certain penalties] * * * and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own with interest. * * *

"Written notice of redemption must be given to the sheriff and a duplicate filed with the recorder of the county, and if any taxes or assessments are paid by the redemptioner, or if any sum for fire insurance, maintenance, upkeep, or repair of any improvement upon the property, is paid by the redemptioner, or if he has or acquires any

lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the recorder; and if such notice be not filed, the property may be redeemed without paying such tax, assessment, sum, or lien.

"If no redemption be made within twelve months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but, in all cases, the judgment debtor shall have the entire period of twelve months from the date of the sale to redeem the property.

"If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. * * *"

Before attemting to interpret these sections the precise legal relationships of the parties should be kept in mind. The facts pleaded, which are of course admitted to be true by the demurrer, are that Max Manig claims as the purported successor in interest of the judgment debtor, Ernest Manig. Appellant Lawler as a junior encumbrancer redeemed from Pritchett who had purchased at his own execution sale. Under the above sections, how much money is Lawler entitled to from Max Manig, assuming him to be a successor in interest of Ernest Manig?

The solution to this problem seems reasonably clear. Section 702, by its terms, is limited to redemptions from the execution sale purchaser, a type of redemption not here involved. Under this section the execution purchaser does not get his own judgment satisfied by the redemptioner in the event the execution sale has been for an amount less than the judgment—he gets only the amount of his purchase plus the amount of any prior liens he may hold. Otherwise, a judgment creditor who purchased at an execution sale, would continue as a creditor for the unsatisfied portion of his judgment. See discussion 11 Cal.Jur. p. 103, § 52.

Section 703 deals specifically with the measure of payment due a prior redemptioner when the property is redeemed by another redemptioner. That measure specifically includes the prior liens the first redemptioner holds. The language used is that such subsequent redemptioner must pay the amount of the prior redemption, plus penalties and, in addition, "the amount of any liens * * * held by the last redemptioner previous to his own." This measure of payment is not limited to creditors redeeming from a prior redemptioner, but is expressly made applicable to a judgment creditor redeeming from a redemptioner. The language is, "if the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner." Thus, the reasonable interpretation of this language is that by section 703 judgment creditors are placed in the same position as any other subsequent redemptioner after a prior redemption. See Youd v. German Savings & Loan Soc., 3 Cal.App. 706, 86 P. 991.

The cases relied upon by respondent do not suggest a contrary interpretation. The principal case relied upon is Simpson v. Castle, 52 Cal. 644. There a mortgagee purchased the property at a foreclosure sale at a price below the amount of the judgment held by the mortgagee. A successor in interest of the mortgagor redeemed by paying the mortgagee what he had paid at the foreclosure sale. The mortgagee then attempted to levy on the property for the unsatisfied portion of his judgment. An action was brought to enjoin the execution sale. The court held, and properly so, that the successor in interest to the judgment debtor by redeeming from the purchaser at the execution sale took title free from the lien of the deficiency judgment. The case stands for the proposition that a purchaser at an execution sale who buys for less than the amount of his lien cannot have the balance of his judgment become a lien when the property is redeemed by a successor in interest of the judgment debtor. The case has

nothing to do with what a successor in interest of the judgment debtor must pay to redeem from a redemptioner who redeemed from the execution sale purchaser. The latter situation is covered by the clear language of section 703.

The other cases cited by respondent are of the same type. They are not in point.

[11] Thus, in the event that Max Manig should qualify as a successor in interest of the judgment debtor, it would then follow that the sheriff accepted a redemption for an amount less than the amount required by law. The complaint thus states a cause of action in this respect.

Some mention should be made about the obvious inter-relation of parties, subject matter, and issues in this case and the one involved on the prior appeal. In the other action Max Manig sought to quiet his title against Lawler, and Lawler sought to quiet his title against the claims of Max. The trial court quieted Lawler's title, but that determination was reversed. On the retrial of that action Max Manig may be declared to be the owner of the property. In that event, all of Lawler's claims made in that action, as well as all his claims made in the present one, would be without merit. This follows because the validity of all of Lawler's claims in the instant case against the sheriff and against the Manigs, are entirely dependent on his claim that he secured good title by redeeming from the execution purchaser. If the execution purchaser did not get good title Lawler had no right to redeem, nor would anyone else have the right to redeem from him. If Lawler has no title to the property, and Max Manig has good title, Lawler has no right to complain that Manig improperly redeemed the property when the title of Manig is not dependent on the redemption.

On the other hand, in the other action, on the retrial, Lawler's title may again be quieted against the claims of Max. If that judgment becomes final, then Lawler would be entitled in the present action to have the validity of the attempted redemption by Max Manig determined.

Under such circumstances, it is apparent that either the two cases are so inter-dependent that they should be consolidated for trial, or the prior action between Max Manig and Lawler should be tried before the instant case is tried. The trial court possesses complete discretion to control this phase of the litigation and will undoubtedly do so.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.



130 Cal.App.2d 445

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James Franklin BACHMAN, Defendant and Appellant.

Crim. 2589.

District Court of Appeal, Third District, California.

Jan. 26, 1955.

Prosecution for a felonious sexual offense involving a child under 14 years of age. From order of the Superior Court, Placer County, Lowell L. Sparks, J., that judgment and sentence in criminal case against defendant be executed following his return from state hospital, the defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that where superintendent of state hospital to which defendant had been committed as sexual psychopath following conviction reported that defendant was not a sexual psychopath, that he was not a menace to health and safety of others, and that he would not benefit by care and treatment in state hospital, and he recommended return of defendant to court for further proceedings in criminal case against him, order of court

that judgment and sentence in criminal case be executed was nonappealable.

Appeal dismissed.

1. Mental Health ⇐444

Sexual psychopathy proceedings are special proceedings of a civil nature which are collateral to the criminal case. Welfare and Institutions Code, § 5512.

2. Mental Health ⇐449

Orders entered in sexual psychopathy proceedings are appealable under general provisions of statute allowing appeals in special proceedings, and rules on appeal in civil cases govern time within which such appeals may be taken. West's Ann. Code Civ.Proc. § 963; Welfare and Institutions Code, §§ 5501(c), 5512.

3. Criminal Law ⇐1069(1)

Where defendant, who had been committed to state hospital as sexual psychopath following conviction for a felonious sexual offense, was returned to court by superintendent of state hospital for further proceedings in criminal case against him, appeal taken more than ten days but within sixty days after entry of order that judgment and sentence in criminal case be executed was timely. Pen.Code, § 288; Welfare and Institutions Code, §§ 5501(c), 5512; West's Ann.Code Civ.Proc. § 963.

4. Criminal Law ⇐1023(12)

Where superintendent of state hospital to which defendant had been committed as sexual psychopath following conviction of a felonious sexual offense reported that defendant was not a sexual psychopath, that he was not a menace to health and safety of others, and that he would not benefit by care and treatment in state hospital, and he recommended return of defendant to court for further proceedings in criminal case against him, order of court that judgment and sentence in criminal case be executed was nonappealable. Pen.Code, § 288; Welfare and Institutions Code, §§ 5501(c), 5512; West's Ann.Civ.Proc. § 963.

Cecil J. Bishop, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Gail A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is a motion to dismiss appeal. James Franklin Bachman, defendant, appellant herein, was convicted of a violation of Section 288 of the Penal Code, to which charge he pleaded guilty. This conviction was for a felonious sex offense involving a child under fourteen years of age. Judgment committing the defendant to imprisonment at the State prison for the term prescribed by law was pronounced on March 25, 1954. Pursuant to the provisions of Section 5501, Subdivision (c) of the Welfare and Institutions Code, the court suspended the execution of the sentence and certified Bachman for hearing and examination to determine whether he was a sexual psychopath within the meaning of Chapter 4, Part 1, Subdivision 6 of said code. The hearing was held. The court-appointed psychiatrists reported that he was a sexual psychopath and on April 15th the court made an order to that effect and ordered that he be placed temporarily in the Mendocino State Hospital for an observation period not to exceed ninety days; and further that the superintendent of that hospital report to the court within said period his findings as to the sexual psychopathy of defendant. This order was made agreeable to the provisions of Section 5512 of the Welfare and Institutions Code and pursuant thereto Bachman was received and observed at the hospital. On June 24th there was filed in the cause the report of the superintendent and medical director of the hospital that Bachman was not a sexual psychopath as defined under the code, that he was not a menace to the health and safety of others, and that he would not benefit by care and treatment in a state hospital. The superintendent recommended that Bachman be returned to the court for further proceedings in the criminal case against him. On June 29th following Bachman appeared in court and it was ordered that the judgment and sentence in the criminal case be executed, and he was remanded to the custody of the

sheriff of the county, to be delivered to the state prison. In the meantime, however, and on the coming in of the medical report, Bachman asked of the court that it take further evidence as to whether he was a sexual psychopath, stating that a staff member of the hospital was in disagreement with the medical superintendent's findings. He asked the court to permit this psychiatrist to testify. To this request the court consented and on June 29th the psychiatrist, Doctor Clarence S. Bennett, testified that he had been the physician actively in charge of Bachman's case while he was at the hospital for observation, that in his opinion Bachman was a sexual psychopath and would benefit from hospital treatment. Thereafter the court made the order above recited, remanding Bachman to the sheriff for delivery to the prison to serve out the sentence theretofore imposed. Within sixty days from the date of that order, but far in excess of ten days from that date, Bachman filed a written notice of appeal stating that he appealed from said order of June 29th "against the said defendant, James Franklin Bachman, pursuant to Section 5512 of the Welfare & Institutions Code, that defendant, James Franklin Bachman, was not a menace to the health and safety of others, and that he would not benefit by care and treatment in a State Hospital.

The People have moved to dismiss said appeal upon the grounds: 1. That it was not timely, not having been taken within ten days after entry of the order appealed from; and, 2. That it was an attempt to take an appeal from a non-appealable order.

We hold that the appeal was taken in time.

[1] "* * * Sexual psychopathy proceedings are special proceedings of a civil nature which are collateral to the criminal case." Gross v. Superior Court, 42 Cal.2d 816, 820, 270 P.2d 1025, 1027.

"* * * The entire statutory procedure [in sexual psychopathy proceedings] * * * [is] civil in nature rather than penal." People v. McCracken, 39 Cal.2d 336, 346, 246 P.2d 913, 918.

"The proceedings under section 5512 of the Welfare and Institutions Code are of a civil nature." People v. Howerton, 40 Cal. 2d 217, 219, 253 P.2d 8, 10.

"* * * A proceeding provided for by section 5501 of the Welfare and Institutions Code is a proceeding civil in nature, not criminal, * * *." In re Keddy, 105 Cal.App.2d 215, 217, 233 P.2d 159, 161.

"* * * Sexual psychopathy proceedings * * * [are] civil in nature". People v. Gross, 115 Cal.App.2d 502, 505, 252 P.2d 416, 418.

"* * * In the absence of statutory provision denying the right to appeal, an appeal may be taken by virtue of the general provisions of section 963 [C.C.P.] allowing appeals in special proceedings. * * * While there is no provision in the Welfare & Institutions Code for an appeal in sexual psychopath proceedings as there are for some of the other proceedings there authorized, we do not believe that is an indication that the general provisions on appeal, Code Civ.Proc. § 963, do not apply. It would thus appear that the original order of commitment as a sexual psychopath is appealable as a final judgment in a special proceeding and that subsequent orders made under section 5519 would be appealable as special orders after final judgment." Gross v. Superior Court, supra, 42 Cal.2d at pages 820–821, 270 P.2d at page 1027.

[2, 3] It having been decided that sexual psychopathy proceedings are special proceedings of a civil nature and that orders therein are appealable under the provisions of Section 963 of the Code of Civil Procedure, it follows that the rules on appeal in civil cases govern the time within which such appeals may be taken and that the rules on appeal in criminal cases have no application thereto so far as is concerned the time within which such appeals must be noticed.

[4] We hold that the order appealed from is non-appealable and for that reason the appeal must be dismissed. As heretofore noted, Section 5501, Subdivi-

sion (c), of the Welfare and Institutions Code provides that:

"When a person is convicted of a sex offense involving a child under 14 years of age and it is a felony, the court shall adjourn the proceeding or suspend the sentence, as the case may be, and shall certify the person for hearing and examination by the superior court of the county to determine whether the person is a sexual psychopath within the meaning of this chapter."

Section 5512 of the Welfare and Institutions Code provides that:

"If, after examination and hearing, the judge finds that the person is a sexual psychopath within the meaning of this chapter, he shall make and sign an order that the person be placed temporarily in a suitable psychiatric facility maintained by a county or in a state hospital * * * designated by the court for observation and diagnosis for a period not to exceed 90 days, * * *."

The same section further provides that if the superintendent of the hospital or person in charge of the county facility reports to the court that the person is not a sexual psychopath or that he is a sexual psychopath but will not benefit by care and treatment in a hospital the person shall be returned to the court for further disposition of his case and that the court shall then cause the person to be so returned to the court in which the criminal charge was tried to await further action *"with reference to such criminal charge."* There are further provisions which call for a further hearing on the issue of sexual psychopathy if the report is that the person is a sexual psychopath and would benefit by hospital treatment, which provisions declare that the court may accept such report if verified or may take additional evidence; and after such further hearing may make an order committing the person to the Department of Mental Hygiene for placement and treatment; and that the person so committed may have the same rights to a jury trial upon the issue of his sexual psychopathy as is provided in the Welfare and Institutions Code for mentally ill persons. But the statutes make no provision for any further hearing if the report of the medical authority is that the person either is not a sexual psychopath or is a sexual psychopath but will not benefit by hospital treatment. When such a report is made, the sexual psychopathy proceedings are at an end and the specific direction of the code is that the person is returned to the court in which he was convicted, which, of course, may be the same court which instituted the psychopathy proceedings, or a different court, to await further action, not with reference to psychopathy, but with reference to the criminal charge of which he was convicted. The plain purport of the statute in this respect is that the court may not disregard the report of the superintendent of the hospital or the person in charge of the county facility, but must abide by the same, treat the psychopathy proceedings as at an end and proceed in the criminal case. This action the court in the instant case took, and, although at the request of Bachman it took the evidence of Dr. Bennett, nevertheless any issue as to the further treatment of Bachman as a sexual psychopath was ended by the report of the superintendent of the hospital to which he had been sent for observation. The situation is so closely analogous to that considered by the Supreme Court in the case of In re Phyle, 30 Cal. 2d 838, 186 P.2d 134, 138, that we think the decision herein must be governed by what was there said. In that case Phyle had been found guilty of first degree murder and sentenced to be executed. While awaiting execution at the State Prison at San Quentin the Warden of that prison initiated proceedings pursuant to Section 3701 of the Penal Code to determine the question of defendant's sanity. After a jury trial defendant was adjudged insane and committed to the Mendocino State Hospital. About one year thereafter the superintendent of that hospital certified to the Governor that Phyle had recovered his reason and the Governor then issued a warrant to the warden appointing a day for Phyle's execution. He petitioned for

a writ of habeas corpus, contending that the superintendent of the hospital had no authority to release him to the warden without an adjudication of a competent court that he had recovered his reason. The Supreme Court held that it was apparent from reading the pertinent sections of the Penal Code that the legislature had no intention of providing for a judicial determination of the question of Phyle's restoration to sanity, but on the contrary expressly provided that restoration to sanity should be determined by the hospital superintendent, and that when that superintendent reported such restoration to sanity to the Governor, courts were powerless to adjudicate that issue. The court pointed out that in a number of instances the legislature had provided that restoration to sanity was to be determined solely by the superintendent of the hospital in which the person adjudged to have become insane was held; and that while continued detention in the hospital might be inquired into upon a writ of habeas corpus, nevertheless when the medical superintendent of the hospital determined that sanity had been restored courts were without power to adjudicate otherwise or at all upon that issue. Said the court in the cited case while discussing action by the medical superintendents when trials had been interrupted by insanity of the defendant:

"'* * * The Penal Code undoubtedly prescribes the exclusive manner by which the proceedings shall be set in motion when the defendant is restored to sanity or is not insane.' People v. Superior Court, supra, 4 Cal.2d [136] at page 145, 47 P.2d [724] at page 728. After the superintendent determines that a defendant placed in his custody pursuant to sections 1370 to 1372 of the Penal Code is sane, the defendant is returned to the court in which his trial had begun. It is not necessary for the verdict finding him insane to be vacated before the trial court may proceed. (People v. Rice, 83 Cal.App. 55, 60, 256 P. 450.)"

The statute under consideration here is as clear and conclusive upon the matter under consideration as were those statutes referred to by the Supreme Court in the Phyle case. Upon the statute, therefore, and upon the authority of that case and of the cases therein cited, we hold that the statutory provisions here under consideration do not contemplate any further judicial determination as to sexual psychopathy when the medical authority reports to the court that the person referred for observation either is not a sexual psychopath or that, being such, he will not benefit by hospital treatment. Such a report concludes the psychopathy proceeding without any further order of court. The order of the court here made, so far as it refers to the psychopathy proceedings, is a mere recital of the termination thereof by the report of the medical superintendent and does not constitute an appealable order in the psychopathy proceeding.

The appeal is dismissed.

SCHOTTKY and PEEK, JJ., concur.



130 Cal.App.2d 282

Trinidad FLORES, as President, and Floyd Jones, as Treasurer, of and for and on behalf of Furniture Workers, Upholsterers and Wood Workers Union, Local 576, Independent, a voluntary unincorporated association and labor union, and its members, Petitioners and Appellants

v.

Sam BARMAN and Harry Sunshine, co-partners doing business as Crown Upholstering Company, Defendants and Respondents.

Civ. 20343.

District Court of Appeal, Second District, Division 3, California.

Jan. 20, 1955.

Rehearing Denied Feb. 17, 1955.

Union applied for an order confirming award of arbitrator, and employer answered and filed a counter-application for an order

vacating the award. The Superior Court of Los Angeles County, Frank G. Swain, J., entered judgment denying application to confirm, denying application to vacate, and modifying the award, and the union appealed. The District Court of Appeal, Vallée, J., held that where collective bargaining agreement between union and employer expressly provided that arbitrators should have no authority to change the contract in any respect or to add to or take away from its terms, and arbitrator not only changed the contract, but rewrote it and extended its life beyond the time expressly provided therein, the arbitrator exceeded his powers.

Affirmed.

1. Labor Relations ⇐257

Where no extrinsic evidence was received by arbitrator, construction of collective bargaining agreement between union and employer involved a clear question of law.

2. Trial ⇐136(3)

Where the interpretation of a written instrument is based solely on the terms of the instrument without the aid of extrinsic evidence, the interpretation presents a question of law.

3. Arbitration and Award ⇐76

Where arbitrator exceeds his powers, Superior Court must make an order vacating the award. West's Ann.Code Civ.Proc. § 1288(c).

4. Arbitration and Award ⇐73

In absence of some limiting clause in arbitration agreement, merits of the award, either on questions of fact or of law, may not be reviewed except as provided in statutes. West's Ann.Code Civ.Proc. § 1288(c).

5. Arbitration and Award ⇐29

Powers of arbitrator are derived from and limited by contract.

6. Arbitration and Award ⇐29

Arbitrator has no legal right to decide a question which the contract expressly says he shall have no power to decide.

7. Labor Relations ⇐454

Where collective bargaining agreement between union and employer expressly provided that arbitrators should have no authority to change the contract in any respect or to add to or take away from its terms, and arbitrator not only changed the contract, but rewrote it and extended its life beyond the time expressly provided therein, the arbitrator exceeded his powers. West's Ann.Code Civ.Proc. § 1288(c).

8. Labor Relations ⇐261

Where collective bargaining agreement between union and employer provided that agreement should remain in full force and effect until September 1, 1953, and thereafter annually, and that either party could terminate agreement by notifying the other not less than 60 days before expiration and that negotiations on new agreement shall commence not later than 20 days following receipt of written notice, and that pending agreement on a new agreement, agreement shall remain in full force and effect, and that provisions of new agreement shall be retroactive to expiration date of current agreement, and negotiations for new contract were not completed before September 1, 1953, contract terminated on that date.

9. Labor Relations ⇐261

Where collective bargaining agreement between union and employer provided that agreement should remain in full force and effect until September 1, 1953, and thereafter annually, and that either party could terminate agreement by notifying the other not less than 60 days before expiration and that negotiations on new agreement shall commence not later than 20 days following receipt of written notice, and that pending agreement on a new agreement, agreement shall remain in full force and effect, and that provisions of new agreement shall be retroactive to expiration date of current agreement, retroactive provision merely meant that if new contract was not executed before expiration date, new contract should be retroactive to that date.

Margolis, McTernan & Branton and John T. McTernan, Los Angeles, for appellants.

Gendel & Raskoff and H. Miles Raskoff, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by petitioners from a judgment denying an application to confirm an award of an arbitrator and modifying the award.

Petitioners are officers of Furniture Workers, Upholsterers and Wood Workers Union, Local 576. They instituted the proceeding on behalf of the Union and its members. Crown Upholstering Company, referred to as "the company," is a partnership and the employer of members of the Union. On October 1, 1951, the company and the Union entered into a collective bargaining contract. The pertinent parts of the contract (article XIV) read:

"(a) This Agreement shall remain in full force and effect until September 1, 1953, and thereafter annually; provided, however, that either party may terminate this Agreement or give notice of a desire to modify any portion thereof on said date, or at the end of any subsequent yearly period, by notifying the other party in writing to that effect not less than sixty (60) days prior to said date or not less than sixty (60) days prior to the end of any subsequent yearly anniversary.

"(b) Negotiations upon a new or modified Agreement shall commence not later than twenty (20) days next following the receipt of said written notice. Pending agreement on a new or modified Agreement this Agreement shall remain in full force and effect. The provisions of the new or modified Agreement shall be retroactive to the expiration date of the then current Agreement."

The contract provided for the submission of unsettled controversies between the company and the Union to an "Impartial Umpire" for decision and,

"Every decision of the Impartial Umpire shall be retroactive to and take effect as of the date upon which the controversy originally occurred. The decision of the Impartial Umpire shall be final and binding upon the Union and the Employer. * * * *The Impartial Umpire shall at all times be governed by the terms of this Agreement and shall have no power or authority to change the Agreement in any respect or to add or take away from its terms.*" (Italics added.)

On June 26, 1953, the company in writing notified the Union it intended to terminate the contract on its expiration date, September 1, 1953. The writing further stated:

"You are further notified that Crown Upholstering Company offers to meet with any authorized representatives of the Union for the purpose of negotiating a new contract, and will arrange a mutually satisfactory time and place for such negotiations, at any time after receipt by you of this notice and prior to September 1, 1953.

"You are further advised that if no agreement is reached on or before September 1, 1953, it is the intention of Crown Upholstering Company by this notice to terminate absolutely any and all obligations under the existing agreement as of September 1, 1953, and particularly any obligation to keep the existing agreement in force after September 1, 1953, or to make any new agreement retroactive to September 1, 1953.

"This notice is intended as the Notice of Termination referred to in Paragraph XIV of the existing Labor Agreement, and also in accordance with the provisions of Section 8(d) of the Labor-Management Relations Act of 1947."

Petitioners replied in writing on July 1, 1953, stating the company's notice was in violation of the contract, by its terms the contract was to remain in effect pending negotiations toward a new one, and the new contract was to be retroactive to September 1, 1953.

On July 6, 1953, the company in writing denied the notification of June 26 constituted a violation of the contract; stated it had always complied with the terms of the contract and would continue to do so for its full term; reiterated its intention

to "terminate absolutely any and all obligations under the existing agreement as of September 1, 1953"; and repeated the statement of its intention to negotiate with the Union for a new contract to commence at the expiration of the existing contract. Negotiating meetings without results were held by the parties on July 3 and 10. Another union claimed to represent a majority of the employees of the company. Petitioner-Union petitioned the National Labor Relations Board for an election. On July 23, 1953, the company in writing asked the Union if, in view of the question of representation, it (the Union) thought "it would be proper for the employer to carry on further negotiations with you before this question is determined." On August 5 a hearing was held by the National Labor Relations Board. The other union notified the board it did not desire to intervene. The company advised the board that inasmuch as the other union did not represent a majority of the employees, it desired to resume negotiations with petitioner-Union. On August 6, 1953, the Union requested resumption of negotiations.

Without waiting for a reply from the company, the Union, on August 6, requested the "Impartial Umpire" to arbitrate the controversy—with the statement that the issue was:

> "Has the Company the unilateral right to abrogate Article XIV(b) and does the Contract continue in full force and effect after September 1, 1953, pending negotiations and agreement on a new Agreement."

On August 7 the company expressed a willingness to resume negotiations. Nevertheless, the "Impartial Umpire" proceeded to hear the matter on August 11. The company objected to arbitration, and reserved its objection at all times, contending before the "Impartial Umpire" that the right to terminate the contract was purely a matter of law and that there was no decision an arbitrator could make in the matter. The award of the "Impartial Umpire," made on August 17, was:

> "The Company does not have the unilateral right to abrogate Article XIV(b) and the Contract continues in full force and effect after September 1, 1953 pending negotiations and agreement on a new Agreement or until all negotiations end."

After the award, the company again expressed a willingness to continue negotiations in an effort to reach a new contract by September 1, 1953.

On September 10, 1953, the Union applied to the superior court for an order confirming the award. The company answered and filed a counter application for an order vacating the award. The court denied the application to confirm, denied the application to vacate, and modified the award to provide:

> "The Company does have the right to terminate that certain collective bargaining agreement dated October 1, 1951, on its expiration date, to wit, September 1, 1953, by virtue of the written notice given by the Company to the Union on June 26, 1953."

The Union appeals.

Appellants' contentions are: 1. The trial court erred by examining the merits of the controversy decided by the arbitrator and substituting its judgment for that of the arbitrator. 2. In any event, the arbitrator's construction of the contract is sound, as a matter of law.

[1, 2] Construction of the contract involved a pure question of law. No extrinsic evidence was received by the arbitrator. The interpretation of a written instrument based solely on the terms of the instrument without the aid of extrinsic evidence presents a question of law. Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 826–827, 167 P.2d 719, 164 A.L.R. 685.

[3, 4] The superior court must make an order vacating the award where the arbitrator exceeded his powers. Code Civ. Proc. § 1288(c). Petitioners assert that the merits of the controversy and errors of law are not reviewable. The question is not one of review of the issues before the arbitrator. It is one of determining his powers. "[*I*]*n the absence of some limiting clause in the arbitration agree-*

ment, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute." Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 186, 260 P.2d 156, 172. (Italics added.)

[5, 6] The powers of the arbitrator are derived from and limited by the contract. Bierlein v. Johnson, 73 Cal.App.2d 728, 733, 166 P.2d 644. He has no legal right to decide a question which the contract expressly says he shall have no power to decide. If in the present case he decided such a question, the trial court properly held he exceeded his powers. Bierlein v. Johnson, supra. In Screen etc. Guild v. Walt Disney Productions, 74 Cal.App.2d 414, 168 P.2d 983, 984, the contract provided that any ruling or decree of the arbitrator "shall not be in conflict with the express provisions of this agreement" and "'this agreement shall constitute the basis upon which such decision shall be rendered.'" The contract in the 13th clause provided that five days shall constitute a "work week." The arbitrator ruled that the "work week" mentioned in the contract was a 7-day week. The court held, 74 Cal. App.2d at page 418, 168 P.2d at page 985: "[I]n construing the work week to include Saturday, the arbiter's ruling was in direct conflict with the express terms of the bargaining contract, and thus exceeded the powers conferred upon him under clause thirteenth, heretofore quoted." See also Hanes v. Coffee, 212 Cal. 777, 779–780, 300 P. 963; Drake v. Stein, 116 Cal.App. 2d 779, 784, 254 P.2d 613; Stetson v. Orland Oil Syndicate, 42 Cal.App.2d 139, 143, 108 P.2d 463.

[7] In the case at hand it is clear that the arbitrator exceeded his powers. The contract expressly provided that he should have no authority to change the contract "in any respect or to add or take away from its terms." As we shall see, he not only changed the contract, he rewrote it and extended its life beyond the time expressly provided therein. The award amounted to a complete negation of the contract.

The Labor Management Relations Act of 1947, § 8(d), 29 U.S.C.A. § 158(d), provides that where there is in effect a collective bargaining contract covering employees in an industry affecting commerce the duty to bargain collectively shall mean that no party to the contract shall terminate it unless the party desiring termination: 1) serves a written notice on the other party to the contract of the proposed termination 60 days prior to the expiration date; 2) offers to meet and confer with the other party for the purpose of negotiating a new contract; 3) notifies the federal and state mediation and conciliation services within 30 days after such notice of the existence of a dispute; 4) continues the existing contract in full force and effect for a period of 60 days after such notice is given or until the expiration date of the contract, whichever occurs later.[1] The notices were given to the

1. Section 8(d) in part reads: "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a

federal and state conciliation services by the company. Congress, in enacting section 8(d), specified that the reasonable notice of termination would be sixty days. Boeing Airplane Co. v. National Labor Relations Board, 85 U.S.App.D.C. 116, 174 F.2d 988, 991.

Article XIV(a) of the contract gives an absolute power of termination. The Union argues that under article XIV(b), if the power to terminate the contract is exercised and if negotiations do not result in a new agreement by the terminal date, the old agreement remains in force while negotiations continue and the new agreement is retroactive to the expiration date.

Paterson Parchment Paper Co. v. International Brotherhood, 3 Cir., 191 F.2d 252, 253, certiorari denied 342 U.S. 933, 72 S.Ct. 376, 96 L.Ed. 694, is directly in point and determinative of the proper construction of the contract in the case at bar. The contract in that case provided:

> "'This agreement shall be in effect from August 15, 1947 to August 15, 1948 and thereafter from year to year, provided, however, that either party may terminate the same on not less than sixty (60) days written notice given to the other prior to the anniversary date.
>
> "'However, should there by a delay in negotiating the new agreement, this agreement shall remain in full effect until such time as a new agreement is completed.'"

On June 1, 1948, the defendants gave the plaintiff a 60-day notice of termination of the contract. The plaintiff claimed that the defendants had breached the contract by a strike called on August 20, 1948. The question was whether the contract had been terminated on August 15, prior to the strike called on August 20. The court held 191 F.2d at page 254:

> "Intended as notice of termination, the words used are adequate for the purpose. It is true the notice envisages a continuing labor-management relationship between the parties, but under a new contract to be negotiated in the two months available before expiration of the old contract. As concerns the old contract, the notice is a plain manifestation of unwillingness to continue under its provisions beyond its potential expiration date.
>
> "It is also necessary to consider the meaning and effect of the language of the second paragraph of Section 15 of the contract that 'should there be a delay in negotiating the new agreement, this agreement shall remain in full effect until such time as a new agreement is completed'. The language follows immediately after the provision for 60 days notice of termination on a contract anniversary. It is obviously directed at the avoidance of a no contract situation where pending negotiation of a new contract continues beyond the notified termination of the old. It is phrased only in terms of a successful negotiation. It leaves to inference the result of unsuccessful negotiation.
>
> "But the correct inference is not hard to draw. Negotiation is set up as a factor suspending or postponing the normal effect of notice of termination. The end of negotiation, whether success or failure, marks the end of this postponement. * * *
>
> "In summary, the contract here required 60 days notice of termination, and appropriate notice was given. But, also in accordance with the contract, termination was suspended by negotiations toward a new contract. These failed and ended. The old con-

> dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> "(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later * * *."

tract thereupon terminated pursuant to the permitted election already made manifest by timely notice as provided in the document itself. The obligation not to strike, like the other obligations of the contract ceased to exist."

[8] So in the present case the contract required 60 days' notice of termination and the notice given was adequate for the purpose. The provisions of the Labor Management Relations Act of 1947 must be read as a part of the contract. The act specifies 60 days as reasonable notice of termination. Negotiations for a new contract followed almost immediately after notice of termination was given. They were interrupted by the proceeding before the National Labor Relations Board. Notwithstanding the willingness of the company to negotiate further after that proceeding ended, the Union proceeded in an attempt to arbitrate a question of law before the "Impartial Umpire." The contract contemplates continuing labor-management relation, but under a new contract to be negotiated within the 60 days available before expiration of the old contract. The notice of termination was a plain manifestation of unwillingness to proceed under the terms of the old contract beyond its potential expiration date. Negotiations for a new contract must commence within 20 days after the receipt of the notice of termination. We think it clear that if negotiations for a new contract are not completed before the termination date, the contract terminates on that date. The negotiations appear to have come to an impasse. They began, but stopped when the Union demanded arbitration. Thereafter and until September 1, 1953 the company was ready and willing to continue negotiations in an effort to reach a new contract by September 1. Instead of continuing negotiations the Union waited until after September 1 and then petitioned for confirmation of the award. The contract terminated on September 1, 1953 pursuant to the notice given on June 26.

[9] Paragraph XIV(b) is, of course, to be read with paragraph XIV(a). To give paragraph XIV(b) the construction contended for by the Union would create an absurd situation—the old contract and the new contract would be in force during the same period. During the period after the expiration date, when negotiations were proceeding, the old contract would remain in force; on execution of the new contract, that contract would be retroactive to the expiration date: two contracts would be in force at the same time. The parties could not have contemplated that absurd situation. The retroactive provision simply means that if a new contract is not executed before the expiration date, the new contract shall be retroactive to that date. The old contract cannot reasonably be construed to continue during a period when a new contract is in effect retroactively. We think the trial court correctly construed the contract.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



130 Cal.App.2d 439

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

M. W. McCLEAN, Jr., and Bertha A. Germon, Defendants and Appellants.

Cr. 5259.

District Court of Appeal, Second District, Division 3, California.

Jan. 26, 1955.

Rehearing Denied Feb. 3, 1955.

Hearing Denied Feb. 24, 1955.

Prosecution for grand theft and forgery. The Superior Court, Los Angeles County, Clement D. Nye, J., revoked probation, and entered judgment sentencing accused to prison. Accused appealed. The District Court of Appeal, Vallée, J., held that where court in granting probation had required that accused pay off civil judgments to persons they had defrauded in commission of crimes, or show their finan-

cial inability to pay, and accused did not pay off judgments, although they were financially able, court did not abuse its discretion in revoking probation.

Appeals from orders revoking probation dismissed and judgment affirmed.

1. Criminal Law ⇐1023(10), 1134(10)

Orders revoking probation made before rendition of judgment were not appealable, but orders were reviewable on appeal from judgments.

2. Criminal Law ⇐982

A court, during the term of probation, may modify its original probation order. Pen.Code, § 1203.1.

3. Criminal Law ⇐982

Where court had placed persons convicted of grand theft and forgery on probation which required that they give persons defrauded "value received", later order of court requiring persons convicted to pay off civil judgments to persons they defrauded was not the imposition of additional condition of probation, but was a modification of the original conditions. Pen.Code, § 1203.1.

4. Criminal Law ⇐982

A court may revoke probation solely on the basis of a probation officer's report. Pen.Code, § 1203.1.

5. Criminal Law ⇐982

Where court had placed persons convicted of grand theft and forgery on probation that required that they pay off civil judgments to persons whom they had defrauded in commission of their crimes, or show their financial inability to pay, but probationers did not pay off judgments, although they were financially able, court did not abuse its discretion in revoking their probation. Pen.Code, § 1203.1.

Jesse A. Hamilton, San Monica, for appellants.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Robert Wheeler, Dep. Dist. Attys., Los Angeles, for respondent.

VALLÉE, Justice.

[1] Defendants appeal from orders revoking probation and from judgments thereafter entered sentencing McClean to state prison and Bertha Germon to the institution for women. The orders revoking probation made before rendition of the judgments are not appealable and the appeals therefrom will be dismissed. Those orders are reviewable on the appeals from the judgments. People v. Robinson, 43 Cal.2d 132, 271 P.2d 865.

In March 1951 defendants pleaded guilty to one count of grand theft and to two counts of forgery. The grand theft charge was that defendants had feloniously taken $27,564.11, the property of Flintridge Heights Mutual Water Company, Inc., a corporation. One of the forgery charges was that defendants had forged a grant deed and had uttered the same with intent to cheat and defraud Benedict Heights, Inc., a corporation, and its shareholders and creditors. The other forgery charge was that defendants had forged a grant deed and had uttered the same with intent to cheat and defraud Flintridge Heights, Inc., a corporation, and its shareholders and creditors. The prosecution arose out of the activities of defendants in the operation of three corporations—Benedict Heights, Inc., Flintridge Heights, Inc., and Flintridge Heights Mutual Water Company, Inc.—which they apparently controlled. Prior to these proceedings Flintridge Heights, Inc., had been adjudicated bankrupt.

On May 2, 1951 proceedings were suspended and defendants were granted probation for a period of 6 years on condition that each defendant must report as required and must cooperate with the probation officer and anyone designated by him in some proposition to work out the situation to the satisfaction of all persons concerned. On granting probation, the judge said to defendants:

> "I think that the threat of jail should be held over their heads, and that is what the court tends [sic] to do. * * * Now, that doesn't mean that that is all there is to this thing, that

you are going to go out of here scot-free. It means that you are going to have to work this thing out together; give these people value received or you are going to be brought in here as probation violators and possibly be sent to the penitentiary. In other words, you either do or you don't; if you do we can perhaps clean this matter up; if you don't it means Tehachapi for Mrs. Germon and San Quentin for you, Mr. McClean. You understand that, do you? * * * I am going to give you this time to try to work this out. We will see what your intentions are. It won't take 6 years to find out, and I am sure that if the probation officer comes in to court in the next 6 months with the report that you are not cooperating that you will probably serve time."

On October 31, 1951, defendants being present, the order granting probation was modified as to each defendant as follows:

"The order requiring restitution is modified in this respect as to each defendant: If and when the matter is reduced to civil judgment, that judgment shall become part of the terms of probation in this case. The Probation Officer is to follow through and determine whether reduced to judgment; if so, the Probation Officer is to report back to the Court for further instructions as to the payment of judgment."

On December 3, 1953, defendants being present, the probation officer reported to the court that the matter had been reduced to judgment and that there was now a judgment in the amount of $29,700 against defendants jointly and severally.

On January 28, 1954 the terms of probation were modified as follows:

"Payment of $56,700 in civil judgment is made part of the terms and conditions of probation and each defendant is ordered to pay it jointly and severally. It is further ordered that they pay $30,000 of said amount within sixty days or failing in this, that defendants have a Certified Public Accountant issue a complete financial statement reflecting their income and receipts since November 1947, and that this include any real or personal property which they may have sold or conveyed or disposed of in any way to other people."

At that time the court stated to defendants:

"I have read Judge Carter's opinion.[1] I am thoroughly in accord with some

1. The opinion of Judge Carter, which was included in the report of the probation officer, in part says:

"This case presents a sorry tale of fraud, reckless violation of law and utter disregard for the rights of creditors.

"The bankrupt corporation, Flintridge Heights, Inc., was incorporated on May 3, 1948. * * *

"The remaining defendants in the case are Bertha M. Germon, one of the promotors, her husband, Louis Germon, Matthew W. McClean, Jr., brother of Bertha and one of the promoters and his wife, Eugenia K. McClean.

"* * * Two tracts of land were involved; * * *

"Sales were made from unrecorded maps of the three proposed tracts * * *; such sales of course were void. * * * [The corporation] deeded out approximately one-half of the lots to the four defendants herein and placed a blanket trust deed on all the property in the Tract for $65,000.00. As a result none of the buyers in the tract received title to their property and now are creditors of the bankrupt estate with claims filed in the bankruptcy proceeding.

"Most of the escrows were handled through Santa Monica Escrow Company which permitted the escrows to be robbed of the funds deposited by buyers before the escrows could be closed and title delivered. The escrow permitted various of the defendants to draw funds from these escrows from time to time; the license of the escrow company was later revoked. * * *

"Fraud abounds throughout the record. Bertha Germon took title under the alias, Mary Ellen Anderson to property in Benedict Canyon and then deeded as Mary Ellen Anderson to the corporation. The escrow shows that the consideration of $26,000.00 was paid out of escrow.

"Funds of the corporation were handled by various defendants as if they were the personal property of the defendants. No proper Minutes or records were kept

of the conclusions if not all of the conclusions that he has made. * * * He states that there is 'A sorry tale of fraud, reckless violation of law and utter disregard of the rights of creditors.

"[']Funds of the corporation [Flintridge Heights, Inc.] were handled by various defendants as if they were the personal property of the defendants. The evidence shows the Court finds a conspiracy between the four remaining defendants' including these two before this court, 'to defraud the corporation and its creditors. Escrows were robbed before closing and laws recklessly violated'—

"I note your comment that the only reason they are unable to protect themselves or make any showing is because of their failure to have any books. That follows right along with the pattern of a person who has fraud in his heart. He doesn't keep books for the reason that he doesn't want the books to disclose his business. I am satisfied that although Mrs. Germon may make the claim that the only time she ever told a lie was when she pleaded guilty, that that was perhaps, the only time she has told the truth."

On June 24, 1954, defendants being present, the matter came on for hearing on the report of the probation officer as to the progress of probation. The court stated:

"The Court is concerned with the payment of $56,700 civil judgment and a $30,000 amount within sixty days from January 2nd, 1954 or January 28th; it is blurred here and I can't make out which it is. That has not been made and no effort has been made to pay it. * * *

"[W]e have the statement before the Court here that the defendants are in possession of $120,000.00 or assets worth that. * * *

"The date of this offense is December 1947. That is seven years ago. The complaint was not filed until February of 1951. The plea of guilty was entered on May 2, 1951 to one count of grand theft and two counts of forgery, and I think that any fair minded person will agree that this Court has been more than reasonable in giving these defendants an opportunity to work it out. * * * I think that any fair minded person all [sic] also agree that these defendants have not cooperated one iota with the court in the efforts

except for one or two meetings where a document had to be executed by the corporation. * * * The promotors made secret profits on the transfer of the property in Benedict Canyon and on the Flintridge property. The Flintridge property was contracted for by Matthew McClean and then paid for almost entirely out of the funds deposited by prospective buyers buying from unrecorded maps. After the property was paid for with these monies, McClean then deeded to the corporation. A mutual Water company was formed for the Flintridge property and the corporation manipulated by the promotors purported to give the Water company corporate ground and facilities for a well in return for 77 shares of stock; but previously the Water facilities had been deeded to the defendant, Eugenia McClean and thus the water company took nothing. Bertha Germon converted the 1949 Studebaker originally costing about $3,500 when it was about a year and a half old. So much for the sordid tale that lies behind this case.

"The evidence shows and the court finds a conspiracy between the four defendants remaining, Bertha Germon, Louis Germon, Matthew McClean and Eugenia McClean (and Edward McClean not a party to this action) to defraud the corporation and its creditors. In addition to the facts above recited, money was transferred from the corporation to certain of these defendants and to M.G.M. The two McCleans and Bertha endorsed the name of M.G.M. as payee on checks constituting funds of the corporation. They treated the corporation funds as if they were their own.

"Property was purchased in the name of Matthew McClean paid for out of corporate funds, and in fact from the creditors' money paid for lots. But though the corporation paid for the property, the buyers whose money in truth paid for the property, never got title to these lots in the property purchased. Escrows were robbed before closing, and laws recklessly violated. * * *"

that have been made to straighten out this situation.

"In May 1951 probation was granted. On October 31st, 1951, certain other terms and conditions were imposed and then the matter has been on the calendar from time to time since October 31st of 1951, until the Court has just come to the definite conclusion that there is no honest effort on the part of either one of these defendants to comply with the orders of this court. * *

"[T]his Court has extended every opportunity to these defendants to cooperate, and they have not in good faith cooperated with the Court. We said that on May 13th and nothing has been done since that time which would indicate that we are going to get any cooperation on these terms and conditions. * * * I have read the opinion of Judge Carter; I have read the statements of Judge Pearson in the matter, and I am satisfied that this was fraud, with fraud from the beginning to the end. I say that deliberately. There isn't any question in my mind about it. As to each of these defendants probation heretofore granted on Counts 6, 10 and 12 is ordered revoked and it is the judgment and sentence of this Court that each defendant be committed to the Adult Authority of the State of California for the term prescribed by law on each of those counts."

An order was thereupon made revoking the probation of each defendant. Judgments were entered sentencing McClean to state prison and Bertha Germon to the institution for women.

Defendants contend that the condition of probation imposed on January 28, 1954 requiring them to pay a civil judgment in the amount of $56,700 and to pay $30,000 within 60 days was void and that because one of the corporations had been adjudicated bankrupt they were unable "to work the matter out," consequently, revocation of probation was an abuse of discretion.

[2, 3] The court, in the order granting probation, may impose "such terms and conditions as it shall determine"; "may provide for reparation in proper cases"; may order the probationer to work and earn money to pay any reparation condition; and may impose and require such "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer, that should the probationer violate any of the terms or conditions imposed by the court in the instant matter, it shall have authority to modify and change any and all such terms and conditions and to reimprison the probationer in the county jail within the limitations of the penalty of the public offense involved." Pen.Code, § 1203.1. The court, during the term of probation, may modify its original order. In re Marcus, 11 Cal. App.2d 359, 53 P.2d 1021. We think it patent that the order of January 28, 1954 was not the imposition of an additional condition but was a modification of the original order.

[4, 5] The court may revoke probation solely on the basis of the probation officer's report. In re Levi, 39 Cal.2d 41, 44, 244 P.2d 403. It appeared from the probation officer's report that defendants were "in possession of $120,000.00 or assets worth that" which were not affected by the bankruptcy proceedings. The record shows that over a period of three years the court extended defendants every opportunity to comply with its orders and that not only did they not comply but they made no effort to do so and exhibited a willful defiance of such orders. The court did not abuse its discretion in revoking the orders granting probation. See People v. Lippner, 219 Cal. 395, 400, 26 P.2d 457.

The appeals from the orders revoking probation are dismissed. The judgments are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

130 Cal.App.2d 370

Martha PERRY and Mary Perry, Plaintiffs and Appellants,

v.

CITY OF SANTA MONICA, Joann Cesario, Mrs. Molina S. Delane, Firemen's Fund Insurance Company, a corporation, Doe I to Doe X, inclusive, and Roe I to Roe X, inclusive, Defendants.

City of Santa Monica, Respondent.

Civ. 20376.

District Court of Appeal, Second District, Division 3, California.

Jan. 25, 1955.

Hearing Denied March 25, 1955.

Action against city for personal injuries suffered by automobile passengers in collision at street intersection. The Superior Court, Los Angeles County, Allen T. Lynch, J., sustained demurrer to complaint. Passengers appealed. The District Court of Appeal, Vallée, J., held that Public Liability Act is only applicable where injury resulted from dangerous and defective condition of public property in existence at time of accident, and that city had no duty under Public Liability Act and statutes providing for the erection of such stop signs "as may be necessary", to erect stop signs or warning signs at particular intersection in the absence of a defective condition in public property.

Judgment affirmed.

1. Municipal Corporations ⇐847

Under Public Liability Act, a local agency is only liable for injuries resulting from dangerous or defective condition of public property in existence at time of accident, or which had been in existence but was not maintained or replaced. Government Code, §§ 53050, 53051.

2. Municipal Corporations ⇐724

The governmental immunity which a city enjoys as a state agency can only be taken away by legislative enactment. Government Code, §§ 53050, 53051.

3. Municipal Corporations ⇐756

The Public Liability Act was not enacted for the purpose of protecting those who come upon city streets, but only those who sustain injuries by reason of a dangerous or defective condition. Government Code, §§ 53050, 53051.

4. Municipal Corporations ⇐755(1)

A city is not an insurer of the safety of travelers, and is only required to exercise ordinary care to maintain its streets in a reasonably safe condition for those using them.

5. Municipal Corporations ⇐798

Under statutes directing local authorities to place stop signs or signals on such streets and highways "as may be necessary", cities are not compelled to place signs or signals at a particular intersection, and cities are to determine when a sign or signal is necessary at a particular intersection. Vehicle Code, §§ 459, 465(a, b), 466, 471.

6. Municipal Corporations ⇐798

Under Public Liability Act, a local authority is not liable for failure to install a stop sign at an intersection in the absence of a defective or dangerous condition in public property. Government Code, §§ 53050, 53051.

7. Automobiles ⇐279

City was not liable under Public Liability Act to persons injured in automobile collision at allegedly heavily traveled "blind" intersection for failure to erect stop or warning signs at such intersection, although several accidents allegedly had occurred at that intersection, and city erected stop signs at such intersection after collision. Government Code, §§ 53050, 53051.

Stanley Fleishman, Los Angeles, for appellants.

Robert G. Cockins, Mark C. Allen, Jr., and Robert D. Ogle, Santa Monica, for respondent.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment in favor of defendant city of Santa Monica entered on the sustaining of a demurrer to the first amended complaint, referred to as the complaint, without leave to amend.

The complaint alleges:

On April 1, 1953, at 7:40 a. m., plaintiffs were passengers in an automobile driven by Aleck Penny who was traveling north on Euclid Avenue near Michigan Avenue in Santa Monica. At the same time, Joann Cesario negligently drove an automobile west on Michigan Avenue and collided with the automobile being driven by Penny. As a proximate result of such negligence plaintiffs were injured.

At the time of the accident the intersection of Euclid and Michigan Avenues was in a dangerous and defective condition. It was so laid out, constructed, and maintained that a "vehicle" traveling northerly on Euclid could not see traffic approaching from the west on Michigan without first entering the intersection and placing "itself" in a hazardous position and a "vehicle" traveling westerly on Michigan could not see traffic approaching in a northerly direction on Euclid without first entering the intersection. It was a heavily traveled blind intersection and it did not have traffic signals, stop signs, semaphores, or other traffic control devices. Defendant city had knowledge, by way of petition of its citizens and otherwise, of the dangerous and defective condition of the intersection. Notwithstanding such knowledge, the city carelessly, negligently, and unlawfully refused and failed to place or maintain any appropriate stop or warning signs at the intersection. On or about the day of the accident, but subsequent thereto, the city placed stop signs at the intersection. The city waited an unreasonable length of time after having notice of the dangerous and defective condition of the intersection before installing the stop signs.

On information and belief plaintiffs allege that prior to April 1, 1953, the city had decided it was reasonably necessary to place stop signs at the intersection, and it waited an unreasonable length of time after so deciding before it actually installed the signs. Also on information and belief plaintiffs allege that preceding the accident there were many other accidents at the intersection caused by its dangerous condition. This was well known to the city and its governing board.

[1] Under the Public Liability Act of 1923 (now Government Code, §§ 53050, 53051):

> "A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition: (a) Had knowledge or notice of the defective or dangerous condition. (b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

The injuries must result from the dangerous or defective condition of public *property*. What is included in the term "property" was exhaustively considered by this court in Bady v. Detwiler, 127 Cal.App. 2d 321, 273 P.2d 941. In all of the cases cited relative to the question, the property was in existence at the time of the accident or had been in existence, and liability was incurred by the local agency because either the property was in a dangerous or defective condition or it was not maintained or replaced after it once had been in existence.

[2–4] The governmental immunity which a city enjoys as a state agency can be taken away only by legislative enactment. Whiting v. City of National City, 9 Cal.2d 163, 165, 69 P.2d 990; Van Dorn v. City & County of S. F., 103 Cal.App.2d 714, 716, 230 P.2d 393; 19 Cal.Jur. 126, § 461. The Public Liability Act was not enacted for the purpose of protecting those who come upon city streets, but only those who sustain injuries by reason of a "dangerous or defective" condition. Shipley v. City of Arroyo Grande, 92 Cal.App.2d 748, 750, 208 P.2d 51, 52. It has been repeatedly held that a city is not an insurer of the safety of travelers; it is required only to exercise ordinary care to maintain its streets in a reasonably safe condition for those using them. George v. City of Los Angeles, 11 Cal.2d 303, 308, 79 P.2d 723.

There is no allegation that irregularities, defects, or obstructions existed in the streets themselves. In Belcher v. City and County of S. F., 69 Cal.App.2d 457,

158 P.2d 996, it was held that the plaintiff had failed to state a cause of action against the city for personal injuries when she was blown over by a strong wind as she was descending steps cut by the city into the sidewalk, since she did not allege that there was anything dangerous or defective in the construction or design of the steps themselves or that there were any irregularities or defects such as holes, ridges, or upraises upon which a pedestrian might trip or by which one might be entrapped but merely alleged that the city was negligent in failing to provide a handrail and in not posting a warning sign.

Stang v. City of Mill Valley, 38 Cal.2d 486, 240 P.2d 980, was an action against the city for damages sustained as a result of a fire on the plaintiffs' property. The water lines leading to the fire hydrant adjacent to the plaintiffs' property and the fire hydrant had become clogged and were incapable of providing sufficient water for effective fire control. The court observed, 38 Cal.2d at page 489, 240 P.2d at page 982:

> "The ordinary case coming within the terms of this act involves a situation where the injured person is *using* some type of city property that is dangerous or defective, and which he had a legal right to use, such as public streets [citation], highways [citation], buildings [citation], bridges [citation], school grounds [citation], or other similar property [citation]. Likewise the act sustains the imposition of liability in the situation where the city is *using* the dangerous or defective property and injury was proximately caused thereby: [citations], where the city negligently allowed a fire to spread from a city dump; [citation], where the city used defective sewer pipes, resulting in the flooding of plaintiffs' property; [citation], where the city negligently installed and maintained street drainage facilities, causing an overflow on plaintiffs' property with damage to the improvements thereon. But here the city did not create the fire causing the damage to plaintiffs' property; rather the claimed fault lies in defendants' failure to provide the means for remedying a condition otherwise created—a different set of circumstances to which plaintiffs seek to apply the act in support of their action. Upon analysis, it clearly appears that the gravamen of plaintiffs' complaint is the failure of a governmental function. Such failure involves the denial of a benefit owing to the community as a whole, but it does not constitute a wrong or injury to a member thereof so as to give rise to a right of individual redress, Restatement of Torts, § 288, which right must be predicated upon the violation of a duty of care owed to the injured party."

[5] Plaintiffs contend the city had the affirmative duty to erect boulevard stop signs at the intersection. They rely on section 465(b) of the Vehicle Code which provides:

> "Local authorities in their respective jurisdictions shall place and maintain or cause to be placed and maintained such traffic signs and, subject to the provisions of Section 466, such stop signs, semaphores and control devices upon streets and highways as may be necessary to indicate and to carry out the provisions of this code or local traffic ordinances or to regulate, warn or guide traffic."

Subdivision (a) of section 465 provides that the Division of Highways of the State Department of Public Works shall post such appropriate signs and signals "with respect to highways under its jurisdiction" as may be authorized under the code, "or as may be necessary properly to indicate and to carry out the provisions of this code, or to direct or warn traffic upon the highways." Section 466 applies to state highways. Section 459 of the Vehicle Code provides that:

> "The provisions of this division [which includes section 465] shall not prevent local authorities within the reasonable exercise of the police power from adopting rules and regulations by ordinance or resolution on the following matters: * * * (d) Regulating traffic by means of semaphores or other traffic control signaling devices."

Section 471 provides that:

"[A]ny local authority * * * *may designate* any intersection under its exclusive jurisdiction as a stop intersection and erect like signs at one or more entrances thereto." (Italics added.)

Subdivision (b) of section 465 does not compel local authorities to place signs or signals at a particular intersection. They are directed to place them upon streets and highways "as may be necessary." Clearly the local authorities are to determine when a sign or signal is necessary at a particular intersection.

Bradshaw v. City of Seattle, 43 Wash.2d 766, 264 P.2d 265, is analogous. A Washington statute was substantially identical with subdivision (b) of section 465 of the Vehicle Code. Construing the statute the Supreme Court of Washington said, 264 P.2d 270, 271:

"Where a street itself is reasonably safe for public travel it is not rendered inherently dangerous solely because a municipality fails to cut down natural vegetation which tends to obstruct the view at an intersection. * * * In the absence of an express statute, a municipality cannot be held liable for failure to erect warning signs or barriers to apprise travelers of extraordinary or unusual conditions unless the danger existed in the highway itself."

[6] A local authority is not liable under the Public Liability Act of 1923 for failure to install a stop sign at an intersection in the absence of a defective or dangerous condition in public property. We are not to be understood as holding that once having installed a stop sign a city may not be liable for failing to maintain it. See Rose v. County of Orange, 94 Cal.App.2d 688, 211 P.2d 45.

[7] Plaintiffs, whose burden it is to show an actionable wrong, have cited no authority whatever where, under facts and circumstances at all comparable or similar to those alleged in their complaint, a municipality or any other local agency has been held liable. To hold that the city had the affirmative duty to erect stop signs at the intersection in question would unduly extend the scope of the Public Liability Law and go far toward establishing the rule that a municipality is an insurer. The trial court properly sustained the demurrer.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.



130 Cal.App.2d 356

Jack W. WOOD, Catherine S. Wood, H. Rex Collins, Annie L. Collins, Karl F. Venter, Jr., Mildred L. Venter, Basil W. Wheeler, Tennie L. Wheeler, Emilio J. Lagomarsino, Marjorie E. Lagomarsino, Mildred L. Venter, Karl F. Venter, Fred W. Moser and Halmar Moser, Petitioners and Respondents,

v.

CITY PLANNING COMMISSION OF CITY OF SAN BUENAVENTURA, Peter Altpeter, John H. Dresch, Harold C. Gragg, C. Thomas Huffman and Lloyd G. Warren, constituting the members of the City Planning Commission of the City of San Buenaventura; The City of San Buenaventura, a municipal corporation, Ernest J. Pate, Idah W. Iliff, Karl L. Heiling, Larry H. Larson, Charles W. Petit, Hal V. Hammons, Jr., and Bruce Johnston, constituting the members of the City Council of the City of San Buenaventura, John Doe One, John Doe Two and John Doe Corporation, Respondents and Appellants.

Civ. 20368.

District Court of Appeal, Second District, Division 1, California.

Jan. 25, 1955.

Proceeding for writ of mandate to compel municipal authorities to establish an oil drilling district. The Superior Court, Ventura County, Charles F. Blackstock, J., entered order and judgment for plaintiffs, and defendants appealed. The District Court of Appeal, White, P. J., held that record disclosed that municipal au-

thorities, in denying application, had been justified by substantial evidence and that no fraud, malice or arbitrary action was disclosed, so that court was without power to substitute its judgment for that of the commission and city council.

Judgment reversed and cause remanded with directions.

1. Municipal Corporations ⇐40

City of San Buenaventura ordinance relating to formation of oil drilling districts was intended to give planning commission and city council discretion to determine whether district should be established and what conditions and restrictions should be imposed, and vested commission and council with discretion to grant or deny an application to form a district.

2. Administrative Law and Procedure ⇐744, 754

Mandamus ⇐172

In reviewing acts of local administrative boards, courts are limited to determining whether there has been abuse of discretion, and are without power to try issues de novo or to compel boards to act in particular manner.

3. Mandamus ⇐26

Mandamus cannot be used for purpose of determining whether or not, in opinion of reviewing tribunal, evidence was sufficient to support decision complained of, provided inferior tribunal or board has jurisdiction and record discloses substantial evidence to support the decision.

4. Administrative Law and Procedure ⇐324, 761

Administrative boards and officers are vested with a high degree of discretion in working out the problems confronting them, and abuse of that discretion must be clear and manifest before courts will interfere.

5. Mandamus ⇐168(4)

Record on appeal from issuance of mandamus to compel establishment of an oil drilling district within city disclosed that municipal authorities had been justified by substantial evidence in denying application for formation of district, and that no fraud, malice or arbitrary action was disclosed, so that court was without power to substitute its judgment for that of the commission and city council.

6. Municipal Corporations ⇐611

A city has right not only to regulate business of operating oil wells within city limits but to prohibit operation within delineated areas and districts, if reason appears for so doing.

Richard C. Heaton, Ventura, for respondents and appellants.

Ned S. Porter and Robert J. Lagomarsino, Ventura, for petitioners and respondents.

WHITE, Presiding Justice.

This is an appeal by the City Planning Commission of the City of San Buenaventura and its several individual members; the City of San Buenaventura, a municipal corporation, and the several individual members of the council of said city, from an order and judgment directing the issuance of a peremptory writ of mandate commanding the establishment of an oil drilling district pursuant to the provisions of sections 8151 to 8151.6, inclusive, of the San Buenaventura Ordinance Code. The appeal comes to us upon a record consisting solely and alone of the Clerk's Transcript on appeal.

In the proceedings had before the Superior Court, respondents on this appeal were designated "Petitioners". In the proceedings before the City Planning Commission, some of the respondents herein were designated "Applicant". In the interest of clarity the foregoing parties will here be referred to as "Plaintiffs" unless more particularly identified.

In the trial court appellants herein were designated "Respondents". Here we shall refer to them as "Defendants" unless more particularly identified.

The zoning regulations of the City of San Buenaventura (Division 8, section 8100 of the City Ordinance Code) contain the provisions usually found in comprehensive zoning codes for the establishment of zones; the specification of permitted uses in such zones, including the most restricted

or "R–1" zone, and the prohibition in each such zone of all uses not expressly permitted therein.

The provisions of the zoning regulations also set forth in section 8162, the conditions and procedure under and by which the regulations, zone boundaries, and classifications of property may be amended, supplemented or changed.

Sections 8151–8151.6, inclusive, provide for the establishment of special oil drilling districts upon the compliance by applicants with specified requirements enumerated therein.

Section 8151.4 provides conditions which applicants are subject to in drilling for and production of oil wells. Section 8151.5 enumerates many conditions which the council may impose in connection with drilling and production of oil district wells.

Section 8151.3 prescribes the requirements and procedure for formation of an oil drilling district.

The drilling for and production of oil are among the uses of land not permitted in an "R–1" zone.

On November 13, 1952, one of the plaintiffs, Jack W. Wood, as agent for another of the plaintiffs, Fred W. Moser, filed with the City Planning Commission an application requesting the establishment of an oil drilling district as contemplated by said section 8150 (Secs. 8151–8151.6) of the San Buenaventura Ordinance Code, in, upon, and comprising certain real property in the City of San Buenaventura lying wholly within a long-established R–1 zone.

The Planning Commission, all in accordance with the procedure provided in section 8162 of the Code, duly and regularly set said application for hearing before the Commission on December 1, 1952.

Following the conclusion of the hearings the Planning Commission adopted a resolution in which the following findings were made:

"That Fred W. Moser is the owner of the proprietary or contractual authority to drill for and produce oil, gas or other hydrocarbon substances under the surface of at least 51% of the property to be included in said proposed oil drilling district, as hereinabove described; that said proposed district is in excess of 40 acres in area and it is compact in area, contiguous and the boundaries thereof follow natural boundary lines and property lines; that all of said property lies within an R–1 Zone; and

"That applicant proposes to establish one or more controlled drilling sites for the directional drilling of oil and gas wells for the exploration of said property for oil and gas, the first of said proposed oil drilling sites to be located in the Charles Cole Canyon in Blocks 55, 67 and 78 of the Addition to the Town of San Buenaventura; that all of said drilling operations will be carried on by the applicant in compliance with the standard conditions set forth in Section 8150 of said Ordinance Code, together with such new and additional conditions as may be proposed by the Planning Commission and the Council of the City of San Buenaventura.

"That in the opinion of the Planning Commission the establishment of an oil drilling district as proposed by applicant will be detrimental to the planned development of the City of San Buenaventura and contrary to good zoning practices; that in addition, the operation of an oil drilling district in the area proposed will be detrimental to the community and to the public health, safety, comfort and general welfare of the residents of this City."

The application was thereupon denied. Following receipt of notice of the action taken by the Planning Commission, and on February 3, 1953, plaintiff Jack W. Wood filed his "Appeal to the Council of the City of Buenaventura from Notice of Denial of Application by Planning Commission of the City of San Buenaventura" which appeal was by the council referred to the Planning Commission for written report to the council as required by section 8162.4 of the Ordinance Code.

On February 16, 1953, the Planning Commission accordingly made its report to the council, and included therein was the entire record of the proceedings had before the Commission.

On February 24, 1953, the City Council held a hearing on the matter at which time

three persons spoke in favor of the formation of the oil drilling district and a petition signed by 346 persons in opposition to the formation of said district was presented. Following conclusion of the hearing the council adjourned until March 9, 1953, on which latter date it adopted a resolution that "* * * the decision of the City Planning Commission should be affirmed and it is hereby affirmed and said appeal denied."

Following such denial by the city council of the appeal of plaintiff Jack W. Wood from the decision of the Planning Commission, and the refusal of the council to grant his application for the creation of an oil drilling district, Wood and the other plaintiffs herein filed in the Superior Court of Ventura County a second amended petition for a writ of mandamus whereby they sought a writ directing and compelling the city council to create an oil drilling district under the provisions of sections 8151 to 8151.6 of the Ordinance Code and a writ directing the Planning Commission to rescind and annul its action denying the application of plaintiffs for the creation of an oil drilling district and further commanding that the Commission grant plaintiffs' application for the creation of the district and so to report and recommend to the city council that said district be created.

To this second amended petition, the defendants interposed a demurrer and a motion to strike out the whole, or in the alternative, portions thereof.

The Superior Court overruled said demurrer, denied said motion to strike, and ordered the issuance of an alternative writ of mandate.

Thereafter the defendants filed a return and answer to said second amended petition setting forth, among other things, the full, true and correct record of all proceedings before the Planning Commission and the city council relating to plaintiffs' application for the establishment of an oil drilling district.

The matter came on regularly for hearing, all parties being represented by counsel. Counsel for defendants made a motion for judgment on the pleadings; counsel for plaintiff made a similar motion. The court denied both motions. After hearing and argument, the court ordered the peremptory writ of mandate to issue and from that order and judgment defendants prosecute this appeal.

We are impressed that the main, if not determinative issue involved in this appeal is whether or not the city council and City Planning Commission were clothed with discretion under section 8150 (sections 8151–8151.6) of the Ordinance Code to grant or deny the formation of an oil drilling district once the applicant therefor has complied with all of the provisions of section 8151.3 of the ordinance. In effect, plaintiffs concede this when in their brief they say: "Plaintiffs have complied with all of the provisions of Section 8151.3 of the Ordinance Code, to wit: That they are the owners of the proprietary or contractual authority to drill for and produce oil, gas, or other hydrocarbon substances under the surface of at least 51% of the property to be included in said proposed Oil Drilling District; that said proposed District is in excess of 40 acres in area and it is compact in area, contiguous and the boundaries thereof follow natural boundary lines and property lines. Defendant Planning Commission admitted this compliance in the findings of fact in its Resolution No. 548. *By reason of this compliance with the procedural provisions of the Ordinance, it became mandatory upon the defendants to create the Oil Drilling District.*" (Emphasis added.)

With this contention of plaintiffs we cannot agree. Section 8151 provides as follows:

"Oil Drilling Districts, Objects and Purposes. It is hereby declared to be the object and purpose of this Section to establish reasonable and uniform limitations, safeguards and controls for the future drilling for and production of oil in the City. Limitations, safeguards and controls are deemed necessary in the public interest to effect practices which will not only provide for a more economic recovery of oil, gas and other hydrocarbon substances, but which will also take into consideration the surface uses, of land, as such uses are indicated by the value and character of the

existing improvements in or near districts where oil drilling or production are hereinafter permitted, the desirability of the area for residential or other uses, or any other factor relating to the public health, comfort, safety and general welfare. It is contemplated that areas within the City may be explored for oil by directional drilling methods by which surface drilling and production operations are limited to a few small controlled drilling sites so located and spaced as to cause the least detriment to the community and to the public health, safety, comfort, and general welfare."

With reference to the establishment of such districts and the procedure therefor, section 8151.3 reads:

"Establishment of Districts. The procedure for the establishment of Oil Drilling Districts shall be the same as that provided in Section 8162. (Changes and Amendments.) Each application for the establishment of an Oil Drilling District shall contain a statement that the applicant has the proprietary or contractual authority to drill for and produce, oil, gas or other hydrocarbon substances under the surface if at least fifty-one percent (51%) of the property be included in said District. The District described in said application shall be not less than forty (40) acres in area, including all streets, ways and alleys within the boundaries thereof, and shall be substantially compact in area and the boundaries thereof shall follow public streets, ways or alleys so far as may be practicable. Provided, however, that land located outside the boundaries in said City and contiguous with the proposed Oil Drilling District within the City may be included for the purpose of calculating said forty (40) acre area."

Turning now to section 8162 as directed in the section just cited, we find a complete formula for initiating proceedings for the formation of an oil drilling district, including the contents of the application, notice of the time, place and purpose of the hearing on said application, methods of giving such notice and to whom it shall be given. Sections 8162.3 and 8162.4 outline the duties of the Planning Commission and provide for an appeal to the city council from an adverse ruling by the Commission. It was under this section that plaintiffs herein admittedly proceeded when they sought the formation of an oil drilling district and the provisions of the section were followed by both the Planning Commission and the city council.

Had the framers of the municipal ordinance code intended, as claimed by plaintiffs, that upon compliance with the procedural provisions contained in section 8151.3 it was mandatory upon the council to form the oil drilling district, then why should the section just mentioned provide that the provisions contained in section 8162 must be followed before the council was authorized to permit drilling for oil in a zone in which such activity was prohibited? The answer is obvious.

[1] We therefore conclude that the Planning Commission and city council were invested with discretion to grant or deny an application to form an oil drilling district. That the purpose underlying section 8150 and its subdivisions is to repose in the Planning Commission and city council a discretion to determine *first,* whether or not an oil drilling district shall be established in a given area at all and, *second,* if so, what conditions and restrictions shall be imposed under the peculiar circumstances of each case to insure the maximum protection of the several conflicting private interests and the minimum detriment to the community and to the public health, safety, comfort, and general welfare.

[2–5] This brings us to a consideration of the scope of judicial review of the acts of local administrative agencies. The weight of authority supports the pronouncement that in reviewing the acts of local administrative boards, the courts are limited to determining whether there has been an abuse of discretion, and the court is without power to try the issues *de novo* or to compel such boards to act in a particular manner. The writ of mandate cannot be used for the purpose of determining whether or not, in the opinion of the reviewing tribunal, the evidence was sufficient to support the decision complained of, provided the inferior tribunal or board had jurisdiction and the record discloses substantial evi-

dence to support the decision. The court is not authorized to judge the intrinsic value of evidence considered by an administrative agency, nor to weigh it, if the record discloses substantial evidentiary support for the decision. It is also the rule that administrative boards and officers are vested with a high degree of discretion in working out the problems confronting them, and an abuse of that discretion must be clear and manifest before the courts will interfere. Nishkian v. City of Long Beach, 103 Cal.App.2d 749, 751, 752, 230 P.2d 156; Cantrell v. Board of Supervisors, 87 Cal.App.2d 471, 475, 197 P.2d 218; Fascination, Inc., v. Hoover, 39 Cal.2d 260, 264, 266, 246 P.2d 656. The question presented to the superior court and now before us was whether there was evidence of sufficient substantiality before the Planning Commission and city council to justify the finding that "* * * the establishment of an oil drilling district as proposed by applicant will be detrimental to the planned development of the City of San Buenaventura and contrary to good zoning practices; that in addition, the operation of an oil drilling district in the area proposed will be detrimental to the community and to the public health, safety, comfort and general welfare of the residents of this City.", and whether the Commission and council were guilty of fraud or malicious or arbitrary use of their powers. From a review of the record herein it must be held that the action of the municipal authorities was justified by substantial evidence, and that there is no showing of fraud, malice or arbitrary action either in the hearings afforded all concerned or in the decision arrived at. The trial court was therefore without power to substitute its judgment for that of the Commission and city council.

[6] Plaintiffs' contention that the municipal ordinance here in question if it contemplates an absolute prohibition of oil drilling within the city is unconstitutional because municipalities may not absolutely prohibit oil drilling but may only impose reasonable regulations upon such drilling, cannot be sustained. A city has the unquestioned right not only to regulate the business of operating oil wells within its city limits, but to prohibit their operations within delineated areas and districts, if reason appears for so doing, Beverly Oil Co. v. City of Los Angeles, 40 Cal.2d 552, 557, 254 P.2d 865, and cases therein cited; Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348; Chicago & A. R. Co. v. Tranbarger, 238 U.S. 67, 78, 35 S. Ct. 678, 59 L.Ed. 1204.

The case of Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal.App.2d 776, 194 P. 2d 148, relied upon by plaintiffs, does not aid them. In the cited case a permit had been issued and later revoked. The action challenged the right of the city to revoke the permit in a "proven field" in the absence of any non-compliance with the terms thereof. The court held that a permit having been issued, the power of a municipality to revoke it was limited, but the court, 85 Cal.App.2d on page 783, 194 P.2d on page 152, recognized the rule that the right of an owner of real property to use the same for any lawful purpose that he may see fit was subject "to such restrictions and regulations as the municipality may, in the exercise of the police power, by proper enactment, reasonably impose."; that "Confined within the proper limits of the police power such restrictions and regulations do not violate the rights of the individual."

In view of the foregoing it becomes unnecessary to discuss or decide other issues raised by defendants on this appeal.

The order and judgment from which this appeal was taken are, and each is reversed, and the cause remanded to the court below with directions to discharge the alternative writ and deny a peremptory writ.

DORAN and DRAPEAU, JJ., concur.

130 Cal.App.2d 353

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Glen C. RIDER, Defendant and Appellant.

Cr. 2541.

District Court of Appeal, Third District, California.

Jan. 24, 1955.

Hearing Denied Feb. 23, 1955.

Defendant was convicted of first degree murder. From so much of a judgment of the Superior Court, Sacramento County, Grover W. Bedeau, J., on the jury's verdict as found the degree of the crime, defendant appealed. The District Court of Appeal, Peek, J., held that the evidence warranted the jury's finding that the killing was committed in perpetration or attempt to perpetrate robbery and hence constituted first degree murder.

Judgment affirmed.

1. Criminal Law ⇐1144(13), 1159(2)

On appeal from judgment on jury's verdict of conviction, District Court of Appeal must assume, in favor of verdict, existence of every fact which jury could have reasonably deduced from evidence, and if evidence, when so viewed, is sufficient to warrant verdict, judgment must be sustained.

2. Homicide ⇐253(6)

In murder prosecution, evidence warranted jury's finding that killing was committed in perpetration or attempt to perpetrate robbery and hence constituted first degree murder. Penal Code, § 189.

3. Criminal Law ⇐772(2)

In murder prosecution, trial court did not err in giving jury instruction defining crime of robbery, instead of instruction on negligent homicide, in view of evidence that killing was committed in perpetration or attempt to perpetrate robbery. Penal Code, § 189.

Milton L. Baldwin, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Gail A. Strader, Deputy Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal from only that portion of the judgment finding the degree of the crime to have been murder of the first degree.

Defendant was charged by way of indictment with the crime of murder. He was arraigned and entered a plea of not guilty of the crime charged. Thereafter he was rearraigned and entered an additional plea of not guilty by reason of insanity which latter plea was subsequently withdrawn. The matter proceeded to trial by the court sitting with a jury which returned a verdict of guilty of murder in the first degree and fixed the punishment at life imprisonment. Appellant's sole contention is that the evidence viewed as a whole is insufficient to sustain the judgment of first degree murder.

In view of the nature of defendant's contention, it becomes necessary to discuss in detail only that portion of the evidence relating to the facts and circumstances relied upon by the prosecution to establish that the murder was committed in the perpetration of a robbery. Present counsel for defendant did not represent him at the trial but was appointed for the purpose of this appeal. Although he has ably and with obvious diligence discussed the evidence at length, such a discussion would more properly be directed to a jury than to a reviewing court.

[1] This court is, at the outset, confronted with the first rule of review—that we must " 'assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence' ", People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780, and if the evidence, when viewed by such rule, proves sufficient, it necessarily follows that the judgment must be sustained.

[2] The record shows that defendant was badly in need of money. On the morning of December 1, 1953, he pawned his watch for $3 and obtained some gasoline on credit. Shortly after noon on that day, he went to an auto wrecking establishment in North Sacramento and there borrowed a hack saw with which he sawed off the

barrels of a shotgun. He testified this was to remove a dent in the barrels; however, he sawed them off more than eight inches from the point of damage, thereby unnecessarily shortening the barrels. Thereafter he drove to a point near Sacramento where he fired the gun several times to see if it was functioning properly.

Just prior to December 1, 1953, defendant had been contacted on numerous occasions by a Mr. Walton who demanded that he make good that day on several checks which had been cashed by Mr. Walton, and which had been returned because of insufficient funds. Walton had informed defendant that unless he complied with such demands, he (Walton) was going to the District Attorney. At approximately 1:30 p. m. that day defendant telephoned Mr. Walton and told him that he would "pick those checks up" that evening and asked that he withhold such action.

About 2:30 p. m. defendant drove to decedent's grocery store, parked his car parallel to the roadway, left the motor running, left the door on the driver's side ajar, and went into the grocery store carrying the sawed-off shotgun. When defendant first entered the store Mr. Hall was busy waiting on a customer, a Mr. Pearce. Defendant approached another customer, a Mr. Mobley, and unsuccessfully endeavored to sell the shotgun to him. A third customer, aware of these facts, made a note of the license number of defendant's automobile. There were no witnesses to the actual firing of the shotgun. The witness Mobley, however, upon hearing the shot turned quickly and observed defendant taking the gun down from his shoulder. The shot caused Hall's death almost immediately. Defendant then hurried from the store, jumped into his car and drove off. Upon leaving the store he brushed past Mrs. Hall, who also had been attracted by the report of the gun, and attempted to conceal his face with his coat.

Defendant was apprehended about midnight at the home of a friend. He first denied any connection with the slaying; however, in a later confession he admitted the slaying but contended that he was temporarily insane. Subsequent to the killing Mrs. Hall discovered that $177.06 in cash was missing from a box kept on a shelf under the cash register. Although the defendant when testifying in his own behalf denied any attempt to rob and stated the gun was fired by accident, such testimony only created a conflict in the evidence which was for the jury to resolve.

The evidence as to the element of robbery was circumstantial; nevertheless it was such that the jury could have reasonably inferred that the murder occurred during an attempt to commit robbery; that defendant, motivated by a need for money, had sawed off the barrels to better conceal the gun; that he then went to Hall's grocery store with the intent to get the needed funds by one means or another; that, being unable to sell the shotgun, he used the only other alternative; and, that he then fled in his car. His attempt to conceal his face, his attempt to hide the murder weapon, his reticence in giving himself up to the Sheriff's officers and his attempt to dispose of the gun all indicated a consciousness of guilt.

In view of the evidence summarized and the reasonable inferences which it could draw therefrom, the jury could properly find the killing to have been "committed in the perpetration or attempt to perpetrate * * * robbery" and hence to have been "murder of the first degree." Penal Code, § 189.

[3] Defendant, incidentally, but in support of his main contention, argues that the trial court erred in giving an instruction defining the crime of robbery. Rather, he says, the trial court should have given an instruction on negligent homicide. As previously noted, in view of the evidence as summarized herein, the propriety of the instruction as given by the court cannot be challenged.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

130 Cal.App.2d 488

Louise NORTHON, Plaintiff and Appellant,

v.

John R. SCHULTZ and LaVerne Schultz, Defendants and Respondents.

Civ. 16143.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1955.

Hearing Denied March 22, 1955.

Action for injuries to plaintiff as the result of being knocked down by defendants' dog while plaintiff was a visitor in defendants' home. From a judgment of nonsuit by the Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., plaintiff appealed. The District Court of Appeal, Dooling, J., held that the evidence was sufficient to take to the jury the question of defendants' knowledge of the dog's dangerous habit of jumping on people.

Judgment reversed.

1. Animals ⇐70

The keeper of a dog known by him to possess traits which may make it a source of danger to other persons is absolutely liable for injuries to another by the dog as result of such traits.

2. Animals ⇐74(2)

In action for injuries to woman knocked down by defendants' dog while she was visiting in defendants' home, allegations of complaint that defendants, for a long time before date of accident, knowingly, intentionally and negligently caused and allowed dog to jump on various guests and invitees, were sufficient to state cause of action on theory of defendants' absolute liability because of their knowledge of such habit of dog, though framed in language of negligence.

3. Appeal and Error ⇐927(3)

On appeal from judgment of nonsuit, defendants' testimony must be construed most favorably for plaintiff.

4. Animals ⇐74(8)

In action for injuries to woman knocked down by defendants' dog while she was visiting in defendants' home, evidence was sufficient to take to jury question of defendants' knowledge of dog's dangerous habit of jumping on people.

5. Animals ⇐68

Owners of dog, causing injury to visitor in their home by jumping on her, cannot avoid absolute liability therefor on ground that injured woman, as owners' social guest, was mere licensee.

6. Negligence ⇐32(1)

A landowner owes licensee duty not to injure him by active conduct.

Belli, Ashe & Pinney, Melvin M. Belli, Clifford Nelle, Harriet Ross, San Francisco, for appellant.

Alexander, Bacon & Mundhenk, San Francisco, for respondents.

DOOLING, Justice.

Appellant was seriously injured when she was knocked down by a dog belonging to respondents while a visitor in their home. She appeals from a judgment of nonsuit.

Appellant, who is the sister of respondent John R. Schultz, had gone to visit in his home on January 1, 1951. On January 2 she was coming out of the bedroom to go to the bathroom. Respondent Mrs. Schultz opened the door leading to the basement and the dog, which had been in the basement, dashed into the living quarters and ran into the back of appellant's legs throwing her violently to the floor. Appellant was unaware of the presence of the dog until it ran against her. The dog was a cocker spaniel about eight months old.

[1] The keeper of a dog who has knowledge that it possesses traits which may make it a source of danger to other persons is subject to an absolute liability to another who is injured by the dog as a result of such traits. Hicks v. Sullivan, 122 Cal.App. 635, 638, 10 P.2d 516; Restatement Torts, sec. 509.

[2] Respondents raise the objection that the complaint proceeds on the theory of negligence and not of absolute liability. The complaint is framed in the language of negligence but we are satisfied that its allegations are sufficient to state a cause of action on the theory of absolute liability. The

elements needed to be pleaded and proved are knowledge of a trait in a dog dangerous to the safety of others and injury to another as a result of such trait. The complaint alleges that for a long time prior to January 2, 1951 "defendants and each of them knowingly and intentionally did carelessly and negligently cause and allow said dog * * * on occasion, to jump upon the persons of various guests and invitees * * *." If respondents did this they had knowledge of the habit of their dog of jumping upon others.

[3, 4] The proof of scienter came entirely from the testimony of respondent Mrs. Schultz. On an appeal from a nonsuit this testimony must be construed most favorably for plaintiff. Mrs. Schultz at the trial tried to minimize the habit of their dog of jumping upon persons, as a harmless playfulness. However portions of her deposition taken before the trial might well have been given another construction by the jury. She testified in part: "If there was no one around there * * * he was all right, but when he entered the house or came upstairs there if anybody was around, he was a very high spirited animal * * * He would run and jump on people. * * * He would jump on people when they would come in, if he was upstairs * * * we didn't like him jumping on people. * * *"

Appellant testified that after her injury her sister-in-law said that was why they kept him in the basement and Mrs. Schultz testified: "We keep him in the basement as much as possible."

Mrs. Schultz testified as to the manner of injury: "the dog bounded up the stairs and came through the door and went around through the dining room and hit her as she came out of the bedroom, behind * * * From behind, on the back of her legs. * * *"

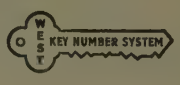
We are satisfied that the evidence was sufficient to go to the jury. An excitable dog in the habit of jumping on people, which is kept in the basement as much as possible for that reason, dashed against the legs of appellant at the first opportunity. From these facts if the jury concluded that the defendants were liable we cannot say that the evidence would not reasonably support that conclusion.

Respondents rely strongly on Hagen v. Laursen, 121 Cal.App.2d 379, 263 P.2d 489. The case is distinguishable. There two dogs were playing on the lawn in full sight of the plaintiff and one of them in his play with the other struck against her. Here the dog, which was known to have the habit of jumping on people, and which was not playing with another dog, dashed against plaintiff from behind without her knowledge of his presence.

[5, 6] Respondents' argument that as a social guest appellant was a mere licensee cannot avail them. Since the decision of Oettinger v. Stewart, 24 Cal.2d 133, 138, 148 P.2d 19, 156 A.L.R. 1221, it is settled that a landowner owes to a licensee the duty of not injuring him by "active conduct."

Judgment reversed.

NOURSE, P. J., and KAUFMAN, J., concur.



130 Cal.App.2d 347

William H. HERSCHFELT, Sr., Plaintiff and Respondent,

v.

KNOWLES–RAYMOND GRANITE COMPANY, Inc., a corporation, Arthur J. Barrett, Jr., Individually, Oscar F. Person, Individually, Nils H. Wik, Individually, and Person and Wik, a co-partnership, Defendants and Appellants.

Civ. 8476.

District Court of Appeal, Third District, California.

Jan. 24, 1955.

Action in Madera County, against corporate defendant and others to quiet title to certain shares of stock and to a promissory note. The Superior Court, Madera County, Stanley Murray, J., denied defendants' mo-

tion for a change of venue, and plaintiff appealed. The District Court of Appeal, Peek, J., held that the rule whereby the fiction that a corporation has its legal domicile at the place designated in its articles should be disregarded when it results in absurdity, was not applicable merely because the assets of the corporation were allegedly located in Madera County, where the principal place of business had been in fact changed from Madera County to San Mateo County.

Reversed.

1. Corporations ⇐503(3)

In action against corporate defendant and others, on defendants' motion for change of venue, rule whereby fiction that corporation has its legal domicile at place designated in its articles will be disregarded when it results in absurdity was not applicable merely because corporation's assets were allegedly located in the county of suit, where principal place of business had in fact been changed to another county.

2. Corporations ⇐610(1)

Statutory provisions for filing with Secretary of State a certificate of election to dissolve corporation or certificate evidencing revocation of such election were enacted for convenience of Secretary of State and the public, and for protection of directors and trustees. Corporations Code, §§ 4600, 4603, 4606.

3. Corporations ⇐610(1)

Strict compliance with statutory provisions for filing with Secretary of State certificate of election to dissolve corporation or certificate evidencing revocation of such election is unnecessary to validity of such election or revocation, and this is particularly true in absence of any showing of injury by failure so to comply. Corporations Code, §§ 4600, 4603, 4606.

4. Parties ⇐73

Under statute authorizing use of fictitious name in pleading for defendant whose name is unknown, plaintiff's ignorance of true name must be real and not feigned, i. e., must not be ignorance such as might be removed by some inquiry or resort to information easily accessible, and fictitious defendant must be necessary or proper party in mind of plaintiff at time of filing of complaint. West's Ann.Code Civ.Proc. § 474.

5. Venue ⇐41

Where plaintiff was not genuinely ignorant of true names of defendants whom he designated fictitiously, and did not consider that they were proper or necessary parties, he had not met requirements of statute permitting fictitious designation of defendants whose names are unknown and could not successfully oppose motion for change of venue on ground that such fictitiously named defendants were residents of the county wherein he had brought suit. West's Ann.Code Civ.Proc. § 474.

Dudley Harkleroad, San Francisco, for appellants.

Coffee & Wolfe, Madera, for respondent.

PEEK, Justice.

This is an appeal from an order denying defendants' motion for a change of venue.

By the first cause of his complaint, plaintiff sought to quiet title against defendants as to certain shares of stock in the defendant Knowles-Raymond Granite Company, Inc., which shares were previously issued to plaintiff and thereafter placed in escrow with the defendant Barrett. By the second cause of action, plaintiff sought to quiet title against all defendants to a promissory note alleged to have been executed by plaintiff and "made payable to A. C. Shaw and Harriet D. Shaw". The principal place of business of the corporate defendant was alleged to be in Madera County. The complaint further contained the usual allegations concerning fictitious defendants. On January 28, 1953, defendants filed their demurrer to the complaint, and on the same day filed their notice of motion for a change in the place of trial. In their motion it was alleged that all of the named defendants except Barrett were residents of San Mateo County and that he was a resident of the City and County of San Francisco. Prior to the hearing on said motion, Barrett filed his consent to having the matter heard in San Mateo County.

It is undisputed that the residences of the originally named individual and co-partnership defendants are in San Mateo County. The affidavits of the parties filed in conjunction with the motion for change of venue indicate that prior to November, 1952, the principal place of business of defendant Knowles-Raymond Granite Company, Inc., was in the County of Madera. On November 11, 1952, at a meeting duly called, a majority of the shareholders of said corporation adopted a resolution ordering its dissolution; however, no certificate of intention so to do was ever filed with the Secretary of State. On November 15, 1952, a majority of the shareholders gave their written consent to revocation of election to dissolve. On November 24 a certificate of amendment of the Articles of Incorporation, changing the principal place of business to San Mateo County, was filed with the Secretary of State. Subsequently, and on November 27 and December 5, 1952, certified copies of said Articles of Incorporation were filed in Madera County and San Mateo County, respectively.

It further appears that plaintiff caused summons to be served on William H. Herschfelt, Jr., as "Doe I" on January 28, 1953, and on Theodore R. Carlson as "Roe I" on January 31, 1953. Plaintiff also alleged service on Mrs. Harriet D. Shaw, "served as Doe II", but the record fails to disclose any other facts in regard thereto. By affidavit defendant Barrett who is the secretary of the defendant corporation, points out that William H. Herschfelt, Jr., is the son of plaintiff and one of the co-makers of the promissory note sued upon; that Theodore R. Carlson was a business associate of plaintiff and one of the co-makers of the note; that Mrs. Harriet D. Shaw is one of the payees of the note; and that no further steps, by way of substitution or otherwise, have been taken by plaintiff to make these three parties so served defendants in the action.

The motion was submitted, and on May 8, 1953, the order denying it was filed.

It is undisputed that the residences of the originally named defendants were in San Mateo County. Respondent, however, contends that the trial court properly denied defendants' motion for two reasons. First because from the facts it conclusively appears that all of the corporation's property and assets were located in, and all of its business was conducted from Madera County; that the revocation by the shareholders of the previous resolution of dissolution was without authority; and, that the attempted change in its principal place of business was a mere paper transaction. Secondly, he contends that by virtue of the service on his son, Carlson and Mrs. Shaw there were defendants who were residents of Madera County.

We find no merit in either of respondent's contentions. The facts respecting the action taken by the shareholders of the corporation are not in conflict. There can be no question but that under the provisions of section 4600 of the Corporations Code, shareholders representing 50 per cent or more of the voting power of the corporation may elect to dissolve. Likewise, there can be no question but that under the terms of section 4606 of that code a representation of no less than a majority of the voting power may rescind the resolution of dissolution. Plaintiff's affidavits in no way point to any irregularity in the two steps so taken other than his unsupported statement that such action, as well as the subsequent action changing the place of business, was without authority.

[1] We find nothing in the one case cited by respondent, Partch v. Adams, 55 Cal. App.2d 1, 130 P.2d 244, which supports his contention. The facts in the two cases are entirely different. In the Partch case the court found that the corporation did not maintain an office in Sacramento County which was the county designated in its articles as its principal place of business, and that the office from which it conducted all of its business was located in another county. From such facts the court concluded that for the purposes of venue and jurisdiction, the corporation was present in and had its residence in the county where it so conducted its affairs, and such conclusion merely followed well-established law. In the present case, however, it cannot be denied that the principal place of business of the corporation was changed from Madera

County to San Mateo County. The mere allegations in plaintiff's affidavit in opposition to defendants' motion that all of the properties and assets of the corporation are located in Madera County does not bring the case within the rule noted in the Partch case. The bare assertion that the change was solely for the purpose of avoiding jurisdiction in Madera County and to cast an unreasonable burden upon plaintiff is likewise inadequate.

[2, 3] Furthermore the failure of the defendant corporation herein to file either the certificate of election to dissolve or the certificate evidencing revocation thereof as required by sections 4603 and 4606 of the Corporations Code could in no way change the result. Such provisions for filing were enacted for the convenience of the Secretary of State and the public, and for the protection of the directors and trustees, but strict compliance therewith is not necessary. Particularly is this true in the absence of any showing of injury by a failure to so comply. Bank of Alameda County v. McColgan, 69 Cal.App.2d 464, 159 P.2d 31.

Plaintiff's second argument in support of the order of the trial court is that all of the fictitious defendants were residents of Madera County, and that they not only were proper parties but were necessary parties as well, hence the trial court properly denied defendants' motion.

With such contention we cannot agree. Even assuming, but definitely not deciding, that plaintiff had fully complied with the rule so aptly set forth in Bachman v. Cathry, 113 Cal. 498, 45 P. 814, the case must nevertheless be reversed for the further reason that plaintiff has failed to bring himself within the provisions of section 474 of the Code of Civil Procedure. The pertinent portion of that section provides that:

"When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly * * * ."

[4] In Mercantile Trust Co. of San Francisco v. Stockton, etc., Co., 44 Cal.App. 558, 560, 186 P. 1049, it was held that the purpose of this section is to enable a plaintiff who has in mind a person he deems a proper or necessary party defendant, but of whose true name he is ignorant, to bring suit alleging the fact of his ignorance of the true name of the party, designating him by any name, and that when his true name is ascertained to amend his pleading accordingly. In other words, plaintiff's ignorance of the true name must be real and not feigned. It must not be willful ignorance such as might be removed by some inquiry or resort to information easily accessible, Rosencrantz v. Rogers, 40 Cal. 489, 491; and, secondly, the fictitious defendant must have been a necessary or proper party in the mind of the plaintiff at the time his complaint was filed. Mercantile Trust Co. of San Francisco v. Stockton, etc., Co., supra.

[5] In the present proceeding plaintiff alleged in his complaint that he was ignorant of the true names of the fictitiously named defendants, and therefore sued them under such fictitious names and prayed that when their true names were ascertained he would be allowed to so amend his complaint. In the second cause of action of his complaint he alleged the existence of a note in a specific amount, executed by himself and made payable to A. C. and Harriet P. Shaw; however, it appears from the affidavit in support of the motion, and it is not denied by plaintiff, that the note in question was signed by himself, his son, William H. Herschfelt, Jr., and a business associate, Theodore R. Carlson, as co-makers. It also appears from the affidavit of plaintiff's counsel in opposition to the motion that "the names of these individuals [Herschfelt, Jr., and Shaw] were known but that it was not known to the plaintiff at the time of filing the complaint; that it was necessary to make them parties to the action * * * "

Thus it is quite evident that plaintiff has met neither of the two requirements of the said section; that his ignorance of the true names of said persons was real and not feigned or was something that could have been removed by inquiry or resort to in-

formation easily accessible, and secondly, that he had them in mind at the time of filing his complaint as "a person he deems a proper or necessary party." Obviously under the circumstances disclosed, he could not have been ignorant of the true names of his son and Carlson, co-makers with him on the note, and by the very express averment in counsel's affidavit, he did not consider that they were proper or necessary parties.

The order is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



130 Cal.App.2d 321

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jerry POPE, Defendant and Appellant.

Cr. 1007.

District Court of Appeal, Fourth District, California.

Jan. 21, 1955.

Hearing Denied Feb. 16, 1955.

Prosecution for murder. The Superior Court, San Diego County, Joe L. Schell, J., entered judgment of conviction. Accused appealed from judgment and order denying motion for new trial. The District Court of Appeal, Barnard, P. J., held that where husband and wife had quarreled most of day, husband came came home and continued quarrel, and then took pistol and killed wife, evidence was sufficient to support verdict of conviction of murder in the first degree.

Judgment and order affirmed.

1. Homicide ⇐253(1)

Evidence that husband and wife had quarreled most of day, husband came home and continued quarrel, and then took pistol and killed wife, was sufficient to support verdict of conviction of murder in the first degree.

2. Homicide ⇐269

In prosecution of husband for murder of wife, whether or not husband acted without malice during sudden quarrel and in the heat of passion, and whether or not evidence disclosed premeditation, were factual questions for jury.

3. Homicide ⇐286(1, 2)

In prosecution for murder, court's statement that thoughts may follow each other with great rapidity, and cold, calculated judgment and decision may be arrived at quickly contained in instruction on the subject of malice and intent was not erroneous.

4. Homicide ⇐338(1)

In prosecution of husband for murder of wife, admission of evidence of prior quarrel between husband and wife, was not prejudicial error, as such matter was material to the question of intent and motive.

5. Witnesses ⇐277(5)

In prosecution of husband for murder of wife, allowing district attorney to cross-examine husband as to whether he was able to satisfy his wife's sexual urges was not error, as such matters were material on issues of intent and motive.

6. Criminal Law ⇐728(2)

In prosecution of husband for murder of wife, permitting district attorney to comment on the meaning of malice and other terms involved in charge to jury was not error, in absence of objection.

Alfred J. Hennessy, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with murder in that on January 24, 1954, he wilfully, unlawfully, feloniously and with malice aforethought, killed and murdered Helen Pixley Pope. A jury found him

guilty of murder in the first degree, fixing his punishment at life imprisonment. He has appealed from the judgment and from an order denying his motion for a new trial.

It is first contended that the evidence was insufficient to support a verdict of murder in the first degree, or of any unlawful homicide other than manslaughter.

The defendant married Helen Pixley in Tijuana, Mexico on July 27, 1953. Shortly after the marriage he claims to have discovered that she did not have a final decree of divorce from her former husband, Pixley, and that she had lived for some months with a sailor named Zobel. She corresponded regularly with Zobel, who was at sea, and refused the defendant's request to advise Zobel that she was married. He testified that he left her twice during the marriage because of her conduct with other men, and that they then made up and he went back with her. The second of these occasions was on September 23, 1953, when she had gone out with a man named "Bob" and returned about 3:00 A.M. She told him that it was none of his business where she had been, and he beat her severely. Two nights later she went to where he was staying to take him some of his clothes. At that time, in the presence of a witness, he struck her and told her he was going to kill her one of these days if he had to go to the gas chamber for it. Sometime in October he said to another witness "Don't you think I did a good job beating the 'old lady' up?" The witness replied in effect "You knew what she was" and the defendant responded that what she did before was her own business, and that if she did it again he was going to kill her and then kill himself. During December, he told another witness on several occasions that he was going to "beat the hell out of her". On January 12, he told a witness that it looked like things were going to be in a mess as Pixley and Zobel were coming back and that "If she gets out of line I'll kill her and kill myself."

On January 24, 1954, the boat on which Zobel was stationed returned to San Diego, and Zobel and his friend Schimming went ashore together about 11:15 A.M. Zobel immediately called Mrs. Pope and then met her at a "cafe". They then went to another "cafe" where Helen went inside. She came out with the defendant and they both got in the car. The defendant then asked Helen "What is the score, what are we going to do?" She replied: "I can't take any more, I'm through". The defendant then got out of the car and Helen and the two sailors drove off. They proceeded to her home, arriving there about 2:30 or 3:00 P.M. At about 3:30 P.M. the defendant had a conversation with a waitress at another "cafe", in which he told her that his wife was going to dinner with Zobel; that he wanted to go out to the house and get some of his things; and that he hoped he would not find his wife there because if he saw her he would kill her. He asked to borrow this witness' automobile but instead of allowing him to do so she asked a Mr. and Mrs. Stultz, who were present, if they would drive him out to his home and they did so.

When they reached the home the defendant went in first, and Stultz parked the car. He testified that when he and his wife entered the house the two sailors were there; that the defendant and his wife were standing near the door of their bedroom; that the defendant asked his wife to have the sailors leave; that she replied "If they leave, I leave"; that the defendant said "I am getting tired of your whoring"; that she replied "Well, I am through with you anyhow, you bastard"; that the defendant asked her if she would talk to him privately and they went into the bedroom; that they returned in about two minutes; that as they came out of the bedroom door the defendant said "You are either going to get rid of these men or I will kill all of you"; that the defendant then said: "If you leave with them I'll shoot you"; that she replied, "Shoot. You haven't got the guts, you son-of-a-bitch"; that the firing then started; and that the shots were fired in such rapid succession that the witness did not know how many shots were fired.

Schimming's testimony was to the same effect with respect to the shooting, with immaterial variations in detail. Zobel testified that when the defendant entered the house he told the witness and Schimming that he wanted them to leave; that he replied "All right, we will leave"; that as they were about to leave the defendant and his wife started arguing and went into the bedroom; that she came out and they were arguing; that he saw a gun in the defendant's hand; and that Mrs. Pope said something to the defendant and he started shooting. Mrs. Stultz testified that she went immediately to the bathroom when she entered the house, that when she came out she saw the defendant and his wife in the doorway and saw the flash of the pistol, and that she heard none of the conversation between them. Both Schimming and Zobel testified that when the defendant stopped shooting he dropped the gun and reached for a 22 rifle; that they "jumped him" and took the rifle away from him; and that Zobel called the police while Schimming held the defendant.

The gun was an automatic 22-caliber pistol. A police officer, an expert on fire arms, testified that he made tests with this gun, that "it takes 3½ pounds squeeze or weight to fire the gun"; that the gun is not fully automatic; that the trigger has to be released with every shot fired, whereupon the gun would kick out the empty shell and reload itself; that 10 or 11 bullets could be put in the gun at once; and that he did not believe he could fire nine shots in four seconds. A doctor testified that there were 14 bullet holes in the body of the deceased and that some of the bullets had made more than one hole. Nine empty shells were found on the floor of the room where the shooting occurred. A deputy sheriff testified that he arrived at the house at about 4:00 P.M. on that day; that he found a 22 automatic pistol which was empty and a 22 rifle which was loaded; that the defendant told him that he had shot her, that he did not mean to do it, and that he had started pulling the trigger and could not stop. The officer further testified that later, in the automobile, the defendant stated that he had asked the sailors to leave; that he and his wife had had some words; that he reached up and got the 22 automatic and started shooting; that his wife told him he didn't have the guts to shoot; and that he knew he was guilty and would get the gas chamber.

The defendant testified that he was taken to the house by Mr. and Mrs. Stultz; that when he opened the door Zobel was just coming out of the bedroom; that when he went into the bedroom his wife was pulling her dress on; that when he asked her not to go out with Zobel she said she was going out with him alone; that she also said she was through an called him a "bastard"; that "I reached back and got the gun" intending to scare the two sailors out of the house; that "It is rather vague to me what happened after that"; that the first thing that he could clearly remember was the gun going off in his hand; that "I knew Helen was hit"; and that the only thing he could think of was to get the rifle and kill himself.

[1, 2] The appellant argues that the evidence clearly indicates that this killing was done during a sudden quarrel and in the heat of passion; that there was no time for premeditation; and that the killing occurred as the result of provocation which would naturally arouse the passions of an ordinarily reasonable person and cause him to act rashly without reflection or deliberation. Whether or not the appellant acted without malice during a sudden quarrel and in the heat of passion, and whether or not the evidence disclosed premeditation were factual questions for the jury. The evidence, with the inferences that might reasonably be drawn therefrom, was sufficient to support the verdict rendered. The basic cause of defendant's anger was a matter of long standing and the quarrel had continued at intervals through most of that day; the applying of opprobrious epithets by each to the other was nothing new, and the threats to kill were obviously based upon other matters which had been long continued; and about fifteen minutes elapsed between the time the appellant entered the house and the time when the shooting began. It could reasonably be inferred that he had made up his mind to kill

her, and then kill himself. The facts in this case are distinguishable from those in People v. Kelley, 208 Cal. 387, 281 P. 609; People v. Holt, 25 Cal.2d 59, 153 P.2d 21, and People v. Thomas, 25 Cal.2d 880, 156 P.2d 7, which are relied upon by the appellant. It cannot be held, as a matter of law, that the required elements to establish murder in the first degree were not sufficiently established by the evidence. People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911.

[3] It is next contended that the trial judge committed reversible error in telling the jury that "Thoughts may follow each other with great rapidity and a cold, calculated judgment and decision may be arrived at quickly." This statement was a part of a long instruction which reads:

"To constitute murder of the first degree in this case, the killing must have been a willful act, accompanied by malice together with a clear and deliberate intent to take life. That intent must have been the result of deliberation and must have been formed on preexisting reflection and not under heat of passion or such other condition as to preclude deliberation. The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. Thoughts may follow each other with great rapidity and a cold, calculated judgment and decision may be arrived at quickly. However, the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides not specifically enumerated in the statutes. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decide to and commit the unlawful act causing death.

"The adjective 'deliberate' means 'formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on coolly and steadily, according to a preconceived design; given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; unhurried; characterized by reflection; dispassionate; not rash.' The word 'deliberate' is an antonym of 'hasty, impetuous, rash, impulsive.'

"The verb 'premeditate' means 'to think on, and revolve in the mind beforehand; to contrive and design previously.'

"Thus to find the defendant guilty of murder in the first degree, you must be satisfied beyond a reasonable doubt and to a moral certainty that the unlawful killing was accompanied with a deliberate and clear intention to take life. The intent to kill must be the result of deliberate premeditation; it must be formed upon a preexisting reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. It is necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer."

Most of that instruction, including the language complained of, is identical with the instructions quoted and approved in the case of People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911, which the court held were sufficient to satisfy the requirements of the law with respect to the matter of deliberation and premeditation. When taken in connection with the other language of the instruction the words complained of are neither erroneous nor prejudicial.

[4–6] Finally, it is contended that the court committed prejudicial error in permitting the admission of evidence with regard to the quarrel between the appellant and the deceased in September, 1953; in per-

mitting the district attorney to ask the appellant, on cross-examination, whether his wife had strong sexual urges, and whether he was able to satisfy her; and in permitting the district attorney, in his opening argument, to describe "malice and the elements of the terms willful, deliberate and premeditate to the disadvantage of appellant." No objection to these matters was made, and the first two matters were more or less material on the issues of intent and motive. In the light of the record as a whole no prejudice or reversible error appears. No attempt is made to point out anything wrong in the district attorney's comments on the meaning of malice and other terms involved in the charge, and we find neither error nor prejudice in that connection.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.



130 Cal.App.2d 476

L. E. LANTZ, Plaintiff and Respondent,

v.

Fred T. STRIBLING, Ralph E. Hopper, Frank Steffensen et al., Defendants and Appellant.

Civ. 15968.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1955.

Rehearing Denied Feb. 25, 1955.

Hearing Denied March 22, 1955.

Equitable owner's action to quiet title, to cancel deeds of trust and for other relief, brought against, inter alia, one who purchased realty from a realty company with notice of a joint venture agreement between the realty company and the equitable owner's assignor, by which agreement the realty company was to have held title for development purposes. From a judgment of Superior Court, Alameda County, Cecil Mosbacher, J., quieting title in the beneficial owner subject to payment of a certain sum to the defendant above described, an appeal was taken. The District Court of Appeal, Dooling, J., held that evidence sustained the trial court's finding that the land had been conveyed to the realty company in contemplation of the joint venture agreement.

Modified, and as modified, affirmed.

1. Joint Adventures ⇐4(1)

Rights and liabilities of joint adventurers, as between themselves, are governed by the same principles which apply to a partnership.

2. Partnership ⇐68(1)

One partner holding title to property for the partnership is a trustee for his copartners.

3. Trusts ⇐357(2)

One who takes property from a trustee in violation of trust with knowledge of the trust holds the property subject to the trust as constructive trustee. West's Ann.Civ. Code, § 2243.

4. Trusts ⇐357(2)

Where purchaser of realty from realty company had, before purchase, seen joint venture agreement whereby realty company was holding title for development purposes, purchaser became trustee for beneficial owner. West's Ann.Civ.Code, § 2243.

5. Joint Adventures ⇐1.10

Where joint venture agreement was in writing, consideration would be presumed. West's Ann.Code Civ.Proc. § 1963, subd. 39; West's Ann.Civ.Code, § 1614.

6. Joint Adventures ⇐8

In action to cancel deeds of trust, to quiet title and for other relief, evidence sustained trial court's finding that land had been conveyed to realty company in contemplation of a joint venture agreement and that the agreement was therefore supported by consideration.

7. Evidence ⇐69

In action to cancel trust deeds and to quiet title and for other relief, wherein it was claimed by a defendant that grantee of land had purchased same unconditionally and later entered into joint venture agree-

ment without consideration, and plaintiff claimed conveyance had been made in contemplation of joint venture agreement, presumption that ordinary course of business has been followed was applicable. West's Ann.Code Civ.Proc. § 1963, subds. 20, 39; West's Ann.Civ.Code, § 1614.

8. Evidence ⇐591

In action to cancel deeds of trust and to quiet title and for other relief, trial court was not precluded from finding, favorably to plaintiff, that land had been conveyed to realty company in contemplation of joint venture agreement merely because plaintiff's own witness stated conveyance had been made in satisfaction of debt owed to realty company, where other evidence sustained the court's finding. West's Ann. Code Civ.Proc. § 2049.

9. Trusts ⇐371(2)

In action to cancel deeds of trust and to quiet title and for other relief, wherein basic ground of recovery was that a defendant took property with knowledge of a trust, fraud and good faith were immaterial and complaint was not insufficient by reason of failing to allege facts which would support charge of fraud.

10. Trusts ⇐357(2)

Where transferee of property subject to trust has knowledge of trust, it is of no importance that he acted in good faith or without intention of perpetrating a wrong.

11. Appeal and Error ⇐1170(3)

In action to cancel deeds of trust, and to quiet title and for other relief, wherein decree required plaintiff to do equity by compensating the defendant for expenditures, decree would not be reversed merely because complaint had failed to contain offer to do equity. West's Ann.Const. art. 6, § 4½.

12. Appeal and Error ⇐1170(3)

Reviewing court will not reverse for an omission in complaint which is cured by evidence and judgment. West's Ann.Const. art. 6, § 4½.

13. Appeal and Error ⇐1170(3)

Alleged failure of complaint in action to cancel deeds of trust and to quiet title to realty and for other relief, to allege sufficiently the sale of portion of land by constructive trustee was not ground for reversal where subject was fully covered by evidence, findings and judgment. West's Ann. Const. art. 6, § 4½.

14. Trusts ⇐371(8)

Equitable owner was not obliged to show any interest of record in action to enforce trust against transferee who took with notice.

15. Taxation ⇐789(4)

Rule that deed to state must be proved to prove tax title has no application where under existing law no deed to state was made or required to be made to perfect tax title.

16. Taxation ⇐764(1)

Where there were five recorded maps of town or parts thereof on file but only one showed block 218 divided into twenty-six lots, tax collector's deed which made reference to "lots 1 to 26 inc. Block 218" was not invalid for want of sufficient description.

17. Taxation ⇐781

A tax deed is not limited to a conveyance of only such interest as taxpayer has in land conveyed

18. Taxation ⇐778

A title granted by tax deed, pursuant to sale of property for non-payment of taxes, conveyed not merely title of person assessed, but a new and complete title under independent grant from the state.

19. Adverse Possession ⇐110(4)

In action to cancel deeds of trust and to quiet title to realty and for other relief, trial court properly excluded evidence that a purchaser had been in actual possession of a block for over five years, where party offering evidence had not pleaded statute of limitations, and had not claimed payment of taxes during the period. West's Ann. Code Civ.Proc. § 325.

20. Trusts ⇐357(2)

Where one purchased judgment, which was lien upon lands in question, at same time he was negotiating for purchase of the lands from a trustee, with notice of the trust, court in beneficial owner's action to quiet title and for other relief was entitled to con-

clude judgment purchase was part of scheme to defeat trust.

21. Trusts ⇐357(2)

Where one purchased lands from trustee with notice of the trust and purchased judgment which was lien upon same lands, as part of scheme to defeat trust, he was not entitled to purchase deeds of trust upon same lands to protect the judgment lien.

22. Election of Remedies ⇐3(4)

Where transferee of lots, who took with notice of the trust, sold one lot, beneficial owner had election to follow trust property or to hold first transferee as trustee for proceeds of the sale, but he could not pursue both remedies.

23. Trusts ⇐374

Where one purchased property from trustee with notice of the trust, he was not entitled, in beneficiary's action to quiet title and for other relief, to be compensated for price he paid trustee, where no part of price was paid before notice of the trust.

24. Trusts ⇐374

Where one purchased property from trustee with notice of trust, and then purchased outstanding deeds of trust against same property, his attempt to foreclose deeds of trust was violation of constructive trust imposed upon him as purchaser with notice of beneficial owner's rights and he was not entitled to reimbursement for expenditures incurred in attempted foreclosure, upon quieting of title in beneficial owner.

25. Trusts ⇐375(1)

Where one purchased real property from trustee with notice of trust and, as part of scheme to defeat trust, purchased judgment which ran against various defendants and was lien upon lands in question as well as on lands of other defendants, trial court erred, in beneficial owner's action to quiet title and for other relief, in ordering judgment transferred to beneficial owner but should have extinguished judgment lien upon the property in question.

David D. Oliphant, Jr., Oakland, for appellant, and Fred T. Stribling, Oakland, in pro. per.

Ralph E. Hopper, Oakland, for appellant Frank Steffensen.

Ralph E. Hopper, Oakland, in pro. per.

John V. Copren, San Francisco, for respondent.

DOOLING, Justice.

This is an appeal from a judgment quieting title to a large tract of undeveloped land in the town of Newark in favor of plaintiff-respondent Lantz and naming defendant-appellant Steffensen as trustee of the real property for the benefit of Lantz pending a payment of a certain sum of money by the latter to the former.

California Land and Livestock Company (hereinafter called Calif. Land) a corporation, executed and delivered to Riviera Realty Company (hereinafter called Riviera) a corporation, a deed dated October 26, 1949 and recorded on December 7, 1949 which conveyed certain land located in the town of Newark.

Subsequent to the conveyance to Riviera, a joint venture agreement was entered into between it and Calif. Land on January 26, 1950 and amended in certain particulars on February 21, 1950. The agreement was signed by Wilson and Constance Barnett for Calif. Land and by P. E. and F. O. Beutke for Riviera. It provided that Riviera would hold the land conveyed and would carry out a building program on it with the view to selling the lots for the best possible price. Riviera was given the power to negotiate for and obtain loans, to execute deeds of trust and promissory notes and to use the money so obtained to construct buildings and for other necessary expenses. All expenses incurred including building expenses, taxes and liens would be deducted from the sales price and the net amount remaining was to be divided equally. Riviera was given authority to sell the lots unimproved also, but for not less than a price of $200. This sum, less prorations of liens, taxes, etc., would go to Calif. Land and the excess above $200 would be divided equally between the parties. The agreement was amended on February 6 to read that the minimum sales price for each lot was to be $300 instead of $200. The original agreement also stated

that it was binding "upon the successors and assigns of the parties hereto", and that it was to terminate in five years unless there were still outstanding notes signed by Calif. Land. In such event the agreement was to continue until all notes were paid or Riviera absolved of liability. At the expiration of the agreement, all remaining properties were to be conveyed back to Calif. Land by Riviera.

Later on February 26, 1951 Calif. Land assigned its interest in the joint venture agreement to L. E. Lantz, the plaintiff and respondent in the action at bar.

By a deed recorded June 28, 1951, Riviera conveyed its interest in the land to Frank Steffensen for a consideration of $1,800. This was composed of $1,500 in cash and a lot valued at $300. Steffensen testified that he knew of and saw the joint venture agreement before the land was deeded to him by Riviera.

In September 1946, Central City Construction Company, a corporation, that owned the land prior to Calif. Land, executed a deed of trust on blocks 162 and 163 to Bancroft & Gove, Inc. as security for the sum of $1,600. In July 1947 Central City executed another deed of trust in favor of Bancroft & Gove, Inc. on blocks 150–155 inclusive, lots 14–20 of block 160 and blocks 217 and 218 and lots 21–24 in block 3 as security for a loan of $5,500 by Bancroft & Gove.

On December 19, 1949, in the Municipal Court in San Francisco, George Workman obtained a judgment against Calif. Land and others for $1,399.88 and $29.50 costs. The judgment became a lien on the lands described in the deed of trust.

Workman assigned this judgment to Steffensen on May 4, 1951 in consideration of payment of $1,330.50.

On September 15, 1951 Steffensen acting through his attorney Ralph E. Hopper bought both Bancroft & Gove notes and deeds of trust. He paid $9,716.29 for them and they were assigned to Hopper. The reason for this was to prevent a merger of the lien of the deeds of trust and Steffensen's title received from Riviera.

Simultaneously with the acquisition of the deeds of trust Steffensen consummated a sale of blocks 217 and 218 to Food Machinery Corporation. The sale was made subject to an agreement that Steffensen would prosecute to successful conclusion a quiet title action in the name of Food Machinery. This action was brought and the court rendered a decree in favor of the plaintiff, Food Machinery Corporation.

The two deeds of trust evidently were due on August 23, 1947 and January 18, 1948, and at the time Steffensen purchased them no money had been paid either on the principal or as interest.

Fred T. Stribling, as a substitute trustee under the above deeds of trust, caused to be recorded notices of default of the two deeds of trust and on July 4, 1952 caused to be published a notice of trustee's sale of the properties securing the notes. Before the noticed sale plaintiff filed his complaint herein "to cancel deeds of trust and promissory notes and to quiet title, and for restraining order and injunction."

The trial court decreed that Steffensen holds all the blocks with the exception of 217 and 218 in trust for Lantz subject to the terms and conditions of the joint venture agreement. It ordered further that Lantz pay Steffensen the sum of $8,248.67 less the costs of the suit within 90 days from the date of the judgment and that Steffensen within 10 days after receipt of the money assign to Lantz the two promissory notes and deeds of trust securing them and the judgment in the case of Workman v. Calif. Land and convey by deed all his right, title and interest to all the property involved excepting blocks 217 and 218. The court found that Lantz had acquired no interest in lot 217 but as to lot 218 found that Calif. Land had conveyed title to that lot to Steffensen and that Lantz was entitled to an accounting of the purchase price received by Steffensen on the sale of that lot to Food Machinery Corp.

Appellant's brief is long and divided into many sub-topics which in some cases can best be considered together.

[1–4] Before considering the many points made by appellant it will simplify

the discussion to outline the basic theory of the trial court in rendering the judgment appealed from. The joint venture agreement between Calif. Land and Riviera constituted Riviera, as the joint venturer holding title to the property, a trustee for Calif. Land. "The rule is that the rights and liabilities of joint adventurers, as between themselves, are governed by the same principles which apply to a partnership", Zeibak v. Nasser, 12 Cal.2d 1, 12, 82 P.2d 375, 380; Cunningham v. de Mordaigle, 82 Cal.App.2d 620, 186 P.2d 423, and one partner holding title to property for the partnership is a trustee for his copartners, Bastjan v. Bastjan, 215 Cal. 662, 667, 12 P.2d 627. One who takes property from a trustee in violation of the trust with knowledge of the trust holds the property subject to the trust as a constructive trustee. Civ.Code, § 2243; Scott v. Symons, 191 Cal. 441, 453–454, 216 P. 604; Lucas v. Associacao Protectora, etc., Da Cal., 61 Cal.App.2d 344, 351–352, 143 P.2d 53; 2 Scott on Trusts, sec. 291, p. 1605; Restatement, Restitution, sec. 168; Id., Trusts, secs. 288–291. Since appellant testified that he had seen the joint venture agreement before he purchased the property the above stated rule is applicable to this transaction.

[5–7] Appellant's first argument is that the joint venture agreement was not supported by any consideration. He points out that the land was conveyed to Riviera before the joint venture agreement was entered into and that Calif. Land was bound to do nothing by the joint venture agreement, all of its obligations resting on Riviera. The trial court found that the land was conveyed to Riviera in contemplation of the joint venture agreement. Appellant concedes that if this finding is supported by the evidence there would be a good consideration. He argues however that the joint venture agreement on its face shows that this was not true. The writing itself imports a consideration, Code Civ.Proc. § 1963, subd. 39; Civ.Code, § 1614, and the joint venture agreement recites the prior delivery of the deed by Calif. Land to Riviera and follows this recital with the statement: "Now, therefore, it is agreed by and between the parties hereto as follows * * *" Even without the disputable presumption of consideration the court could reasonably draw the inference from this recital that the deed was delivered to Riviera in contemplation of the joint venture agreement. There is another disputable presumption "That the ordinary course of business has been followed", Code Civ.Proc., § 1963, subd. 20, and in the ordinary course of business one corporation having purchased a piece of property from another unconditionally would not at a later date bind itself without consideration to the onerous conditions contained in this agreement with regard to the property that it had previously purchased.

[8] The witness Beutke, an officer of Riviera, was called by respondent Lantz to identify the joint venture agreement and the amendment to it. He testified that the deed from Calif. Land to Riviera was given in satisfaction of a debt of $1800 owed by Wilson, president of Calif. Land, to Riviera. Appellant argues that this testimony of plaintiff's own witness was uncontradicted and must be held as a matter of law to overcome the disputable presumption of consideration for the joint venture agreement. It is sometimes said that a party calling a witness "vouches for" or "is bound by" his testimony. This is a vestige of an early common law rule which is generally outmoded except that such a witness still cannot be impeached in certain ways. 27 Cal.Jur., Witnesses, sec. 144, pp. 170–171; Worthington v. Peoples' State Bank, 106 Cal.App. 238, 241, 288 P. 1086. The history of the rule is traced in 3 Wigmore on Evidence, 3d Ed., sec. 896, pp. 383–385. Under the express language of section 2049 Code Civ.Proc. a witness called by a party may be contradicted "by other evidence." Express testimony may be contradicted by circumstantial evidence as effectively as by direct. Gray v. Southern Pacific Co., 23 Cal.2d 632, 640–641, 145 P.2d 561; McNulty v. Copp, 91 Cal.App.2d 484, 490, 205 P.2d 438. As we have pointed out above the circumstantial evidence that the deed from Calif. Land to Riviera was made in contemplation of the joint venture agreement is strong.

Couple with this the presumption of consideration and the fact that Beutke had represented to Steffensen that the joint venture agreement was not binding on Riviera, a fact which might be weighed by the trial court in determining his motive in volunteering the testimony under discussion, and we are satisfied that the trial court was justified in accepting the circumstantial evidence, buttressed by the presumption, against Beutke's testimony. It may be added that Beutke undertook to give no explanation of why the joint venture agreement came to be executed if, as he claimed, this was done without consideration.

[9–14] Appellant attacks the sufficiency of the complaint on several grounds. 1. *That the complaint alleges fraud without supporting facts.* The basic ground of recovery was that appellant took the property with knowledge of the trust. Fraud or good faith are immaterial to such a cause of action. "Where the transferee has knowledge of the trust, it is of no importance that he acted in good faith or without intention of perpetrating a wrong." Lucas v. Associacao Protectora, etc., Da Cal., supra, 61 Cal.App.2d 344, 352, 143 P.2d 53, 57; Scott v. Symonds, supra, 191 Cal. 441, 454–455, 216 P. 604. 2. *The complaint contains no offer to do equity.* The decree requires respondent Lantz to pay appellant what the court found due him for his expenditures. By this decree respondent is in fact required to do equity. The court will not reverse for an omission in the complaint which is cured by the evidence and the judgment. Cal.Const. Art. VI, § 4½; Steffen v. Refrigeration Discount Corp., 91 Cal.App.2d 494, 500, 205 P.2d 727, and cases cited; Kohn v. Kohn, 95 Cal.App.2d 708, 716, 214 P.2d 71. The same reasoning applies to appellant's third point under this head that the allegations as to the sale of a portion of the land by appellant were insufficient. The subject was fully covered by the evidence, findings and judgment. 4. *The failure of the complaint to show that plaintiff had some interest of record is fatal.* Plaintiff did not sue as the owner of a record title but as the owner of an equitable interest as assignee of the joint venture agreement. As such equitable owner he was entitled to enforce the trust against appellant as we have heretofore pointed out.

[15–18] The court as we have stated above found that respondent Lantz was entitled to an accounting of the sale price of lot 218. Lantz traced his interest in lot 218 to a tax deed made by the tax collector of Alameda County to one Hinkson in 1921 and by mesne conveyances from Hinkson to Calif. Land. Steffensen attempted to show a separate title in himself by another conveyance. He argues that Lantz's tax title was defective: 1. *Because the tax deed only conveyed the title of the party to whom the property was assessed,* citing Dorn v. Baker, 96 Cal. 206, 31 P. 37, and Syme v. Warden, 114 Cal.App. 707, 300 P. 863. One of these cases was distinguished and the other expressly disapproved in Helvey v. Sax, 38 Cal.2d 21, 24, 237 P.2d 269, 271 where the court said: "A property tax operates in rem against the property, and a title granted by a tax deed pursuant to a valid sale of the property for nonpayment of taxes, conveys not merely the title of the person assessed, but a new and complete title under an independent grant from the state."

2. *There was a failure of proof because no deed to the State was proved.* In 1926 there were two methods by which tax sales could be made: one after sale to the State, the other direct from the tax collector without previous sale to the State. The latter method of sale was equally as valid as the former. Jacoby v. Wolff, 198 Cal. 667, 682–683, 247 P. 195. Sections 3764, 3771 and 3785b Political Code which provided for this latter type of sale were carried into the Revenue and Taxation Code as Chapter 3, Division 1, Part 6 and finally repealed in 1949. Stats.1949, p. 468. The deed from the tax collector to Hinkson is in the form provided by section 3785b Pol.C., Stats. 1913 p. 558, which described the form of deed to be given where the property was sold to a purchaser other than the State of California. Where there had been a previous sale to the State section 3898 Pol.C., Stats.1917 p. 715, provided another form of deed, with a recital of the sale to the State

and other recitals not appearing in the deed under consideration. The form of the tax collector's deed to Hinkson makes it clear that the sale was of the sort discussed in Jacoby v. Wolff, supra. Hence, there having been no deed to the State, no such deed could be proved nor was it a link in the tax title. Cases such as Litchfield v. County of Marin, 83 Cal.App.2d 730, 189 P.2d 750, holding that the deed to the State must be proved can have no application to a case where under the existing law no deed to the State was made or required.

3. The property was described in the tax collector's deed to Hinkson as: "In Washington Township, Map of the Town of Newark, Map filed of record in the office of the Recorder of Alameda County, Lots 1 to 26 inc., block 218."

The proof showed that in 1921 there were five maps of the Town of Newark or parts thereof on file in the office of the county recorder. Upon three of these maps no block 218 appeared. On two maps a block 218 is shown. On only one of the maps, filed May 6, 1878, is block 218 divided into lots and on that map block 218 was divided into 26 lots. The subsequent deeds in the chain of title conveyed block 218 as shown on the map recorded on May 6, 1878. On this showing it is futile for appellant to argue that the description in the tax collector's deed to Hinkson is uncertain or that it does not describe the same property as that described in the later deeds. "That is certain which can be made certain." Civ.Code, § 3538. There was only one map of the Town of Newark of record in the recorder's office which showed Block 218 divided into lots and that showed it divided into 26. The reference in the tax collector's deed, "Lots 1 to 26 inc. Block 218", under the circumstances could only refer to this particular map.

Since the tax title under the rule of Helvey v. Sax, supra, 38 Cal.2d 21, 237 P.2d 269, constituted "a new and complete title" and since this title was proved to have been transferred from Calif. Land to Riviera and from Riviera to appellant, subject to the joint venture agreement, the court properly required appellant to account to respondent for the proceeds of the sale of block 218. It is immaterial that appellant had received a deed of block 218 from another source to which the trial court properly found that the tax title was paramount.

[19] Appellant complains of the court's exclusion of evidence that Food Machinery Corp. had been in actual possession of block 218 for over 5 years. It is a complete answer that appellant did not plead the statute of limitations. Hall v. Chamberlain, 31 Cal.2d 673, 679, 192 P.2d 759. There could, of course, be no title in Food Machinery Corp. by adverse possession since there was no claim that it paid the taxes during this period. Section 325 Code Civ. Proc.

Appellant's argument that there was no covenant running with the land is unavailing since the recovery is based on the theory of trust.

[20, 21] The court found that while appellant purchased the Workman judgment prior to his acquisition of the real property from Riviera "negotiations for the acquisition of said real property were commenced prior to the purchase of said Workman judgment." While appellant argues that the acquisition of the Workman judgment was free of the equities of Lantz, the court was entitled to conclude that the purchase of this judgment in anticipation of the acquisition of Riviera's title which was subject to the trust in favor of Calif. Land was a part of a scheme to defeat the trust and therefore must be held to be subject to the trust. This fact disposes of the argument that as the holder of an outstanding junior lien appellant was entitled to purchase the deeds of trust to protect the judgment lien.

[22] After the sale of lot 218 to Food Machinery Corp. an action was brought to quiet its title in which Lantz was joined as a defendant. Lantz defaulted and judgment was entered quieting plaintiff's title in that action. Lantz had the election to follow the trust property or to hold appellant as trustee for the proceeds of its sale. (2 Scott on Trusts, sec. 291.1, p. 1606, sec. 291.3, p. 1609; Restatement Trusts, sec. 291(1) (a) and (b) and Comment on Subsection (1) a and d.) By his default in the quiet title action Lantz elected to ratify the sale and not to attempt to follow the property. This

election did not deprive him of his alternative right to hold appellant accountable for the proceeds of the sale. Indeed in order to hold appellant liable for the proceeds he must ratify the sale since the two remedies are alternatives and he could not have both, as that would amount to a double recovery.

[23] Appellant complains that on the accounting certain items of his expenditures were not properly allowed. The court as a condition of quieting respondent's title required him to reimburse appellant for the purchase price of the Workman judgment and the two deeds of trust, certain attorney's fees and other incidental expenses, taxes paid and interest. Appellant argues that it was error not to make an allowance to him for the consideration paid by him for the land. He cites no authority in support of this point and the law in California is to the contrary. Henry v. Phillips, 163 Cal. 135, 140–141, 124 P. 837; Glenn v. Rice, 174 Cal. 269, 275, 162 P. 1020; Davis v. Ward, 109 Cal. 186, 191, 41 P. 1010. These cases hold that where A purchases from B with notice of the equities of C, C may recover the property from B "upon the condition that the vendee (B) is reimbursed what he [has] paid before notice." Henry v. Phillips, supra, 163 Cal. at page 141, 124 P. at page 839, citing many cases. Here no part of the purchase price was paid by appellant *before notice* and he is therefore entitled to no reimbursement on that account. The reason for the rule is clear. Respondent has not received the benefit of the purchase price paid by appellant to Riviera and it would be unfair to require him to reimburse appellant for that expenditure which appellant made with notice of his equitable rights.

[24] Appellant's complaint of the refusal to allow him the costs incurred in attempting to foreclose the deeds of trust is equally unfounded. The trust estate received no benefit from these expenditures and they were made in violation of the constructive trust imposed upon appellant as a purchaser with notice of the joint venture agreement.

[25] In one particular we agree with appellant that the judgment against him went too far. Upon payment of the amount found due him the court ordered him to transfer the Workman judgment to respondent. The Workman judgment runs against other defendants and is a lien upon the property of all defendants. It is only insofar as it is a lien against the property in litigation here that respondent should be required not to assert it. The decree should be amended to provide that upon payment to appellant by respondent of the amount found due him by the court on the accounting the Workman judgment should be pro tanto satisfied and the lien of that judgment upon the property in litigation should be extinguished. Otherwise respondent would receive a windfall in the Workman judgment which he might later satisfy against other property.

Other arguments made incidentally by appellant are sufficiently answered by what has been said in this opinion.

The trial court is ordered to amend the judgment in the particular specified. Otherwise the judgment is affirmed with costs on appeal to respondent.

NOURSE, P. J., and KAUFMAN, J., concur.



130 Cal.App.2d 527

Nathan LOWENTHAL, Plaintiff and Appellant,

v.

Mary M. LOWENTHAL, Defendant and Respondent.

Civ. 20495.

District Court of Appeal, Second District, Division 1, California.

Feb. 1, 1955.

Husband's divorce action. Husband moved to vacate and set aside interlocutory decree previously granted and to dismiss action. The Superior Court, Los Angeles County, James G. Whyte, J., denied the motion, and husband appealed. The Dis-

trict Court of Appeal, Drapeau, J., held that where husband's motion, made ten months after entry of decree and opposed by wife's affidavit, was properly denied.

Order affirmed.

1. Divorce ⇐165(2)

A divorce decree valid on its face and regularly entered is subject to attack only in some manner provided by law for modification of final judgment.

2. Divorce ⇐165(4)

It is time from entry of interlocutory divorce decree, rather than the final decree, which determines time within which relief from decree must be sought.

3. Judgment ⇐336, 386(3), 403
New Trial ⇐½

Generally, a final judgment can be nullified by rendering court only (1) on motion for new trial, (2) by statutory motion, (3) by motion at any time if judgment is void, or (4) by an independent suit in equity where judgment is extrinsically void for want of jurisdiction or by reason of fraud or mistake. West's Ann.Code Civ.Proc. § 473.

4. Divorce ⇐165(4)

Where husband had obtained interlocutory divorce decree on his wife's default, his motion, which was made ten months after entry of decree, to vacate and set aside interlocutory decree and to dismiss action, and which was opposed by wife's affidavit, was properly denied.

Sylvan Y. Allen, Los Angeles, for appellant.

No appearance for respondent.

DRAPEAU, Justice.

Plaintiff, Nathan Lowenthal, brought this action for divorce. He caused his wife's default to be entered. And an interlocutory decree of divorce was entered April 10, 1953. He claimed that he was in fear of his wife; that she had threatened to "beat him to death." In the interlocutory decree she was enjoined "from harassing, molesting, or interfering with plaintiff."

But Mr. Lowenthal suffered a complete reversal of feeling. February 5, 1954, he came back into the case with a notice of motion to vacate and set aside the interlocutory decree and to dismiss.

In his affidavit in support of his motion he averred: "I have great love and affection for the defendant, and I cannot live without her." In another affidavit he claimed that he had had several acts of sexual intercourse with his wife after the interlocutory decree. Upon this averment he claimed reconciliation.

Mrs. Lowenthal filed her affidavit to the contrary. She denied Mr. Lowenthal's averment as to sexual intercourse. She said she did live in the same house in which he lived for three weeks, because she had no other place to go. And she further said that she had no use at all for him, and would never live with him again.

Mr. Lowenthal appeals from the order denying his motion.

No brief has been filed for Mrs. Lowenthal. In her affidavit she said she had to work for her living, and had no money to appear in proceedings brought to harass and annoy her.

A cursory examination of the law of divorce develops the following rules applicable to this case:

[1, 2] A decree of divorce valid on its face and regularly entered is subject to attack only in some manner provided by law for the modification of final judgments. Deyl v. Deyl, 88 Cal.App.2d 536, 199 P.2d 424; 16 Cal.Jur.2d p. 432. It is the time from the interlocutory decree rather than the final decree which determines the time within which relief from the former must be sought. Macbeth v. Macbeth, 219 Cal. 47, 25 P.2d 11.

[3] Generally a final judgment can be nullified by the court which rendered it only: (1) on motion for a new trial; (2) by motion under Section 473 of the Code of Civil Procedure; (3) by motion therefor at any time if the judgment is void on its

face; or (4) by an independent suit in equity where the judgment is regular on its face but extrinsically void for want of jurisdiction or by reason of fraud or mistake. 16 Cal.Jur.2d 224.

[4] Mr. Lowenthal's motion finds no support either in reason or authority. There is no legal ground whatever upon which it could have been granted. Indeed it would have been an abuse of discretion to have granted it.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.



130 Cal.App.2d 365

Edward John KLASSEN and Amelia Keller Klassen, Plaintiffs and Appellants,

v.

E. STEINKAMP, Inc., Defendant and Respondent.

Civ. 20556.

District Court of Appeal, Second District, Division 1, California.

Jan. 25, 1955

In action, by purchasers against vendors who had foreclosed deed of trust, wherein complaint alleged four causes of action designated by purchasers as (1) money had and received, (2) rescission of purchase, (3) damages for breach of contract, and (4) "both in promissory estoppel and the reliance theory of tort recovery". The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment adverse to purchasers, and they appealed. The Court of Appeal, White, P. J., held that evidence sustained findings that no oral representations had been made making purchasers' liability, on obligation foreclosed, contingent upon vendors' selling of property owned by purchasers.

Judgment affirmed.

1. Estoppel ⇐118
Fraud ⇐58(1)
Vendor and Purchaser ⇐44

In action by purchasers against vendors who had foreclosed deed of trust, wherein complaint alleged four causes of action designated by purchasers as (1) money had and received, (2) rescission of purchase, (3) damages for breach of contract, and (4) "both in promissory estoppel and the reliance theory of tort recovery", evidence sustained findings that no oral representations had been made making purchasers' liability, on obligation foreclosed, contingent upon vendors' selling of property owned by purchasers.

2. Appeal and Error ⇐1010(1), 1011(1)

Where finding is supported by any substantial evidence, contradicted or uncontradicted, it will not be disturbed on appeal.

Charles L. Nichols, Beverly Hills, Ivan Miller, Richard Harker, R. S. McLaughlin, Los Angeles, for appellant.

Lehman & Van Buskirk, M. Lewis Lehman, Wayne L. Van Buskirk, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal by Mr. and Mrs. Klassen, hereinafter referred to as "appellants", from a judgment against them and in favor of E. Steinkamp, Inc., a California corporation, hereinafter referred to as "respondent". The judgment of the trial court is that appellants take nothing by their action and that respondent take from them "the sum of $1,250 with interest thereon at the rate of 4% per annum from December 13, 1948", and costs.

The action was tried upon appellants' seventh amended complaint, hereafter for convenience referred to as "the complaint", and respondent's answer and counterclaim. The complaint alleges four causes of action, to-wit: (1) money had and received in the sum of $19,019; (2) rescission of purchase of real property; (3) damages for breach of contract in the sum of $34,519; and (4) "both in promissory estoppel and the reliance theory of tort recovery", as designated

by appellants. The judgment for respondent is based upon the promissory note described in the counterclaim.

Appellants contend that findings 12, 13, 14, 15 and 19 are not supported by any evidence, and that, for that reason, the judgment must be reversed.

There is no claim that findings 1 to 11, inclusive, and 16 to 18, inclusive, are not in accord with the record. A brief summary of those findings follows.

May 6, 1948, appellants and respondent entered into a written agreement for the purchase and sale of improved real property hereafter designated as "the Chantilly property" for its then reasonable value, $45,500, "to be paid $12,500.00 in cash and the balance evidenced by a note in the sum of $17,500.00, secured by a first Deed of Trust on said property and a second note in the sum of $15,500.00, payable one year from date thereof, secured by a second Deed of Trust on said property. Said agreement further provided that if Lot 2 of Tract 13077, owned by plaintiffs, was sold within a year, the sum of $15,500.00 was to be applied to the above-described second Deed of Trust on the Chantilly property, but that the sale of the Chantilly property was not contingent upon the sale of said lot."

May 14, 1948, escrow instructions, which "did not vary or change the terms or provisions of said written agreement", were executed. The escrow was completed. When appellants executed the agreement and escrow instructions, they had a net financial worth in excess of $300,000. From the close of escrow to the last day of the trial, they resided at and occupied the Chantilly property.

After the close of escrow, respondent tried to sell Lot 2 for appellants, "but was unable to sell same despite its efforts". An extension was obtained on the due date on the deed of trust note on said Lot 2. September 13, 1948, appellants executed and delivered to respondent the promissory note for $1,250, set out by respondent's counterclaim and no part of principal or interest had been paid. November 21, 1948, appellants signed a written statement that they had no claim, offset or defense to the second deed of trust note on the Chantilly property. The extension of time on the trust deed note on Lot 2 expired, and the second trust deed note on the Chantilly property came due. For a period of from eight to nine months prior to the foreclosure on October 21, 1949, of said deed of trust on Lot 2, and the foreclosure on October 14, 1949, of the second deed of trust on the Chantilly property, appellants did nothing to prevent said foreclosures or to arrange to pay the obligations in connection therewith.

There "was no joint venture of any nature whatsoever" between respondent and any of the other defendants pertaining to the purchase and sale of the Chantilly property.

Appellants urge that findings 12, 13, 14, 15 and 19 "are repugnant not only to the substantial weight of the evidence but to *all* of the evidence"; and that proper findings should be made by the appellate court under section 956a of the Code of Civil Procedure. On the other hand, respondent contends that these findings and all others are "substantially supported by all the evidence and fully in conformity therewith". Hereafter said findings are quoted in full.

"12. That it is not true that this defendant, or the other defendants herein, made any oral representations to the plaintiffs that they would sell Lot 2, that the purchase of the Chantilly property was contingent upon the sale of Lot 2, that they would sell Lot 2 before the first Deed of Trust note thereon became due or that said defendants understood that the only source from which the second Deed of Trust note on said Chantilly house could be paid were the proceeds from the sale of said Lot 2.

"13. That it is not true that the plaintiffs relied upon any statements made by this defendant, or other defendants, with respect to attempts that were to be made to sell Lot 2, and it is further not true that plaintiffs refrained from discharging the obligation on Lot 2 or the junior obligation on the Chantilly house because of any acts or promises of this defendant, or the other defendants.

"14, That it is true that said agreement of May 6, 1948, and said Escrow Instructions of May 14, 1948, represented the entire agreement between this defendant and the plaintiffs with respect to the purchase of the Chantilly house.

"15. That it is true that the foreclosures were effected on the Deed of Trust on Lot 2 and on the junior Deed of Trust on the Chantilly property solely because plaintiffs refused and failed to pay said obligations and each of them when same became due.

* * * * * *

"19. Except as hereinabove specifically found, all of the allegations of plaintiffs' complaint and plaintiffs' answer to counterclaim or cross-complaint are untrue and all of the allegations of this defendant's answer are true."

The record before us contains the testimony of appellants and their daughter, as well as that of two real estate brokers employed by respondent, respecting several conversations had prior to May 6, 1948, when the agreement in writing was signed. In said conversations appellant told respondent's agents that he had to use his equity in Lot 2 to pay for the Chantilly property. Respondent's said agents told appellants that respondent would not take the lot as a "trade-in", but they would work out a deal. Appellants' own testimony is that respondent's said agents did not guarantee to sell Lot 2, but that they did "promise to attempt to sell it". There is testimony that respondent's said agents told appellants that they might not be able to sell Lot 2 within a year and that Mr. Klassen said he "thought" it would be hard to find a buyer.

These appellants are not ignorant and inexperienced buyers who were high pressured into signing papers without an opportunity to read them. Both appellants are conversant with the English language; and Mr. Klassen was, at the time the deal was made, the owner and manager of a manufacturing business developed by him in a few years from a starting capital of $30 to a net worth in excess of $300,000, and an annual income exceeding $75,000.

Appellants' testimony is that they were given time to read the agreement and other papers, they "could have read" them; they "might have read them"; and they "must have read part of" the deposit agreement. The language of the agreement which they seek to nullify is not contained in the fine print. It was inserted in the blank space provided for special terms.

One of respondent's agents testified that appellant Klassen read the language on the deposit agreement,—"If Lot 2, Tract No. 13077, owned by Mr. Klassen is sold within a year or sooner, the proceeds in the amount of $15,500.00 will be applied to 2nd T.D. noted above, but not contingent of sale of said lot"—, and that Mr. Klassen said "It wouldn't make any difference if it wasn't sold in a year, because by that time he (Klassen) would be in a better financial condition."

[1, 2] We find no merit in appellant's contention that the evidence does not support the findings above quoted. And it is too clear to need citation of authority that, where a finding is supported by any substantial evidence, contradicted or uncontradicted, it will not be disturbed on appeal.

The conclusion at which we have arrived that the evidence supports the findings and judgment renders unnecessary a discussion of other points argued in the briefs.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



130 Cal.App.2d 517

Robert N. HARTSHORNE, a minor, by Robert B. Hartshorne, his guardian ad litem, and Robert B. Hartshorne and Helen Hartshorne, Plaintiffs and Appellants,

v.

Robert A. AVERY, Defendant and Respondent.

Civ. 20502.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1955.

Action by child by guardian ad litem and child's parents for personal injuries suffered by child when his unlighted bicycle was struck by defendant's truck. The Superior Court, Los Angeles County,

Philbrick McCoy, J., gave judgment for truck owner and denied motion for new trial. Child and parents appealed. The District Court of Appeal, Drapeau, J., held that where court instructed jury that a child is not held to same standard of conduct as an adult, and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity, and experience, court did not err in refusing to instruct that with regard to statute requiring bicycles to carry lights at night, jury was to consider the matter in the light of age, capacity and experience of the child.

Judgment affirmed.

1. Appeal and Error ⇐930(2)

In action for personal injuries suffered by child when his unlighted bicycle was struck by defendant's truck, where jury was instructed on both the issue of negligence per se and issue of minority, District Court of Appeal assumed that jury gave due consideration to both in arriving at verdict.

2. Appeal and Error ⇐1067
Trial ⇐260(1)

It is not error for court to refuse to give a requested instruction if the full charge correctly states the substance of the law applicable to the facts involved in the case, and a reversal is not warranted unless it appears probable that a different result would have resulted had the refused instructions been given.

3. Trial ⇐260(8)

In action for personal injuries suffered by child when his unlighted bicycle was struck by defendant's truck, where court instructed that a child is not held at same standard of conduct as an adult, and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience, court did not err in refusing to give instruction that in regard to statute requiring bicycles to carry lights at night, jury was to consider matter in the light of the age, capacity and experience of the child. Vehicle Code, § 622.

4. Automobiles ⇐244(7)

In action for personal injuries suffered by child when his unlighted bicycle was struck by defendant's truck, at night, evidence was sufficient to support verdict for defendant.

Hunt & McCann, Los Angeles, for appellants.

Spray, Gould & Bowers, Los Angeles, Joseph L. Spray, Hollywood, for respondent.

DRAPEAU, Justice.

This action arises out of a collision between defendant's Chevrolet pick-up truck and the minor plaintiff's bicycle.

The record on appeal is embodied in an engrossed statement in lieu of reporter's and clerk's transcripts.

The accident occurred at nine o'clock in the evening of June 10, 1952, about an hour after sunset, at the intersection of Burbank Boulevard and Avon Street, in the city of Burbank. The intersection was comparatively well lighted.

Defendant was driving westerly on the boulevard at about 20 miles per hour. Approaching Avon, he signaled for a left-hand turn. As he completed the turn and the wheels of his truck were parallel with the west curb line of Avon, his lights picked up the minor plaintiff riding on a white bicycle. He was about ten feet away. Defendant slowed to fifteen miles and proceeded two car lengths after the impact. At the time in question plaintiff, traveling easterly on the boulevard, was turning south and to his right in the intersection. There were no obstructions in the intersection and defendant's lights and brakes were in good order.

The minor plaintiff was thirteen years and eight months of age. He was accustomed to going out at least one evening a week to YMCA, church and boy scout affairs. On the night of the accident, he and a friend were riding around on bicycles. It is admitted that plaintiff's bicycle was not equipped with a light. And

that his parents had warned him not to ride a bicycle at night on the streets without a light. He was traveling at a speed of from eight to ten miles an hour easterly on the boulevard, about one foot north of the south curb thereof. He could see easterly about four blocks and had seen defendant's truck for about half a block before it suddenly turned left in front of him. Although he tried to get out of the way, the rear of his bicycle was struck by the left front of the truck. The point of impact was south of the south curb line of Burbank Boulevard, between the center line and the west curb line of Avon Street.

The minor plaintiff, by his guardian ad litem, sought recovery of damages on account of painful injuries sustained by him in the collision. His parents sued to recover medical and hospital expenses incurred by them in his behalf.

The jury brought in a verdict in favor of the defendant. Thereafter, the court denied plaintiffs' motion for a new trial.

From the judgment on the verdict, plaintiffs appeal.

The sole question presented for decision is stated by them as follows:

"Is it prejudicial error in a personal injury action involving the doctrine of negligence per se to refuse an instruction that distinguishes between the effect of traffic violations by an adult on one hand and by a minor on the other?"

The requested instruction which the court refused to give to the jury reads:

"No. 12 With respect to Vehicle Code section 622 just read to you, you are instructed that you are to consider this matter in the light of the age, capacity and experience of Robert N. (Bobby) Hartshorne and whether or not his conduct was or was not such as might have been reasonably expected from a child of like age, capacity and experience under the same or similar circumstances."

It is here urged that the jury was instructed that the minor must act with respect to statutory violations just as an adult, and that this would have been remedied by giving appellants' instruction No. 12 which points out the distinction between a minor and an adult where negligence per se is involved.

Among others, the following instructions were given:

"Section 622 of the Vehicle Code of the State of California in full force and effect at the time of this accident provides that:

"Every bicycle at the times specified in Section 618 hereof shall be equipped with a lamp emitting a white light visible under normal atmospheric conditions from a distance of 300 feet in front of such bicycle."

B.A.J.I. No. 2:

"If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others."

Instruction No. 6, given at request of appellants:

"If a party to this section violated any of the statutes just read to you, a presumption arises that he was negligent. This presumption is not a conclusive one. It may be overcome by other evidence showing that under all the circumstances surrounding the event the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence.

"In this connection you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise.

"To prove that any violation of a statute, such as those charged in this case, was excusable and justifiable, so as to overcome the presumption of negligence, the evidence must support a finding that the violation resulted from causes or things beyond the control of the person charged with the violation."

B.A.J.I. No. 147, given at request of appellants:

"A child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience. There is no precise age at which, as a matter of law, a child comes to be held accountable for his actions by the same standard as applies to an adult. It is for you to determine the mental capacity and experience of Robert N. Hartshorne, and whether his conduct was or was not such as might reasonably have been expected from a child of like age, capacity and experience, under the same or similar circumstances."

It is appellants' position that the failure to give instruction No. 12 was not cured by giving instructions Nos. 2 and 147. In support of this they quote the following language in Galbraith v. Thompson, 108 Cal.App.2d 617, 621, 239 P.2d 468, 471:

"Even if the child's action was in violation of sec. 562, Vehicle Code (pedestrian to yield right of way to vehicles when crossing outside crosswalk) the question whether this should be considered negligence per se in this child was for the jury. The rule that a child is only held to care in accordance with its age and circumstances to be judged by the jury must prevail over the rule that violation of statute is negligence per se * * *."

Hence, appellants assert that "the rule of negligence per se must yield to the greater policy of the law to protect children."

[1] The jury in the instant case were instructed on both issues, i. e., negligence per se and minority, and it must be assumed that they gave due consideration to both in bringing in their verdict.

[2] As stated by this court in Horrell v. Santa Fe Tank & Tower Co., 117 Cal. App.2d 114, 120, 254 P.2d 893, 896:

"It is not error for a court to refuse to give a requested instruction if the full charge correctly states the substance of the law applicable to the facts involved in the case (24 Cal.Jur. 806–810); and a reversal is not warranted unless it appears probable that a different result would have obtained had the refused instructions been given, 24 Cal.Jur. 861–865."

Also, as held in Lasch v. Edgar, 46 Cal. App.2d 726, 727, 116 P.2d 949.

"The trial judge in passing on a motion for new trial on the ground of an alleged erroneous instruction is controlled by Const., art. VI, § 4½, and his conclusion thereon, after an examination of the evidence, should not be disturbed on appeal except on a clear showing that his ruling was wrong."

[3, 4] Likewise here, the trial court denied appellants' motion for a new trial based on the refusal to give the requested instruction. Moreover, the judgment is supported by substantial evidence and appellants have not shown that they were prejudiced by the refusal to give said instruction.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



130 Cal.App.2d 550

Frank R. HARDY and Bettie J. Hardy, Plaintiffs and Appellants,

v.

George WHITE and Pauline S. WHITE, Defendants and Respondents.

Civ. 20403.

District Court of Appeal, Second District, Division 3, California.

Feb. 2, 1955.

Hearing Denied March 30, 1955.

Action by tenants for compensatory and punitive damages for injuries allegedly caused by defendants when they allegedly unlawfully entered into dwelling house occupied by tenants, seized possession and excluded tenants. The Superior Court, Los Angeles County, John J. Ford, J., granted

defendants' motion for change of venue to county of their residence. Tenants appealed. The District Court of Appeal, Shinn, P. J., held that where money damages was the only relief sought, and title to realty was not questioned, although action alleged elements of trespass quare clausum fregit, it was not local in nature, as judgment in action could be satisfied by payment of money, and venue could be changed to county of defendants' residence.

Order affirmed.

1. Venue ⇐21

Defendant is entitled to have an action against him tried in the county of his residence unless the proceeding comes under statutory exception. West's Ann.Code Civ. Proc. §§ 392(a)–394.

2. Venue ⇐16½

If there is a personal, or in personam, cause of action joined with one that is local in nature, the defendant is entitled to have the proceeding transferred to the county of his residence.

3. Venue ⇐5(1)

Under statute providing that an action for recovery of real property or an estate or interest therein, and for injuries to real property, shall be tried in county where real property is located action must be wholly local in nature to require that it be brought in the county of situs of the real estate. West's Ann.Code Civ.Proc. § 392(a).

4. Venue ⇐5(1)

To make an action local in nature, it is not sufficient that title to land be incidentally involved, or even necessarily entered into, if judgment can be satisfied by payment of money. West's Ann.Code Civ. Proc. § 392(a).

5. Venue ⇐46

In action by tenants for compensatory and punitive damages arising when defendants allegedly unlawfully entered into dwelling house occupied by tenants and excluded them from premises, where money damages was only relief sought, and title to realty was not questioned, defendants were entitled to change of venue to county of their residence. West's Ann.Code Civ. Proc. § 392(a).

Jacob Chaitkin, Neil J. Clarke and Douglas J. Stapel, Pasadena, for appellants.

Burum & Young, Bakersfield, for respondents.

SHINN, Presiding Justice.

Plaintiffs Frank R. Hardy and Bettie J. Hardy appeal from an order of the Superior Court of Los Angeles County granting the defendants' motion for change of venue to Kern County. Defendants and respondents George White and Pauline S. White assert that under the ambit of section 395 of the Code of Civil Procedure they have the right to transfer this action to the county of their residence.

In their complaint plaintiffs alleged that they were tenants in possession of real property "* * * and dwelling house and garage thereon" in Los Angeles County, that they "* * * resided on said premises as their home with their two minor children aged six and seven years. * * *" They further alleged that defendants "* * * unlawfully entered into said dwelling house * * * seized possession * * * placed their own locks, hasps and padlocks thereon, and excluded and are excluding the plaintiffs and their children from further possession of said property." It was alleged that the defendants acted maliciously and were guilty of wanton "disregard of the rights and feelings of plaintiffs"; that plaintiffs have suffered mental, physical and emotional distress, and that plaintiff's psoriasis was aggravated by the emotional shock. Plaintiffs demanded compensatory and punitive damage. They did not ask for restoration of the property.

The appellants contend that their complaint sets forth a single cause of action, viz., trespass *quare clausum fregit,* and that under section 392(a), Code of Civil Procedure, which provides that an action "For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property;"

is to be tried in the county where the real property is located. Their contention is that this action is an injury to real property within this section, and as such is local in character.

The contention of the respondents is that this is a transitory action under section 395 (1) of the Code of Civil Procedure which provides that in "all other cases" the defendant is entitled to have the proceeding transferred to the county of his residence. "[A]ll other cases" refers to those not enumerated under sections 392, 393 or 394. This question must be determined from an inspection of the allegations of the complaint and the nature of the relief sought, the issue on motion for change of venue being whether the complaint sets forth a theory of action supporting the chosen venue. Work v. Associated Almond Growers, 76 Cal.App. 708, 245 P. 790.

In examining the allegations of the complaint, it is seen that money damages is the only relief sought. The title to the real property is not questioned, nor is there an attempt to recover possession of the real property. A judgment which would be rendered would not determine either of these questions, but if the court found that the plaintiff was a tenant at the time of the alleged wrongful eviction, it would be merely evidentiary and not a finding of the tenant's right or interest in the land. The complaint contained no allegation of injury to the dwelling house or premises or to the plaintiffs' interest in the premises.

[1–3] The general rule is that the defendant is entitled to have an action tried against him in the county of his residence unless the proceeding comes under the exceptions of sections 392, 393, or 394. Perkins v. Winder, 123 Cal.App. 467, 11 P.2d 394. Appellants claim as an exception that the action is for an injury to real property. The well settled rule is that if there is a personal, or in personam, cause of action joined with one that is local in nature, the defendant is entitled to have the proceeding transferred to the county of his residence. The action must be wholly local in nature to require it to be brought in the county of the situs as designated in section 392(a), Code of Civil Procedure. Turlock Theatre Co. v. Laws, 12 Cal.2d 573, 576, 86 P.2d 345, 120 A.L.R. 786; see California cases collected in 120 A.L.R. 791–792.

[4, 5] Plaintiffs contend that since this is trespass *quare clausum fregit* it is local in character. This is not sufficient, even though the elements of such an action may be alleged. It is not sufficient that title to the land may be incidentally involved, or even necessarily entered into, to make the action local if the judgment can be satisfied by the payment of money. Work v. Associated Almond Growers, supra, 76 Cal.App. 708, 245 P. 790; Pacific Const. Finance Co. v. Kramer 42 Cal.App.2d 190, 108 P.2d 723.

The out of state cases cited by plaintiffs are not in point. The principles stated above are too well settled to admit of question.

The order granting the motion for change of venue is affirmed.

WOOD and VALLÉE, JJ., concur.



130 Cal.App.2d 529

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

George Frederick ALEXANDER, Jimmie Leon Worthy and Roy James Hunt, Defendants,

Roy James Hunt, Appellant.

Cr. 5292.

District Court of Appeal, Second District, Division 1, California.

Feb. 1, 1955.

Hearing Denied March 3, 1955.

Prosecution for kidnapping and statutory rape, wherein defendant withdrew his plea of not guilty and entered plea of guilty to statutory rape. The charge of kidnapping was dismissed. The Superior

Court, Los Angeles County, Walter S. Gates, J., entered judgment of conviction and denied defendant's motion to set aside his plea of guilty, and defendant appealed. The District Court of Appeal, Drapeau, J., held that, where, at the time defendant changed his plea from not guilty to guilty, he stated to court that he had talked matter over with his counsel, had not been promised anything in regard to sentence or probation, and realized what he was doing and was making such change freely and willingly, subsequent denial of defendant's motion to set aside his plea of guilty did not constitute an abuse of trial court's discretion.

Attempted appeal from order denying motion dismissed, and judgment affirmed.

1. Criminal Law ⇐274, 1149

Defendant, who desires to have his plea of guilty set aside, must show good cause therefor, and granting or denial of such application is matter resting within sound discretion of trial judge and will not be disturbed upon appeal in absence of showing of abuse of discretion.

2. Criminal Law ⇐273

Where defendant is attended by counsel when he changes his plea to guilty, is catechised by deputy district attorney in presence of court as to his reasons, and assures court that he does so because he is guilty and is making such change voluntarily, such plea is an admission of every element of offense charged and constitutes conclusive admission of defendant's guilt. Pen.Code, § 1018.

3. Criminal Law ⇐274

Plea of guilty may be withdrawn by reason of any mistake, ignorance, inadvertance, or other factor which overcomes defendant's exercise of free judgment, but basis of motion for such relief must be established by clear and convincing evidence. Pen.Code, § 1018.

4. Criminal Law ⇐274

Where it is shown that accused acted with knowledge of facts and on advice of his counsel when entering plea of guilty, reviewing court is justified in concluding that motion to set aside plea of guilty was properly denied.

5. Criminal Law ⇐274

Where, at the time defendant changed his plea from not guilty to guilty, he stated to court that he had talked matter over with his counsel, had not been promised anything in regard to sentence or probation, and realized what he was doing and was making such change freely and willingly, subsequent denial of defendant's motion to set aside his plea of guilty did not constitute an abuse of trial court's discretion.

6. Criminal Law ⇐1023(3), 1134(10)

Order, which was made before judgment, and which denied defendant's motion to withdraw plea of guilty and substitute therefor plea of not guilty, was not appealable but could be reviewed on appeal from judgment.

Ernest Best, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

In an information containing two counts, defendant Hunt and two others were charged with kidnaping and forcible rape, respectively.

Upon arraignment time to plead was continued to a later date. On that day, the three defendants entered pleas of "not guilty" and date for trial was set. On the trial date on motion of defendants, count II of the information was amended to charge statutory rape. Each defendant then withdrew his plea of "not guilty" and entered a plea of "guilty as charged in Count 2 of Information A, as amended." The cause of each defendant was referred to the Probation Department for report and hearing thereon set for August 11, 1954.

On that date present counsel of record was substituted into the case for defendant Hunt. The motion of said defendant for change of plea was denied; probation was denied, and he was sentenced to state prison as to count II. Count I was dismissed.

Defendant Hunt here appeals from the judgment of conviction and from the denial of his motion to set aside his plea of

guilty. He urges error by the trial court in denying such motion.

[1] "A defendant who desires to have his plea of guilty set aside must show good cause therefor. The granting or denial of such an application is a matter resting in the sound discretion of the trial judge whose decision will not be disturbed on appeal in the absence of an abuse thereof. People v. Tidwell, 108 Cal.App.2d 60, 63, 238 P.2d 21; People v. Price, 51 Cal.App. 2d 716, 718, 125 P.2d 529; People v. Griffin, 100 Cal.App.2d 546, 224 P.2d 47." People v. Broady, 120 CalApp. 2d 901, 903, 262 P.2d 669, 670.

[2] Also, as stated in People v. Cooper, 123 Cal.App.2d 353, 355, 356, 266 P.2d 566, 567:

"He (defendant) was attended by his counsel when he changed his plea to 'guilty.' He was catechised by the deputy district attorney in the presence of the court as to his reasons, and he assured the court he did so because he was guilty and that he made the change voluntarily. * * * Such a plea is an admission of every element of the offense charged, and constitutes a conclusive admission of defendant's guilt. Ibid; People v. Tidwell, 108 Cal.App. 2d 60, 63, 238 P.2d 21; People v. Griffin, 100 Cal.App.2d 546, 548, 224 P.2d 47; People v. Butler, 70 Cal. App.2d 553, 561, 161 P.2d 401; People v. Brown, 140 Cal.App. 616, 36 P.2d 194.

[3, 4] "While a plea of guilty may be withdrawn pursuant to Penal Code section 1018 by reason of the mistake, ignorance, inadvertence or any factor that overcame the defendant's exercise of a free judgment, the basis of the motion for such relief 'must be established by clear and convincing evidence.' Moreover, the reviewing court is justified in concluding that the motion was properly denied when it is shown that the accused 'acted with knowledge of the facts and on advice of his counsel.' In any event, the granting of such a motion rests in the sound discretion of the court. Ibid."

The record discloses the following proceeding at the time appellant changed his plea from "not guilty" to "guilty":

"Mr. Gerecht: The defendant, Roy James Hunt, requests permission to withdraw his plea to Count II of the Information and plead guilty.

"The Court: That is your desire, Mr. Hunt?

"Defendant Hunt: Yes.

"The Court: If I were to ask you the same questions that I asked your first co-defendant, you would answer in the same way?

"Defendant Hunt: Yes.

"The Court: You are doing this freely and willingly?

"Defendant Hunt: Yes.

"The Court: No one has made you any promise about probation, have they?

"Defendant Hunt: No.

"The Court: Leave is granted. The plea heretofore entered is withdrawn. * * *

"Mr. Howard (Deputy District Attorney): Roy James Hunt, is that your true name?

"Defendant Hunt: Yes sir.

"Mr. Howard: In Information No. 164325-A, as amended, Count II, you are charged with a felony, that of statutory rape. To that charge, how do you plead?

"Defendant Hunt: Guilty.

"The Court: All right, probation and sentence August 11, 1954 at 9:30 A.M. The Defendant is remanded."

The questions asked of appellant's first co-defendant and his answers thereto, above referred to by the trial court, are the following:

"Q. By the Court: You have talked this over very carefully and fully with your counsel and decided to withdraw your plea of not guilty and plead guilty to the statutory rape charge? A. Yes, sir.

"Q. No one has made you any promise about any sentence or probation? A. No.

"Q. You fully realize what you are doing? A. Yes."

[5] In the circumstances presented, no abuse of discretion appears on the part of the trial court in denying appellant's motion to set aside his plea of guilty.

[6] The order denying the motion of appellant for a change of plea having been made before judgment may be reviewed on an appeal therefrom. It is not an appealable order. People v. Ottenstror, 127 Cal.App.2d 104, 273 P.2d 289.

The attempted appeal from the order denying appellant's motion to set aside his plea of guilty is dismissed. The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



130 Cal.App.2d 571

Sophie JOHNSON, Plaintiff and Appellant,

v.

J. E. GOLDBERG, also known as J. E. Igler, Defendant and Respondent.

Alfred H. CASSIDY, doing business as San Francisco Real Estate Company, Andrew S. Gromeeko, doing business as Metropolitan Realty Company, and Joseph M. O'Keefe, Plaintiffs and Appellants,

v.

J. E. GOLDBERG, also known as J. E. Igler, Defendant and Respondent.

Civ. 16135.

District Court of Appeal, First District, Division 1, California.

Feb. 3, 1955.

Hearing Denied March 30, 1955.

Action by purchaser for damages for vendor's alleged breach of contract to sell apartment house and personalty and action by real estate brokers to recover commission from vendor. The actions were consolidated for trial. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., rendered judgments on directed verdicts in favor of defendant in both actions and the plaintiffs appealed. The District Court of Appeal, Bray, J., held that evidence raised questions for jury as to whether sale was not consummated because of purchaser's failure to perform an agreed condition precedent or vendor's refusal to proceed with sale.

Reversed.

1. Appeal and Error ⇐927(7), 989

On review of directed verdict for defendant, evidence must be considered most favorably to plaintiffs and conflicting or unfavorable evidence or inferences will be disregarded.

2. Vendor and Purchaser ⇐49

Standing alone, the words "form of deed of trust" in apartment house agreement of sale will not be construed to include an additional agreement such as a property management agreement. West's Ann.Civ. Code, § 1643; West's Ann.Code Civ.Proc. § 1861.

3. Vendor and Purchaser ⇐352

In purchaser's action for damages for vendor's alleged breach of contract to sell apartment house and personalty, evidence raised question for jury as to whether purchaser's refusal to sign management agreement presented by vendor was breach of agreement of sale providing for "form of deed of trust".

4. Contracts ⇐277(1), 279(1)

Annexing an unwarranted condition to an offer of performance is a refusal to perform, making tender and demand by the other party unnecessary.

5. Vendor and Purchaser ⇐352

In purchaser's action for damages for vendor's alleged breach of contract to sell apartment house and personalty, evidence raised question for jury as to whether vendor waived provision of agreement of sale requiring purchaser to make cash deposit in escrow within ten days.

6. Vendor and Purchaser ⇐352

In purchaser's action for damages for vendor's alleged breach of contract to sell

apartment house and personalty, evidence raised question for jury as to whether defendant's refusal to perform was in bad faith. West's Ann.Civ.Code, § 3306.

7. Brokers ⇐88(4)

In real estate broker's action to recover commission from vendor, evidence raised question for jury as to whether sale was not consummated because of purchaser's failure to perform an agreed condition precedent or vendor's refusal to proceed with sale.

Henry C. Clausen, San Francisco, for appellant.

Charles McLaughlin, Newell J. Hooey, Herbert Chamberlin, San Francisco, for respondent.

BRAY, Justice.

Plaintiff Johnson sued defendant for damages for breach of contract to sell certain real and personal property.[1] Plaintiffs Cassidy, Gromeeko and O'Keefe in a separate suit sued defendant for real estate brokers' commission claimed to arise from the same contract.[2] Both actions were consolidated for trial. The trial court directed verdicts in favor of defendant in both actions. From the judgments entered thereon all plaintiffs appeal.

Questions Presented.

First case: Did the evidence show as a matter of law that all of the conditions precedent of the contract were not performed by plaintiff Johnson? This, in turn, depends upon the interpretation of the clause "Form of Deed of Trust subject to the approval of Seller and Purchaser."

Second case: Were plaintiff real estate brokers entitled to a commission upon the signing of the contract by plaintiff Johnson and defendant?

Facts.

[1] Applying the rule applicable to reviews of directed verdicts, that the evidence must be considered most favorably to plaintiffs and that conflicting or unfavorable evidence or inferences will be disregarded, Hughes v. Oreb, 36 Cal.2d 854, 857, 228 P.2d 550, the facts follow:

Plaintiffs Cassidy, O'Keefe and Gromeeko, real estate brokers, separately endeavored unsuccessfully to consummate a sale of defendant's real property to plaintiff Johnson. Later defendant suggested to Gromeeko that he again try to get Johnson to purchase. Gromeeko saw Johnson, who was willing to purchase for $165,000, defendant's asking price. Gromeeko then prepared a "Uniform Agreement of Sale and Deposit Receipt," reciting a purchase price of $165,000 for the described real and personal property, payable $40,000 cash and balance on certain terms evidenced by a note secured by deed of trust. Among other provisions purchaser was given 10 days to examine title. If no objections to title were made, purchaser must pay the $40,000 and deliver note and deed of trust in escrow to the named title company and seller must deposit deed to buyer within said 10 days. Time was made of the essence of the agreement. November 28, 1950, Johnson, defendant and Gromeeko met at the title company. Defendant agreed with the terms of the agreement drawn by Gromeeko but stated that she wanted the deed of trust to be on a form to be provided by her and which she would later bring to the title company. Because of her desire, the title company officer present added to the agreement "Form of Deed of Trust subject to the approval of Seller and Purchaser." The parties initialed this change and signed the agreement, and Johnson deposited $5,000 mentioned in the agreement as a deposit. Defendant stated she would close the deal as of December 1st and would deposit all papers by that time. Between the 5th and 7th of December she deposited an insurance company form of deed of trust and note which was signed by Johnson December 8th. Shortly after the execution of the deed of trust Gromeeko told Johnson that defendant wanted her to permit defendant's attorney

1. Hereafter referred to as the "first action."

2. Hereafter referred to as the "second action."

to inspect her citizenship papers. This was done at the title company. Two additional documents deposited by defendant were submitted to plaintiff for signature. One was a property management agreement drawn up by defendant herself and required by her because she feared that in case of war with Russia Johnson might be interned. This provided that in case of Johnson's default in any of the monthly payments, a certain real estate concern could take over the operation and management of the property (it is an apartment house) and collect the rents, etc. The second document was a proposed contract regarding payment to defendant of back rent due from a certain tenant. This was the first time Johnson had heard of these documents, and, after consulting with her attorney, she refused to sign them. She authorized her attorney to negotiate with defendant's attorney for a more suitable property management agreement. The attorneys got together and drew up an additional clause to be added to the agreement proposed by defendant concerning curing of default. Defendant refused to accept this change and reprimanded her attorney for letting Johnson's attorney see her proposed property management agreement. About December 5th, Gromeeko told defendant the deal was "completely ready and finished," ready for the deposit of her deed. She refused to do so unless Johnson signed the management agreement. December 8th, Johnson in writing notified the title company that the management agreement was not required by the purchase and sale contract; that Johnson had executed the deed of trust and demanded that the sale be consummated. Because of defendant's refusal to carry out the contract, Johnson on December 19th withdrew her deposit and the note and deed of trust. December 28th Johnson made written demand on defendant to consummate the sale. She refused. It is of some significance that on December 1st, the Office of Price Stabilization granted a 10–25 per cent increase in rent of the apartments and the value of the property had increased $20,000 over the contract price. Also, shortly after signing the agreement defendant phoned Gromeeko to get the contract back, offering him $2,000. He told her the deal was completed and she would have to go through with it, whereupon she answered "I guess I have to." Defendant testified that she would not have signed the revised property management agreement even if her attorney advised her to do so.

A part of the purchase and sale document was an agreement by defendant to pay Gromeeko and O'Keefe $5,000 for services rendered. These two agreed to share the commission with Cassidy.

The court directed the verdict in the Johnson action because Johnson refused to sign the management agreement as presented by defendant, which it considered a breach of the contract, and also because plaintiff did not deposit the $35,000 and withdrew the documents in escrow. In the brokers' case it ruled that the sale was not consummated due to the purchaser's withdrawal and that therefore the brokers were not entitled to their commission.

1. First Case.

Deed of Trust Clause.

[2] In order to support the action of the trial court in directing a verdict in the first case, it must appear that as a matter of law, in view of the evidence, the deed of trust clause is susceptible of only one interpretation, namely, that it gave defendant the right to require additionally the property management agreement. (It should be noticed that the form of the deed of trust submitted contained a clause providing, in the event of default, for collection of rents by the beneficiary or her agent, and for property management.) Taking the clause alone, it is obvious that it cannot be so interpreted. "The terms of a writing are presumed to have been used in their primary and general acceptation * * *." Code Civ.Proc. § 1861. "Form of Deed of Trust" would ordinarily mean just what it says, which would not include an additional property management agreement. In the absence of evidence dehors the instrument, any other interpretation would mean that the parties intended by "Form of Deed of Trust" to include other instruments than a deed of trust and other matters not customarily included in

a deed of trust. This would constitute merely an agreement to agree which in Hiller v. King, 105 Cal.App.2d 181, 190, 232 P.2d 905, we stated was very doubtful of enforcement. That the language would not include an additional agreement is the only interpretation of the clause itself which would make the clause "lawful, operative, definite, reasonable, and capable of being carried into effect * * * without violating the intention of the parties." Civ. Code § 1643. Thus, if under the circumstances of this case, the clause must be interpreted as a matter of law, the court's interpretation was erroneous.

[3, 4] However, there was a fact situation which required submission of the case to the jury. Defendant testified in effect that she told both plaintiffs Johnson and Gromeeko prior to the signing of the sale agreement that the form of deed of trust which she would require would "be severe, and have appendages about the property management clause" and that defendant would not "close the deal" unless plaintiff Johnson would sign such an instrument. Both the latter and Gromeeko denied this, and its truthfulness is somewhat questionable because of the fact that when defendant deposited with the title company the insurance company form of deed of trust it had no appendages to it, and had a property management clause in it, and that defendant did not produce the management agreement for approximately two days thereafter. However, it was for the jury to resolve the conflict in the evidence and to determine as a matter of fact whether the parties, under the circumstances, intended "Form of Deed of Trust" to include additionally anything in the nature of the property management agreement. The language of MacIntyre v. Angel, 109 Cal.App.2d 425 at page 435, 240 P.2d 1047, at page 1054, is applicable here: "As was said in Walsh v. Walsh, 18 Cal.2d 439, at page 444, 116 P.2d 62, at page 65: ' "When the meaning of the language of a contract is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, *the question of its meaning is one of fact* * * *." ' If the facts thus adduced were undisputed, it would be the function of the court, not the jury, to consider the writing in the light of such facts, but where (as in the instant case) those facts are in dispute (evidenced by testimony which is in conflict), ' "and the meaning of the contract is to be determined one way according to one view of the facts and another way in accordance with the other view of the facts, then the determination of the disputed fact must be left to the jury." ' Coats v. General Motors Corp., 3 Cal.App.2d 340, 355, 39 P.2d 838, 845." Annexing an unwarranted condition to an offer of performance is a refusal to perform, making tender and demand by the other party unnecessary. See Loop Building Co. v. DeCoo, 97 Cal.App. 354, 362, 275 P. 881; Steelduct Co. v. Henger-Seltzer Co., 26 Cal.2d 634, 646, 160 P.2d 804. The situation here was similar to that in Jeppi v. Brockman Holding Co., 34 Cal.2d 11, at page 18, 206 P.2d 847, at page 851, 9 A.L.R.2d 1297, where the court said: "Finally, the respondents argue that the 'appellants having themselves cancelled the contract cannot seek relief pursuant thereto'. They rely in this connection on Jeppi's withdrawal of his deposit and the title company's action in marking the escrow instructions 'cancelled'. But all of this occurred a week after the respondent corporation, by its telegram to the title company, repudiated the contract and notified Jeppi of the sale of the property to Young. Such acts clearly amounted to an anticipatory breach of the contract, giving the appellants a cause of action and avoiding the necessity of continuing to tender performance of their obligation under the contract."

[5] The sale agreement is dated November 24th, although signed by the parties on November 28th, and gave "10 days from the date of approval" for the parties to perform. Defendant contends that time being of the essence the failure of plaintiff Johnson to deposit with the title company the $35,000 before December 4th constituted a breach of the contract by her, entitling defendant to refuse to perform. The evidence, however, would have supported a finding by the jury that the parties intended the ten days to run from the actual date of signing. Moreover, at no time un-

til suit brought did defendant claim that plaintiff Johnson was in default for not depositing the $35,000 before December 4th (ten days from the date in the agreement). Defendant had orally agreed to deposit her deed by December 1st. This she did not do. She did not present the form of deed of trust which she was required to do under the contract, until between the 5th and 7th of December, and plaintiff promptly signed it. Two days later she presented the property management agreement without claiming any default on the part of plaintiff Johnson. Even as late as January 2nd in a letter to plaintiff's attorney explaining her position the only default of plaintiff Johnson defendant claimed was her failure to sign the property management agreement. There was ample evidence from which a jury could have found that the ten day provision was waived by defendant, and also that defendant refused performance prior to the expiration of ten days whether the start of the period was November 24th or 28th. Defendant contends that as there was personal property involved in the sale, the agreement contemplated that a chattel mortgage would be executed by plaintiff Johnson. Assuming this to be true (although the agreement merely states that the note is to be "secured by first Deed of Trust on same property" and at no time did defendant demand such an instrument), that fact would not have required the execution of the property management agreement.

There is ample evidence from which the jury could have concluded that the property management agreement was not in the contemplation of the parties, that defendant never intended to go through with the sale, that in view of defendant's insistence that plaintiff Johnson sign the property management agreement and defendant's refusal to put the deed in escrow, plaintiff Johnson was not required to deposit the $35,000, and that rather than plaintiff Johnson, as stated by the court, it was defendant who failed to comply with the terms of the sale agreement.

[6] Plaintiff brokers testified that at the time of the breach the value of the property was $185,000, $20,000 more than the agreed price. This, of course, was substantial evidence. See People v. McReynolds, 31 Cal.App.2d 219, 87 P.2d 734. Defendant contends that under section 3306, Civil Code, such measure of damages applies only where the breach of the agreement is made in bad faith. A deliberate refusal to perform constitutes bad faith. Pixley v. First Federal Sav. & Loan Ass'n, 110 Cal.App.2d 427, 432, 243 P.2d 100. The question of bad faith is a factual one. Engasser v. Jones, 88 Cal.App.2d 171, 198 P.2d 546. There was ample evidence here from which the jury could have found that defendant's refusal was in bad faith.

2. Second Case.

[7] In view of our holding as to the first case, it needs no discussion to show that the court's finding that the plaintiff brokers were not entitled to the agreed commission because the purchaser failed to perform the conditions precedent, is erroneous. It was for the jury to determine whether the evidence showed that the sale was not consummated because of the purchaser's failure to perform an agreed condition precedent or the defendant's refusal to proceed with the sale.

"' * * * where the contract fixes the broker's right to remuneration upon his sale, if he shall produce a purchaser able and willing to buy, he has performed his part of the contract, and the owner's liability for his compensation or commission is complete, and cannot be avoided by any arbitrary or wanton refusal to consummate the sale.' Merriman v. Wickersham, 141 Cal. 567, 570, 75 P. 180, 181." Coulter v. Howard, 203 Cal. 17, 26, 262 P. 751, 755.

Both judgments are reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

130 Cal.App.2d 590

Jack BERGEVIN, Plaintiff and Respondent,

v.

Marvin MORGER, Defendant and Appellant.

Civ. 8497.

District Court of Appeal, Third District, California.

Feb. 3, 1955.

Action for damages as result of assault and battery. The Superior Court, Madera County, Stanley Murray, J., gave judgment for plaintiff. Defendant appealed. District Court of Appeal, Peek, J., held that compensatory damages of $2,000 and exemplary damages of $3,000 were not excessive for contusion to kidney, rectum, testes and coccyx causing severe pain and suffering and loss of earning power for six months and necessitating hiring extra help and weekly consultation with physician.

Affirmed.

1. Appeal and Error ⇐930(1)

Evidence must be viewed in the light most favorable to the judgment, on appeal.

2. Appeal and Error ⇐1034

Attacks on a judgment based on technical defects in pleading or procedure are not favored by reviewing courts.

3. Assault and Battery ⇐24(1)

Where complaint alleged that defendant wrongfully, unlawfully and violently assaulted plaintiff and knocked him down and then struck, beat, and kicked him, inflicting injuries requiring medical care, malice was inferentially pleaded. West's Ann.Code Civ.Proc. § 1962, subd. 1.

4. Assault and Battery ⇐35

Evidence showing unprovoked and wanton attack, maliciously committed with intent to injure, established malice, in assault and battery case. West's Ann.Code Civ.Proc. § 1962, subd. 1.

5. Assault and Battery ⇐43(5)

In assault and battery action, jury was properly instructed to take into consideration in assessing damages such relevant circumstances as impairment of earning capacity and the extent, severity and duration of the bodily and mental suffering caused by the injuries.

6. Appeal and Error ⇐1004(3)

Question of excessive damages, whether compensatory or exemplary, is addressed primarily to the discretion of trial court and award approved by trial judge will not be disturbed unless the amount at first blush suggests passion or prejudice on the part of the jury.

7. Damages ⇐94

The rule that the exemplary damages should bear a reasonable relation to actual damages is only for purpose of guarding against excess and there is no fixed ratio determining the proper proportion between the two classes of damages.

8. Assault and Battery ⇐40

In assault and battery case, compensatory damages of $2,000 and exemplary damages of $3,000 were not excessive for contusion to kidney, rectum, testes and coccyx causing severe pain and suffering and loss of earning capacity for six months, and necessitating hiring extra help and consultation with physician once a week for several months.

J. D. Boyle, M. A. Bailey, Madera, for appellant.

Coffee & Wolfe, Madera, for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment in favor of plaintiff and from the order denying his motion for a new trial. By his complaint, plaintiff alleged that the defendant "wrongfully, unlawfully and violently assaulted" him; that the defendant struck plaintiff, knocking him to the ground, and that while in that position the defendant struck and beat him causing serious injury. He prayed for general damages and special damages for his loss of time from work. The defendant, by his answer, denied the assault and affirmatively alleged that any force used by him was in necessary self defense. At the conclusion of the trial, the jury returned a verdict in favor of plaintiff, assessing

compensatory damages in the sum of $2,000 and exemplary damages in the sum of $3,000.

[1] The evidence appears to be somewhat in conflict; that is, plaintiff testified that his injuries were received solely by virtue of his alleged beating at the hands of the defendant, whereas the defendant testified that plaintiff's injuries, if any, were suffered by him when he ran into an olive tree. Specifically the evidence, viewed as it must be in the light most favorable to the judgment, shows that on the afternoon of the alleged assault, plaintiff and one Fernandes, his employee, were filling a water trough located on property then occupied by plaintiff in Madera County. They noticed the defendant walking toward them from a pump located approximately 300 yards distant. Defendant asked plaintiff for the keys in order to shut off the pump, and when the request was refused, defendant became angry and made derogatory remarks concerning Fernandes. Not wanting to argue with defendant, plaintiff started to walk away, but upon hearing his dog growl, he turned, and just as he did so defendant kicked him, knocking him to the ground. Plaintiff ordered Fernandes to call the Sheriff's office and was about to turn his dog loose, but desisted when defendant threatened to shoot the dog. Plaintiff, being nauseated, remained on the ground where he had fallen. Defendant started toward his car but returned and kicked plaintiff three times. Plaintiff remembers nothing thereafter until he regained consciousness in a hospital. Fernandes, when called as a witness by plaintiff, substantially corroborated plaintiff's version of the altercation. A second witness, Mrs. Rasmussen, testified to being summoned by Fernandes and going to the premises where she found plaintiff face down on the ground, nauseated and in obvious pain. With the aid of Fernandes she carried plaintiff to her car and drove him to the hospital. Plaintiff additionally testified that he had had a recent rectal operation, which fact was known to defendant. The diagnosis of plaintiff's injuries contained in hospital records which were introduced into evidence, disclosed contusion to the kidney, rectum, testes and coccyx.

[2–4] Defendant first contends that plaintiff wholly failed to plead or prove malice. "[R]egardless of the state of the record, attacks on a judgment based on technical defects in pleadings or procedure are not favored by reviewing courts, and it is in the light of our constitutionally declared policy and the statutory admonitions that we must examine the record to ascertain whether defendant has sustained the appellant's burden of establishing error and prejudice." Vaughn v. Jonas, 31 Cal. 2d 586, 601, 191 P.2d 432, 441. Here as in the Vaughn case, by pleading that the defendant wrongfully, unlawfully and violently assaulted him and knocked him to the ground, and while lying on the ground the defendant struck, beat and kicked him resulting in injuries which required medical care and hospitalization, plaintiff has alleged a malicious attack on himself. Under the provisions of section 1962(1) of the Code of Civil Procedure, "a malicious and guilty intent" is to be conclusively presumed "from the deliberate commission of an unlawful act, for the purpose of injuring another." Hence, malice was at least inferentially pleaded. Furthermore the record shows that the malice thus pleaded was proven by substantial evidence. Plaintiff's version of the altercation, which was corroborated by the testimony of an eyewitness, clearly shows an unprovoked and wanton attack, maliciously committed on plaintiff by defendant with the intent to injure. Additionally, it should be noted that the trial court, upon defendant's request, gave three instructions upon the issue of exemplary damages and in two such instructions specifically discussed the element of malice.

Appellant next contends that the damages, both compensatory and punitive, were so excessive as to indicate that the award was made under the influence of passion and prejudice. In support of this contention defendant refers only to that portion of the evidence relating to the amounts for hospitalization, doctors' services and medicine. He fails to note that in addition to those immediate expenses, plaintiff testified that

his earning capacity was lost for a period of six months, and that he was compelled to hire extra help at a cost of $600 and had additional medical expenses because he was required to consult a physician at least once a week for a period of several months. Although the injuries sustained were not of a permanent nature, the testimony of other witnesses indicates that the immediate pain and suffering were obviously quite severe. See Edwards v. Hollywood Canteen, 27 Cal.2d 802, 167 P.2d 729, and Lay v. Pacific Perforating Co., 62 Cal.App.2d 233, 144 P.2d 395

[5] The jury was instructed and properly so, Roedder v. Lindsley, 28 Cal.2d 820, 822, 172 P.2d 353, to take into consideration in assessing damages such relevant circumstances as impairment of earning capacity and the extent, severity and duration of the bodily and mental suffering caused by the injuries.

[6] The question of excessiveness of damages, whether compensatory or exemplary, is addressed primarily to the discretion of the trial court, and an award which a trial judge has inferentially approved by his denial of a motion for a new trial without reduction of the damages, will not be disturbed on appeal unless from the facts the amount thereof at first blush suggests passion or prejudice on the part of the jury. State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal.2d 330, 340, 240 P.2d 282; Finney v. Lockhart, 35 Cal.2d 161, 164, 217 P.2d 19.

[7, 8] Defendant further contends that the exemplary damages are not reasonably proportionate to the compensatory damages, and hence were excessive. "The rule that the exemplary damages should bear a reasonable relation to the actual damages is only for the purpose of guarding against excess * * * there is no fixed ratio by which to determine the proper proportion between the two classes of damages." 35 Cal.2d 164, 217 P.2d 21. Since it cannot be said that from the facts the amount of the award "appears at first blush to suggest passion or prejudice on the part of the jury", 35 Cal.2d 164, 217 P.2d 21, this court cannot interfere with the conclusion reached by the jury and the trial court.

Lastly, appellant contends that for the same reasons advanced concerning the question of damages generally, the trial court abused its discretion in denying his motion for a new trial. And, likewise, for the reasons heretofore set forth, this contention is also without merit.

The judgment and order are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



130 Cal.App.2d 296

Irene McDONELL and Warren McDonell, Plaintiffs and Appellants,

v.

AMERICAN TRUST COMPANY, Executor of the Estate of Hanna M. Vitenson, Deceased, Defendants and Respondents.

No. 16054.

District Court of Appeal, First District, Division 1, California.

Jan. 21, 1955.

Action by tenants against landlord for damages allegedly caused by water entering their store because of defects in roof and roof drains. From adverse judgment of the Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., tenants appealed. The District Court of Appeal, Fred B. Wood, J., held that complaint, which alleged that landlord was in control of and aware of defective condition of roof and roof drains, but that he wilfully failed to make repairs and as a consequence water gathered on floor of tenants' store causing one of tenants to slip and fall, was sufficient to state a cause of action.

Judgment reversed with directions.

1. Landlord and Tenant ⇐169(3)

Complaint, which alleged that landlord was in control of and aware of defective

condition of roof and roof drains, and knew that defective condition could cause damage and injury to property and persons of tenants, but she wilfully failed to make repairs and as a consequence one of tenants slipped on water on floor and fell, was insufficient to entitle tenants to punitive damages. West's Ann.Civ.Code, § 3294.

2. Pleading ⇐205(1)

As against a general demurrer, all that is required is that a plaintiff state facts entitling him to some type of relief.

3. Landlord and Tenant ⇐169(3)

If landlord were in control of and aware of defective condition of roof and roof drains, but she wilfully failed to make repairs and as a consequence water gathered on floor of tenants' store causing one of tenants to slip and fall, landlord would be liable for resulting damages and complaint which alleged such facts was sufficient to state a cause of action against landlord.

4. Landlord and Tenant ⇐164(1)

A landlord, who leases part of premises but retains in her control another part which is necessary to safe use of leased premises, is subject to liability to lessee and others upon land with consent of lessee for bodily harm caused to them by dangerous condition upon that part of land retained in landlord's control, if landlord, by exercise of reasonable care, could have discovered condition and could have made condition safe.

5. Appeal and Error ⇐1040(4)

Even though second and fourth counts of complaint may have been duplicates of first and third counts, which were held good as against demurrers, sustaining demurrers to second and fourth counts, which stated a cause of action, was prejudicial to plaintiff. West's Ann.Code Civ.Proc. §§ 430, 431.

6. Landlord and Tenant ⇐169(3)

Complaint, which alleged that landlord was in control of and aware of defective condition of roof and roof drains, but she wilfully failed to make repairs and as a consequence water gathered on floor of tenants' store, causing one of tenants to slip and fall, did not show on its face, that tenants knew of hazard of water infiltration and assumed risk of bodily injuries that might be sustained.

Arthur D. Klang and Albert E. Polonsky, San Francisco, for appellant.

Sidney L. Weinstock, Roger Anderson, Harold J. Chase, San Francisco, for respondent.

FRED B. WOOD, Justice.

Warren and Irene McDonell, husband and wife, brought this action against Hanna M. Vitenson, alleging that they were lessees of one of the ground floor stores of a multistoried building which belonged to defendant. They sought damages allegedly caused by water entering their store because of defects in the roof and roof drains, portions of the building reserved to the defendant lessor and under her sole control.

The major question is whether or not the second and the fourth counts stated causes of action.[1] The answer will be the same

1. According to the Second Amended Complaint, there were several occasions and types of such damage: (1) On December 1, 1952, water gathered on the floor of the store and plaintiff Irene slipped and fell, to her injury (1st and 2nd counts); (2) On December 6, 1952, a large piece of plaster fell from the ceiling of the store, causing plaintiff Irene to slip and fall in avoiding it, to her injury (3rd and 4th counts); (3) Plaintiff Warren sustained special damages on account of loss of Irene's services and for medical treatment of the injuries suffered by her on December 6th (5th count); (4) In April and May, 1952, water leaked into plaintiffs' store, causing personal property damage (6th count).

The first, third, fifth and sixth counts sounded in negligence; the second and fourth did not expressly allege negligence. Demurrers to the second and fourth counts were sustained without leave to amend. Demurrers to the other counts were overruled with leave to answer. Plaintiffs then dismissed all except the second and fourth counts. Judgment was entered for the defendant. The plaintiffs have appealed.

as to each because they differ only as to the dates and the nature and extent of the injuries received by Irene.

[1] In the second count plaintiffs devoted a series of paragraphs to the statement of facts upon which they based their claim for actual damages, followed by a single paragraph in which they set forth their claim for punitive damages; summarized, respectively, as follows:

(1) *Actual Damages.* Plaintiffs were lessees of one of the ground floor stores of a multistoried building owned by defendant who had sole operation and control of the roof and roof drains, including the sole right of access to make repairs. Defendant knew of the defective condition of the premises and of the roof and the roof drains in January, 1952, and was notified of said defective condition by plaintiffs in April and May and by the city building inspector in October; plaintiffs, in November, 1952, again demanded that defendant remedy said defective conditions. Although defendant knew "that said defective conditions could cause damage and injury to the property and persons of the tenants," she "refused to remedy said defective conditions." December 1, 1952, "by reason of the wilful failure of the defendant to repair the premises as aforesaid, knowing that said defective conditions could cause damage and injury to the property and persons of the tenants therein," water gathered on the floor of plaintiffs' store "due to the defective condition of the premises as aforesaid" and plaintiff Irene McDonell, while carefully walking, slipped upon the floor. "Due to the recklessness and wilful acts" of defendant, "as hereinabove particularly alleged," plaintiff was injured and has suffered damages in the sum of $1,500.

(2) *Punitive Damages.* "In wilfully failing to repair" said defective condition of the premises with reference to the roof and roof drains "after having received due notice of the dangerous condition thereof," and "having knowledge of the fact that said defective conditions could cause damage and injury to the property and persons of the tenants," defendants were "guilty of wilful misconduct in their wilful and wanton neglect for the safety and health of the plaintiffs," and were also "guilty of a conscious disregard to the persons, rights and property of the plaintiffs by continually failing and refusing to repair the defective conditions as aforesaid," and Irene demands punitive damages in the sum of $1,500.

Plaintiffs in their opening brief interpret these allegations as stating that "the landlord wilfully, consciously, intentionally and deliberately failed to keep the roof and drainwells in working condition, and failed and affirmatively refused to repair the same after notice of the defects" with "a conscious, wilful and deliberate intention to injure and harm appellants"; tantamount to oppression and malice in fact, justifying punitive in addition to actual damages.[2]

We do not so read the second count. The gist of the first part of the count (that which deals with actual damages) is that defendant, aware of the defective condition of the roof and drains and knowing they could cause damage, refused to repair them. Those facts do not spell an intentional tort (a conscious, deliberate intent to injure the plaintiffs) or conduct so recklessly disregardful of the rights of others (sometimes characterized as wanton or wilful misconduct) as would show the "malice" *in fact* which the statute, Civ. Code, § 3294, requires as a predicate for punitive in addition to actual damages. (As to malice "in fact," see Davis v. Hearst, 160 Cal. 143, 161–164, 116 P. 530, and Wolfsen v. Hathaway, 32 Cal.2d 632, 647–651, 198 P.2d 1. For a discussion of the differing concepts of negligence, of wanton and reckless misconduct, and of wilful misconduct, see Donnelly v. Southern Pacific Co., 18 Cal.2d 863, 869–870, 118 P.2d 465; Weber v. Pinyan, 9 Cal.2d 226, 230–238, 70 P.2d 183, 112 A.L.R. 407; Meek v. Fowler, 3 Cal.2d 420, 426, 45 P.2d 194.

2. Defendant Vitenson died pending this appeal and her executor was substituted as defendant-respondent. That means there can be no punitive damages assessed. Evans v. Gibson, 220 Cal. 476, 31 P.2d 389, but does not render moot the question whether the second and fourth counts state causes of action for actual damages.

In the Donnelly case the court cited with approval section 500 of the Restatement of the Law of Torts, concerning conduct which the court designated as *wanton and reckless misconduct:* "§ 500. Reckless Disregard of Safety Defined. The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him." The second count falls considerably short of alleging any such violation of duty when it merely pleads that defendant, aware of the defective condition and that such condition *could* cause damage, refused to repair.

Calling this a "wilful" failure to repair was not the same as saying defendant acted with a wrongful personal intent to injure or in reckless disregard of the rights of others. Nor did the words "reckless and wilful acts" add anything of significance, limited as they are by the words "as hereinabove particularly alleged." We conclude that the portion of the second count which deals with actual damages falls short of pleading a basis for punitive damages. At the very most, it sounds in negligence.

The latter part of the second count pleads no additional facts. It merely refers to certain of the allegations of the first part and characterizes defendant's conduct as "wilful misconduct," "wilful and wanton neglect," and "conscious disregard" of the safety, health, rights, and property of the plaintiffs. Those, in their context, are mere labels pinned on by the pleader.

In making this analysis, we do not rely solely upon the fact that, in form, plaintiffs stated their claim for punitive damages separately from their claim for actual damages and used such expressions as "wilful misconduct" and "wanton neglect" and "conscious disregard" solely in connection with punitive damages.[3] That form is a pattern here used by the pleader, a pattern established in the earlier complaints. It reflects his intent.

In the original complaint and again in the first amended complaint, the second count pleaded actual damages by incorporating by reference all of the paragraphs of the first count. It then added a paragraph pertaining to punitive damages, characterizing defendant's conduct as wilful misconduct, wanton neglect, and conscious disregard of plaintiffs' rights. In the second amended complaint instead of incorporating all the allegations of the first count by reference, the second count, when stating the claim for actual damages, repeats most of the allegations of the first count (refraining from the use of the word "neglect" and omitting a statement that defendant "promised" to repair). This is followed, as in the former complaints, by a paragraph in which the pleader gives expression to his mere conclusion that the facts pleaded show wilful misconduct, wanton neglect, and conscious disregard of the rights of others.

Plaintiffs confirm this analysis. In their opening brief, at page 12, they say: *"From the fact* that respondents knew of the defective condition of the drainwells; *from the fact* that respondents knew that appellants could not cause their own repairs to be made; *from the fact* that the dangerous condition of the premises was made known to the respondents; *from the fact* that three separate demands were made for repairs, the *appellants* in their pleading *are entitled* to pray for and did pray for *exemplary damages. These facts can only be construed as* a conscious, wilful and deliberate intention to injure and harm appellants." (Emphasis added.) Plaintiffs could not have told us more plainly that it is sole-

3. There is but one cause of action when punitive damages are allowable: *"In an action* for the breach of an obligation * * *, *where* the *defendant has been* guilty of oppression, fraud, or *malice,* * * * the plaintiff, *in addition to the actual damages,* may recover damages for the sake of example and by way of punishing the defendant." Civ.Code, § 3294, emphasis added. See Foster v. Keating, 120 Cal.App.2d 435, 455, 261 P.2d 529.

ly *from the "facts" stated* in the first part of the second count that they *draw the conclusion* that the defendant *intended to harm plaintiff* and thus was "guilty of * * * malice" and therefore subject to punitive damages under section 3294 of the Civil Code.[4]

We conclude, therefore, that the second count does not state facts sufficient to constitute a cause of action for an intentional tort or for wanton and reckless or wilful misconduct and, therefore, did not plead a basis for an award of punitive damages.

[2] This does not necessarily mean that no cause of action was pleaded. As against a general demurrer[5] all that is required is that a plaintiff state facts entitling him to some type of relief. Boren v. State Personnel Board, 37 Cal.2d 634, 638, 234 P.2d 981. "If a complaint is sustainable on any theory it is not vulnerable to a general demurrer." Schumm, by Whymer v. Berg, 37 Cal.2d 174, 183, 231 P.2d 39, 43, 21 A.L.R.2d 1051.

[3, 4] We think the portion of the second count which pleads actual damages sufficiently states a cause of action against the defendant landlord "upon the tort concept of the duty imposed upon a landlord to use reasonable care in keeping in suitable condition such portions of the premises as are subject to his control." Columbia Laboratories, Inc. v. California Beauty, etc., Co., 24 Cal.2d 114, 117, 148 P.2d 15, 16. See also H. C. Capwell Co. v. Blake, 9 Cal.App. 101, 111, 98 P. 51; Rathbun Co. v. Simmons, 90 Cal.App. 692, 697–698, 266 P. 369; Inglis v. Garland, 19 Cal.App. 2d Supp. 767, 769–770, 64 P.2d 501; 15 Cal.Jur. 706, Landlord and Tenant, § 116. The applicable principle is well stated in section 361 of the Restatement of the Law of Torts: "A possessor of land, who leases a part thereof and retains in his own control any other part which is necessary to the safe use of the leased part, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for bodily harm caused to them by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care (a) could have discovered the condition and the risk involved therein, and (b) could have made the condition safe."

[5] Defendant virtually concedes that the second and fourth counts do state causes of action for negligence[6] but claims it was not erroneous to sustain the general demurrers without leave to amend because, viewed as negligence counts, they were mere duplicates of the first and third counts, respectively, which the court held good as against the demurrers. Therefore, says the defendant, the second and the fourth counts at most were "redundant"

4. This does not mean that "wilful misconduct" and "wanton and reckless misconduct" may not be pleaded in general terms, in similar fashion to the pleading of "negligence" in general terms. See Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 642, 645, 158 P. 119; Gibson v. Easley, 138 Cal.App. 303, 313, 32 P.2d 983. It does mean that plaintiffs have not so used such terms in the second count. It is a matter of interpretation of what they did write. A judicial writing is subject to interpretation just as is any other writing. See Verdier v. Verdier, 121 Cal. App.2d 190, 193, 263 P.2d 57.

5. Defendant interposed special as well as general demurrers to the second and fourth counts but as neither party has discussed the special demurrers upon this appeal we treat the issues as confined to those presented by the general demurrers.

6. Defendant in its brief says: "the trial court properly concluded that plaintiffs had only alleged a failure to make certain repairs, the lessor knowing that certain injuries or damages *might* result to lessees. This amounts to allegations of the defendant's negligence and the plaintiffs were allowed to maintain all causes of action based on a negligence theory" (p. 21); also, that "the trial court could see from the entire second amended complaint and from all prior pleadings that plaintiffs could not and would not allege facts setting out a right to exemplary damages. The plaintiffs' entire theory was revealed to be negligence and the trial court was not required to give plaintiffs further opportunities to plead further legal conclusions on 'willful misconduct' without *facts* justifying such a conclusion, other than a mere failure to repair" (p. 18).

and no prejudice to the plaintiffs' interests was done by sustaining the demurrers. The fallacy of that argument is that "redundancy" is not a cause for demurrer. Code Civ.Proc., §§ 430, 431. It is true that defendant gave notice of a motion to strike the second and fourth counts as redundant but the record before us does not indicate that the motion was ever made or acted upon; and defendant has not appealed.

[6] Defendant further contends that the facts pleaded show that plaintiffs knew of the hazard of water infiltration and therefore assumed the risk of bodily injuries that either of them might sustain. We can not say that it so appears from the face of the complaint as a matter of law. For aught that appears in the complaint, plaintiffs could not and did not know just when the water hazard might develop, or where it might occur, or what form it might take. It is not like an obvious defect in a lobby or hallway which a tenant may readily avoid using and thus escape the hazard.

In a memorandum presented subsequent to the filing of its brief, defendant contends that plaintiffs' sole theory before the trial court was that the second count pleaded an intentional tort and nothing else, and that the plaintiffs are bound by that theory and should not be allowed to advance an alternative theory upon this appeal. Even if a party is bound by his theory in such a case (a question we do not decide) the record does not present the issue. It does not show that the plaintiffs had any such sole exclusive theory. There is, for example, no record of the oral or the written argument, if any, which was presented to the trial court upon the hearing of the demurrers to the complaint.

All that we have said concerning the second count applies with equal force to the fourth count of the complaint.

The judgment is reversed with directions to overrule the demurrers to the second and fourth counts, allow the defendant to answer those counts, and take such further proceedings as may not be inconsistent with the views herein expressed.

PETERS, P. J., and BRAY, J., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Louis Starky HOLBROOK, Defendant and Appellant.

Cr. 5192.

District Court of Appeal, Second District, Division 3, California.

Feb. 1, 1955.

Rehearing Denied Feb. 15, 1955.

Hearing Granted March 3, 1955.*

Defendant was convicted of abortion, but charge of attempted abortion was dismissed following grant of new trial as to such charge. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment and denied new trial, and defendant appealed. The District Court of Appeal, Vallée, J., held that, where evidence was not sufficient to prove an attempt to commit abortion, failure of court to advise jury to acquit defendant as to charge of attempted abortion constituted prejudicial error, even though evidence was legally sufficient to support conviction of abortion.

Judgment and order reversed.

Parker Wood, J., dissented.

1. Abortion ⇐12

Evidence was not sufficient to sustain conviction under count charging attempt to commit abortion, and trial court erred in not advising jury to acquit defendant as to such count, even though motion was that jury be directed to acquit as to such count rather than they be advised to acquit.

2. Abortion ⇐9

In prosecution for abortion and for attempted abortion, evidence of preparation introduced with respect to attempted abortion was not admissible for purpose of proving commission of abortion, but, in order that such evidence be admissible, evidence would have to have substantially established defendant's guilt as to other offense.

3. Criminal Law ⇐824(5)

In prosecution for abortion and attempted abortion, it was incumbent upon the court, on its own motion, to instruct jury that evidence with respect to attempted abortion should be disregarded and could

* Opinion vacated 288 P.2d 1.

not be considered in arriving at verdict in regard to abortion.

4. Criminal Law ⇐1186(4)

If it cannot be said that, in absence of error complained of, different verdict would have been improbable, erroneous ruling constitutes a miscarriage of justice. West's Ann.Const. art. 6, § 4½.

5. Criminal Law ⇐1186(4)

In prosecution for abortion and attempted abortion, wherein evidence was not sufficient to prove an attempt to commit abortion, failure of court to advise jury to acquit defendant as to charge of attempted abortion constituted a prejudicial error, even though evidence was legally sufficient to support conviction of abortion. West's Ann.Const. art. 6, § 4½.

Bodkin, Breslin & Luddy, and Henry G. Bodkin, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., of the State of California, Clarence A. Linn, Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., San Francisco, for respondent.

VALLÉE, Justice.

Defendant was charged in Count I of an information with the crime of abortion, committed on March 10, 1953. In Count II he was charged with the crime of attempted abortion, committed on March 26, 1953. Trial was by jury. After the evidence on behalf of the People and the defendant had been received, counsel for defendant made a motion for a "directed verdict of not guilty" as to Count II on the ground of insufficiency of the evidence, which motion was denied. Defendant was found guilty as charged in each count. He made a motion for a new trial which was denied as to Count I and granted as to Count II. On motion of the district attorney Count II was then dismissed. Probation was granted. Defendant appeals from the judgment and the order denying his motion for a new trial as to Count I.

Appellant contends that the court erred in failing to advise the jury to acquit the appellant as to Count II, and in failing to instruct the jury that evidence relating to the offense charged in Count II could not be considered in arriving at a verdict as to Count I.

Defendant was a licensed chiropractor in Los Angeles. Miss Solis, the person upon whom the abortion referred to in Count I was allegedly committed, was unmarried and living with one Goldstein. On March 8, 1953, Goldstein telephoned defendant's office and made an appointment for defendant to see Miss Solis the next day.

Miss Solis, a witness called by the People, testified that on March 9, 1953, she and Goldstein went to defendant's office. She told defendant that she thought she was pregnant, that she had missed two menstrual periods. Goldstein asked defendant how much he charged for an abortion and defendant said $150. Goldstein said that all he had was $50. Defendant said that was not enough and told them to come back later. Defendant then told Goldstein to go into the reception room. He examined Miss Solis while she was lying on a table, and told her that he was sure she was pregnant, and that she had a little infection. He treated the infection by inserting some gauze and medicine. The next night she and Goldstein returned to defendant's office. Defendant told her to go into the operating room and undress, and he asked Goldstein if he had the money. Miss Solis went into the operating room. After removing her clothes and putting on a gown, which defendant gave her, she lay on the table. Defendant used forceps (speculum, Exhibit 1) and opened her womb. He said the infection had cleared. He then took a little bottle (Exhibit 3), which was about half full of liquid, and a long tube and syringe (Exhibit 4) out of the sterilizer. The syringe consisted of a rubber ball attached to a glass tube that was 4 inches long and on the end of which there was a "rubber." He then took a needle and "inserted" some of the medicine into the tube. He put something else on the end of the tube and then inserted the tube in her vagina. She experienced no pain and she was on the table about ten minutes. Defendant told her that she would have her menstrual period within a few hours, and if she had any pain to stay in bed and to get in touch with him in a

few days. She went home, and about two hours later she had very bad cramps in her stomach, and started menstruating. About two weeks later she became very sick and had a hemorrhage. She was taken to the General Hospital where she remained four days.

Goldstein, a witness called by the People, testified that when he and Miss Solis went to defendant's office on March 9, 1953, he told defendant they were there for an abortion and defendant said "the price would be $150." Goldstein replied that he had $50 with him. Defendant said that was not enough—that Goldstein had to pick up some more money. The next night he and Miss Solis went to defendant's office. He (Goldstein) told defendant that all he could pick up was $25, which made (a total of) $75, and that he could pay the balance to defendant the following month. Defendant said "O.K." He paid defendant $75 in cash and defendant did not give him a receipt. He (Goldstein) then went into the reception room, and Miss Solis remained in defendant's office about half an hour. On cross-examination, Goldstein testified that he did not remember what he said to defendant in defendant's office, but they "mentioned about the price" to defendant.

Dr. Drake, a witness called by the People, testified that he is a resident obstetrician at the General Hospital. He first saw Miss Solis on March 22, the day after she was admitted to the hospital. He examined her and noted she was in the process of having a miscarriage, and he found evidence of infection of the uterus. In order to insert anything other than fluid in the os (opening of the uterus) it would have to be dilated. Any fluid which enters the uterine cavity could produce an abortion, depending upon several factors. If the syringe (Exhibit 4) were filled with fluid and if the rubber were in better condition, the fluid could be injected by applying pressure on the bulb of the syringe. In order to force the uterus to expel its contents it is necessary for the fluid to go inside the internal os. The syringe has a fairly strong bulb but he could not state whether it would be possible to push fluid with that bulb beyond the internal os.

Police Officer Galindo, a witness called by the People, testified that he obtained defendant's telephone number from Miss Solis. On March 26, 1953, about 11 a. m., he (officer) called that number and asked for defendant, and the person who answered said he was defendant. The officer then stated that he had been referred to defendant by Goldstein, that his (officer's) wife was pregnant, and that he had the same problem which Goldstein had. Defendant told him to come in at 1:30. The witness asked defendant how much it would cost and defendant stated "one and a half." He (officer) went to defendant's office with a policewoman, Josephine Collier, and introduced her to defendant as his wife. Defendant asked her how long she had been pregnant. He also asked them if they were in touch with Goldstein, and he stated that Goldstein owed him $75. Mrs. Collier said, "This is new to me," and "I wonder if you can explain to me what is going to happen?" Defendant then said that he was going to treat her and that some 12 hours later she could expect to eject some blood. Defendant told the witness that the price was $150, that the witness should give defendant $140 and leave $10 with the receptionist who would give him a receipt for $10—the reason for this was that his help did not know that he was doing this kind of work. The witness asked when he should pay, and defendant said that he wanted to be paid then "because you know this is illegal." Mrs. Collier gave defendant five $10 bills and the witness gave defendant two $20 bills. The witness then left the room, signaled another officer, who was in an automobile, and they arrested defendant. The witness asked defendant for the money he had given him. Defendant handed him the money. One of the officers told defendant that there was a complaint about defendant treating Miss Solis, the person who owed him $75, and he asked defendant what he had done regarding her pregnancy. Defendant said that he had dilated her vagina and injected a mild astringent. The witness asked defendant to show them the instruments he used on Miss Solis and expected to use on Mrs. Collier. Defendant

went to the sterilizer, pointed to Exhibits 1, 3, and 4, and stated that he filled the syringe with the liquid, dilated her vagina with the speculum, and injected the fluid into her uterus. He told them that the liquid was an astringent, and he also told them that it was distilled water. There were also three hypodermic needles (Exhibit 8) in the sterilizer, which defendant said he did not use.

Mrs. Collier, a witness called by the People, testified that defendant asked her how many periods she had missed. Defendant told them (witness and Galindo) that they were to pay him $140 then and pay $10 at the desk—none of his employees knew he was engaged in that type of work. He told her that he intended to use an astringent to cause the uterous to contract. He also told her that she should remove her clothing, and put on a gown, and he would give the treatment. She gave defendant five $20 bills and Galindo gave him two $20 bills. Galindo left the room. Defendant did not tell her that she was pregnant.

Another officer, a witness called by the People, testified that he went with Officers Galindo and Collier to defendant's office on March 26, 1953. After defendant was arrested he (witness) asked defendant if he had accepted money from Galindo, and defendant handed him seven $20 bills. The witness and Galindo checked the serial numbers on the bills with a list of serial numbers which they had. He then asked defendant if he was satisfied that the numbers (on the bills) corresponded with the list, and defendant said that he was satisfied. The witness asked defendant if that money was to be remuneration for performing an abortion on Mrs. Collier and defendant said "That is true." Defendant said that it would ruin him when his patients found out that "I do abortions." He showed them the instruments, Exhibits 1 and 4, which he stated he had used in performing the operation on Miss Solis. The witness then said that defendant explained what he did in the operation (his testimony in this respect was in substance the same as that of Officer Galindo). Defendant stated that injecting the astringent solution would cause the uterous to contract and to expel its contents.

Defendant testified that when Miss Solis and Goldstein came to his office on March 9, defendant was getting ready to leave and he told them to come back the next day. They returned the next day, and Miss Solis told defendant that he had been recommended to her by a friend. She then gave defendant a history of being nervous, having backache and a heavy vaginal discharge. He performed a routine examination in which he used the speculum (Exhibit 1) for dilating the vagina. The examination disclosed that the uterus was doubled back on itself and was lying against spinal nerves, and that the cervix was swollen. Defendant cleaned the area, using water, cotton, and forceps. He then applied an antiseptic solution with the syringe. He packed the vagina with gauze. Two days later he gave her the same kind of treatment. After that treatment he received $75 from Miss Solis and Goldstein. Defendant had told them the price would be $150—that is the routine price for a series of treatments for cases like this. The needles, which the police officers found in his office, were not his. They belonged to a doctor who formerly had an office next to defendant's office.

As above stated, the appellant contends that the court erred in failing to advise the jury to acquit appellant as to Count II, and in failing to instruct the jury that evidence relating to the offense charged in Count II could not be considered in arriving at a verdict as to Count I. He argues that the evidence was insufficient as a matter of law to support a verdict of guilty as to Count II, and that it was the duty of the court to instruct the jury to acquit defendant as to Count II; that the evidence relating to Count II (attempted abortion) shows nothing more than mere preparation; that the failure of the court to advise the jury to acquit defendant as to Count II permitted the jury to consider the evidence relating to Count II in arriving at a verdict as to Count I, and such failure constituted prejudicial error; and that granting a new trial and dismissing Count II did not remedy the error.

[1] In People v. Gallardo, 41 Cal.2d 57, at page 66, 257 P.2d 29, at page 35, the court, speaking through Mr. Chief Justice Gibson, said:

> "In our opinion this evidence does not support the convictions for attempts to commit abortions. In order to establish an attempt, it must appear that the defendant had a specific intent to commit a crime and did a direct, unequivocal act toward that end; preparation alone is not enough, and some appreciable fragment of the crime must have been accomplished. [Citations.] The record shows merely preparation and does not disclose any direct, unequivocal act toward the commission of an abortion upon any of the three women. There is no evidence that Glynn or Gallardo started to provide, supply or administer any medicine or to use or employ any instrument or other means to procure the miscarriage of any of the three women. Pen.Code § 274. The conduct of Glynn in arranging for operations, filling out hospital cards, and accepting money did not amount to an attempt."

In the present case the record shows merely preparation and does not disclose any direct, unequivocal act toward the commission of an abortion on Josephine Collier. As held by the trial judge in granting the motion for a new trial as to Count II, the evidence as to that count was not sufficient to prove an attempt to commit abortion. The court erred in not advising the jury to acquit the defendant as to Count II. This is true although the motion was that the jury be directed to acquit the defendant as to Count II rather than that the jury be advised to acquit. People v. Ward, 145 Cal. 736, 738–739, 79 P. 448. In People v. Kindleberger, 100 Cal. 367, at page 369, 34 P. 852, at page 853, it is said:

> "When, upon the trial of a defendant, the evidence is clearly insufficient to justify a verdict of guilty, it is the duty of the judge to so inform the jury, and to advise a verdict of acquittal."

See also People v. Crowley, 101 Cal.App.2d 71, 77, 224 P.2d 748.

[2] The evidence of preparation introduced with respect to Count II was not admissible for the purpose of proving Count I. In order that such evidence be admissible, it must substantially establish the defendant's guilt as to such other offense. It must be shown with reasonable certainty that the accused committed the other offense. People v. Albertson, 23 Cal.2d 550, 579–580, 145 P.2d 7.

[3] It was incumbent upon the court on its own motion to instruct the jury that the evidence with respect to Count II should be disregarded and could not be considered in arriving at a verdict with respect to Count I. In People v. Putnam, 20 Cal.2d 885, at page 890, 129 P.2d 367, at page 369, the court said:

> "It is incumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case. [Citations.] The court is not relieved of the duty to give instructions whose necessity is 'developed through the evidence introduced at the trial.' [Citation.] An instruction is necessary if it is vital to a proper consideration of the evidence by the jury. [Citations.] Accordingly, it has been held that the court must of its own motion instruct the jury in criminal cases with respect to accomplices and their testimony [citations], corroborative evidence in cases involving the obtaining of property by false pretenses [citation], testimony of expert witnesses [citation], admission of confessions and the necessity of independent proof of the corpus delicti [citation], definition of manslaughter in prosecution for murder where evidence might sustain verdict of manslaughter [citation], and presumption of innocence and burden of proof [citations]."

[4, 5] To affirm the judgment despite the errors to which we have referred this court must determine that considering the entire record, the errors did not prejudice the rights of defendant. Const. art. 6, § 4½. "If it cannot be said that, in the absence of the error complained of, a different verdict would have been improbable, the erroneous

ruling constitutes a miscarriage of justice, within the meaning of the constitutional provision." People v. Newson, 37 Cal.2d 34, 45, 230 P.2d 618, 624. The prejudicial nature of the evidence with respect to Count II seems apparent to us. People v. Dabb, 32 Cal.2d 491, 500, 197 P.2d 1. We have no doubt it tended to prejudice defendant in the minds of the jury. The district attorney argued vigorously to the jury that the testimony of Officer Galindo and Josephine Collier was indicative of defendant's intent to abort Violet Solis. The inflammatory effect of the testimony with respect to Count II is clearly evident from the fact that the jury found defendant guilty of the charge in that count. That the jury could and did sever such evidence from that with respect to Count I is highly improbable. We cannot say that it did. We have no doubt that such evidence would tend to convince a jury otherwise in doubt as to Count I. The jury was not told that they could not consider the evidence as to Count II in determining the guilt of defendant as to Count I. The denial of the motion to advise the jury to acquit on Count II and the failure to instruct that the evidence on Count II should be disregarded permitted the jury to assume that the evidence was sufficient to justify a conviction on Count II. Their belief that defendant was guilty of an attempt at another unlawful operation could not have failed to influence their verdict as to Count I. Unless it appears that the evidence with respect to Count II was not considered by the jury with respect to Count I, we cannot say that the evidence with respect to Count II did not prejudice defendant. People v. Crowley, 101 Cal.App.2d 71, 77, 224 P.2d 748.

While the evidence is legally sufficient to support the verdict with respect to Count I, we are unable to conclude that the defendant would have been convicted had the errors with respect to Count II not occurred. See People v. Berg, 96 Cal.App. 430, 442, 274 P. 433; People v. McCarthy, 88 Cal.App.2d 883, 890, 200 P.2d 69; People v. Geibel, 93 Cal.App.2d 147, 179–181, 208 P.2d 743; People v. Hooper, 92 Cal.App.2d 524, 531–532, 207 P.2d 117; People v. Carvalho, 112 Cal.App.2d 482, 492, 246 P.2d 950.

The judgment and the order denying a new trial as to Count I are reversed.

SHINN, Presiding Justice.

I concur.

PARKER WOOD, Justice (dissenting).

I dissent. In my opinion there was no prejudice as to Count I in failing to advise the jury to acquit as to Count II. All the evidence was before the court when the motion was made. Even if the jury had been so advised, it was not bound by the advice. Appellant is contending that the prosecution acted in bad faith in proceeding with the trial as to Count II. When the trial judge was called upon to consider the motion to advise the jury to acquit as to to Count II, he had more facts to consider than were involved in the Gallardo case. In any event, it cannot be said that there was bad faith on the part of the prosecution or any one in submitting the evidence under Count II to the jury. The trial judge herein instructed the jury to the effect that it should consider the evidence applicable to each alleged offense as though it were the only accusation before the jury for consideration. It is to be assumed that the jury followed that instruction.

The effect of appellant's argument is that a trial judge in ruling upon a motion to advise the jury to acquit as to one of several counts must be right in his ruling, otherwise verdicts of guilty as to other counts must be set aside because the jury might have been influenced by the evidence which related to the one count. Such argument would lead to the incorrect conclusion that each count should be tried separately. In People v. Foster, 198 Cal. 112, 243 P. 667, the defendant had been convicted of two counts of robbery and the judge declined to sentence the defendant on the second count because the judge was of the opinion that the ends of justice would be served by the imposition of sentence on the first count, and he dismissed the second count. On appeal therein the defendant (appellant) argued that the sec-

ond count was void and that the judgment rendered on the first count should be reversed because the evidence offered in support of the second count must have had a prejudicial effect upon the jury in its consideration of the first count. The court said, 198 Cal. at page 126, 243 P. at page 673: "But error cannot be presumed and it cannot be said that a jury would permit the evidence addressed to a count that failed, to influence it in the consideration of another and separate count. If appellant's reasoning be sound, section 954, Penal Code, which is the authority for the procedure adopted in the instant case, would be rendered fatal to the people in every case. The same argument as to the prejudicial effect of the offer of testimony to establish any one of the counts upon the minds of the jurors with respect to the other separate counts could be made with equal force whether the defendant be convicted on all the counts, or whether he be convicted on one or more and found not guilty on one or more. The people cannot be properly charged with bad faith by charging the defendant with two different offenses, as the evidence amply justifies its action. With bad faith removed as an element of consideration, the fact that a jury should acquit a defendant of an offense charged in one count could not be urged as a reason for vitiating a verdict of guilty found under another count, if it be sufficiently supported by legal evidence. We think there is no substantial merit in the contention of appellant as to legal prejudice suffered by reason of the proof offered to sustain the second count. This form of pleading is authorized by statute."

The evidence as to Count I was sufficient to support the verdict as to Count I. It seems to me that the setting aside of the judgment of conviction as to Count I because the trial judge did not advise the jury to acquit as to Count II introduces a principle of procedure that will have a far reaching effect in the trials of criminal cases when there is more than one count. Under that principle, in a case where there are several counts, if the judge denies a motion to advise the jury to acquit as to one count, and if he later grants a new trial as to that count, it would seem that the judge might be required to grant new trials as to the other counts on the ground that the evidence pertaining to the one count affected all the verdicts. The result in the Gallardo case is that judgments of conviction upon several counts stand, even though the judgments on the three counts of attempted abortion were set aside. (It does not appear that the point here presented was presented in that case.)

I would affirm the judgment.

Rehearing denied; WOOD, J., dissenting.



130 Cal.App.2d 513

Stanley H. ROBERTS, Plaintiff and Appellant,

v.

Sinforeso GARANIA et al., Defendants and Respondents.

Civ. 20478.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1955.

Hearing Denied March 30, 1955.

Pedestrian's action for injuries sustained when he, while crossing street, was struck by automobile which had been struck in rear by overtaking truck. The Superior Court, Los Angeles County, J. T. B. Warne and Frank G. Swain, JJ., rendered judgment for plaintiff but granted a new trial. Plaintiff appealed and certain defendants cross-appealed. The District Court of Appeal, Doran, J., held, inter alia, that record disclosing alleged errors failed to indicate that grant of defendants' motion for new trial had been abuse of discretion.

Judgment and order affirmed.

1. Appeal and Error ⇐933(1)

On appeal, the presumption is in favor of the order granting a new trial and against the judgment.

2. Appeal and Error ⇐867(1)

That motion for new trial was heard and determined and granted by a judge

other than the one who presided at trial did not extend power of reviewing court in passing upon propriety of the order.

3. New Trial ⇦6

The ruling on a motion for new trial is a matter falling within sound discretion of trial judge.

4. New Trial ⇦13

In pedestrian's action for injuries sustained when he, while crossing street, was struck by automobile which had been struck in rear by overtaking truck, record disclosing alleged errors failed to indicate that grant of defendants' motion for new trial had been abuse of discretion. Vehicle Code, §§ 525.1, 544.

5. Automobiles ⇦244(6)

In pedestrian's action against owner and driver of automobile and against owner of truck for injuries sustained when he, while crossing street, was struck by automobile which had been struck in rear by overtaking truck, evidence was sufficient to sustain verdict against automobile owner and driver, who had complained of the verdict rendered against all defendants. Vehicle Code, §§ 525.1, 544.

6. Appeal and Error ⇦1001(1)

Where record contained substantial evidence in support of verdict and judgment, there could be no reversal on ground of insufficiency of evidence.

Zeman, Hertzberg & Schekman, Samuel Schekman, Los Angeles, for appellant Stanley H. Roberts.

Crider, Tilson & Ruppe, Jerome M. Budinger, Los Angeles, for respondents and cross-appellants, Sinforeso Garania and Lupe Garcia.

George L. Hecker, Beverly Hills, Orlan S. Friedman, and Henry F. Walker, Los Angeles, for respondents, Edwin F. Nelson and Edwin H. Taylor, d. b. a. Arroyo Grande Truck Co., and Richard Lawrence Shaffer.

DORAN, Justice.

This is an action for personal injuries sustained by plaintiff while crossing Pacific Coast Highway in a marked pedestrian zone where the highway abuts Malibu Pier. Plaintiff was struck by a car driven by defendant Garania and owned by Lupe Garcia, which car was originally struck in the rear by an empty semi-tractor and trailer, some 40 feet in length, weighing 23,000 pounds, owned by defendants Nelson and Taylor, d. b. a. Arroyo Grande Truck Company, and driven by defendant Richard Shaffer, an employe.

A trial by jury resulted in a verdict in plaintiff's favor of $20,000. There were motions for new trial by the Arroyo Grande Truck Company, R. L. Shaffer, and Sinforeso Garania of the grounds of excessive damages, insufficiency of evidence, errors of law, etc., which motions were heard by Judge Swain who did not preside at the trial. The minute order in reference thereto states that "Motions of defendants for a new trial is granted", no grounds being mentioned. Plaintiff now appeals from the order granting a new trial. Sinforeso Garania and Lupe Garcia have filed a cross-appeal from the judgment.

The record discloses that Rev. Roberts and wife drove to the area for the purpose of fishing off the pier. The day was clear, the road dry. After parking in a parking lot on the east side of the street, the two persons waited for traffic to stop, and two cars approached the marked pedestrian crosswalk and stopped in the thirty-foot easternmost lane. Rev. and Mrs. Roberts then proceeded to cross the highway. Plaintiff had walked ahead and past the two stopped cars and was walking in the second or 12 foot lane when Shaffer's truck rammed into the rear of Garania's car causing the latter to collide with plaintiff who suffered head and leg injuries.

There was a conflict of evidence as to what occurred just previous to the accident. Garania, driver of the car which hit plaintiff, testified that he had stopped next to the double white center line so that the pedestrians might cross, when Shaffer's truck collided with the rear of the Garania car. Shaffer testified that Garania cut into the lane and slowed down quickly; that Shaffer applied the brakes but was unable to stop in time to avoid the collision.

The Roberts Appeal.

Plaintiff-appellant's contention that "It was an abuse of discretion for the Law and Motion Court to grant a new trial to defendants", cannot be sustained. In this connection, an instruction to the jury that "The issues to be determined by you * * * are; First, was the defendant negligent? * * * If you answer that question in the negative, you will return a verdict for the defendant. If you answer it in the affirmative, you have a second issue to determine, namely: Was that negligence the proximate cause of any injury to the plaintiff?" etc., is criticized by respondents as eliminating from the jury's consideration any question of contributory negligence, although that subject was treated in another instruction. Attention is also called to the fact that the defendants Garania and Garcia did not plead contributory negligence, and hence it was improper to grant a new trial to these defendants.

[1–3] As pointed out in respondents' brief, quoting from Sweeley v. Leake, 87 Cal.App.2d 636, 640, 197 P.2d 401, 403, "The principles of law applicable to an appeal from an order granting a motion for new trial are well established. The presumption is in favor of the order granting a new trial and against the judgment. * * * The fact that the motion in the instant case was heard and determined by a judge other than the one who presided at the trial does not extend the power of this court in reviewing the matter". And it is well established that the ruling on a motion for a new trial is a matter falling within the sound discretion of the judge.

In the present situation, Judge Swain, who heard the motion, may well have determined that the instruction in question was likely to mislead the jury by seemingly submitting only two issues, namely the defendants' negligence, and proximate cause, although contributory negligence was treated in another instruction. Or, so far as appears from the record, the new trial may have been granted on some other ground. One such ground was that of excessive damages, the jury having awarded $20,000 to plaintiff, a retired minister about 70 years of age, who received a fracture of the fibula, but was not hospitalized save for having the leg placed in a cast at an emergency hospital. Plaintiff was bedfast for a week and thereafter moved about on crutches. The bill for medical services was $350.

"It is admitted that Defendants Garania and Garcia did not plead contributory negligence", says the respondents' brief, "but when evidence is adduced during the course of trial by means of which contributory negligence is shown, defendants may benefit from such testimony even though the defense of contributory negligence was not pleaded by that defendant", Mautino v. Sutter Hospital Association, 211 Cal. 556, 562, 296 P. 76, and Hoy v. Torinch, 199 Cal. 545, 551, 250 P. 565. And in the brief of respondents Arroyo Grande Truck Co. and Shaffer, evidence is pointed out which might lead to the conclusion that Rev. Roberts failed to keep a proper lookout for northbound traffic, the direction from which danger was to be apprehended.

[4] Other alleged errors relate to the wording of instructions given, the degree of caution required of the plaintiff, plaintiff's right to assume that approaching vehicles would yield the right of way, the presumption that plaintiff exercised ordinary care, Sections 544 and 525.1 of the California Vehicle Code, and to alleged improper limitation of the cross-examination of a police officer. In respect to these matters it is reasonable to assume that they were duly considered by the judge hearing the motions for new trial. Although singly such alleged errors may not have been sufficiently serious to warrant a new trial, it may well be that the sum total thereof, in connection with the other grounds alleged, was persuasive that the defendants were entitled to a new trial. In any event the granting of a new trial was, as hereinbefore indicated, a discretionary matter, and the record fails to indicate that there was any manifest abuse of such discretion.

Garania-Garcia Cross-Appeal.

[5, 6] The cross-appeal of the defendants Garania and Garcia from the judgment against all defendants in the sum of $20,000, is likewise without merit. These cross-appellants contend that the evidence is insufficient to sustain the verdict. As here-

inbefore indicated, the evidence was in conflict as to which party was at fault, each defendant attempting to cast the blame on the other. The plaintiff had no recollection as to how the accident happened. A question of fact was thereby created which the jury resolved in favor of the plaintiff by bringing in a verdict against all defendants. The record contains substantial evidence in support of such verdict and the resulting judgment, and under the long established rule in such cases, there can be no reversal on this ground.

Other errors are alleged in reference to the cross-examination of Officer Lowe, and instructions concerning Sections 544 and 525.1 of the California Vehicle Code. These matters have been mentioned in the respondents' (Garania-Garcia) brief as errors justifying the granting of a new trial, and are discussed in this opinion. In view of the fact that the order granting a new trial is here affirmed, and the parties accorded the opportunity of a reconsideration of all questions before another judge and jury, it is unnecessary to further consider the cross-appeal.

The judgment and order are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.



130 Cal.App.2d 407

Josephine KEANE, Petitioner and Appellant,

v.

George R. REILLY, James H. Quinn, William G. Bonelli, Paul R. Leake and Robert C. Kirkwood, as Members of and Constituting the State Board of Equalization of the State of California, et al., Respondents.

Civ. 16153.

District Court of Appeal, First District, Division 1, California.

Jan. 26, 1955.

Proceeding for writ of mandate to require Board of Equalization to revoke its suspension of petitioner's liquor license. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., denied writ. Licensee appealed. The District Court of Appeal, Peters, P. J., held that where licensee's liquor license had been suspended for selling alcoholic beverages to person under 21 years of age, who had submitted to licensee's bartender an identification card prepared by himself, containing his photograph, fingerprints and statement that he was over 21 years of age, in the absence of a finding by Board of Equalization of bad faith on the part of licensee's bartender in accepting such identification card, board could not suspend license.

Judgment reversed.

1. Intoxicating Liquors ⇐108(1)

Under statute providing that in proceeding for suspension of liquor license for serving alcoholic beverages to minor, proof that licensee or agent had been shown documentary evidence of majority by person served shall be a defense, licensee does not establish an absolute defense by evidence that the minor served produced an identification card purporting to show that he was 21 years old, but defense must be asserted in good faith. West's Ann.Bus. & Prof. Code, § 25660.

2. Intoxicating Liquors ⇐108(9)

Where Board of Equalization, in proceeding to suspend liquor license for serving intoxicating beverage to minor who exhibited to licensee's bartender an identification card minor prepared for himself containing his photograph, fingerprints and stating his age to be over 21, made no finding that licensee's bartender acted in bad faith in examination of such identification, board could not suspend license. West's Ann.Bus. & Prof. Code, §§ 25658(a), 25659, 25660.

3. Intoxicating Liquors ⇐108(1)

In proceeding for suspension of liquor license for serving alcoholic beverages to minor, where evidence showed that documentary evidence of majority had been submitted to licensee's bartender and bartender testified that he believed it was an official identification, Board of Equalization was without power to suspend license in absence of a supporting finding that licensee's bartender acted in bad faith and without due

diligence. West's Ann.Bus. & Prof. Code, §§ 25658(a), 25659, 25660.

Ellis Filene, Ralph Bancroft, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., William M. Bennett, Deputy Atty. Gen., San Francisco, for respondents.

PETERS, Presiding Justice.

Josephine Keane, the owner of an on-sale general liquor license and the operator of a bar and restaurant in San Francisco, was charged with having illegally served liquor on February 28, 1953, to four minors, Rudolph Espinoza, Don Lundy, Frank Mango and Dan Brosnan. At the administrative hearing no evidence was introduced in reference to Dan Brosnan, and the charge, insofar as it refers to him, was dismissed. The hearing officer and the Board found the charges as to the other three minors supported by the evidence, and ordered Keane's license suspended for 15 days. On petition for writ of mandate to the Superior Court, that court, by memorandum opinion and by its findings, conclusions and judgment, held that the accused had established a defense under the law to the charges of serving liquor to Lundy and Mango, but also held that the accused was unjustified in serving liquor to Espinoza. The writ of mandate was therefore denied. From the judgment of denial Keane appeals.

The facts are not in dispute. Admittedly, Espinoza, Lundy and Mango were under 21, on February 28, 1953, Espinoza being 19, and Lundy and Mango being 20. Admittedly, the bartender of appellant, Ruggeri by name, on that date, served the three boys liquor which they consumed on the licensed premises. Admittedly, on the night of the charged violations Ruggeri did not ask the three boys for any evidence of identification. Admittedly, however, the three boys, prior to February 28, 1953, had occasionally patronized the restaurant and bar operated by appellant, and, on different occasions prior to that date, had submitted to the bartender identification evidence that indicated that they were in fact 21, and, as a result, were served drinks. Ruggeri testified that he believed these credentials. He said that Lundy, he believed, had displayed a driver's license, and that Mango had exhibited either a driver's license or a selective service card. He testified that Espinoza had displayed some sort of an identification card, probably a driver's license or a selective service card. Admittedly, all such cards indicated that the boys were 21.

Don Lundy testified that prior to February 28, 1953, he had found a wallet containing a driver's license, and that the license indicated that the licensee was 21; that the physical description on such license fitted him fairly accurately; that he showed this card to Ruggeri on two or three occasions prior to February 28, 1953, and was served drinks. Thereafter, he was not required to submit any identification.

Mango testified that he had possession of a friend's driver's license which, upon request, he had submitted to Ruggeri a couple of months prior to February 28, 1953; that this license showed the licensee was 21; that he had obtained this license to fool bartenders; that the physical description roughly fitted him.

Espinoza testified that in August or September, 1952, upon Ruggeri's request, he had submitted to him an identification card. This card he himself had prepared from a blank identification card of the type that is usually found in billfolds; that the card as prepared by him had his picture, his fingerprints, his name, address and telephone number, his height and weight, the name of his employer, and his age, which he misrepresented to be 21. He had secured the fingerprints from his employer's place of business. He had inserted this simulated card in a cellophane jacket. He also testified that in making up this identification card he had tried to make it look bona fide and official in order to fool bartenders and to induce them to serve him drinks. This simulated identification card was not produced at the hearing or trial.

As already pointed out, the Board found as to all three minors that the identifications submitted by them to Ruggeri were not sufficient to constitute a defense to the charges.

As to Espinoza, the Board found, by adopting the hearing officer's proposed decision, that he had exhibited to Ruggeri the card above described; that such card had been prepared by Espinoza, and that it "was not such bona fide documentary evidence of majority and identity * * * as is required to constitute a defense to this proceeding." The Superior Court reversed the Board as to Lundy and Mango, finding that the identifications submitted by them did constitute a defense to the charges, but as to Espinoza the court found that the findings and conclusions of the Board were supported.

[1] The correctness of the trial court's determination depends upon the proper interpretation of certain provisions of the Alcoholic Beverage Control Act. At the time of the hearing such Act appeared in 2 Deering's Gen.Laws, Act No. 3796; now with some of the sections slightly modified the Act has been codified and found in Business and Professions Code, § 23000 et seq. Section 40 of the Act (now § 24200 of the Bus. & Prof.Code) provides that, subject to certain exceptions not here pertinent, it is a ground for suspension or revocation of a license for a licensee to violate any provision of the Act.

Section 61(a) (now § 25658(a) of the Bus. & Prof.Code) provides: "Every person who sells, furnishes, gives, or causes to be sold, furnished or given away any alcoholic beverage to any person under the age of twenty-one years shall be guilty of a misdemeanor."

Section 61.2(a) and (b) of the Act (see §§ 25659 and 25660 of the Bus. & Prof. Code) provides:

"(a) For the purpose of preventing the violation of Section 61 of this act, any licensee, or his agent or employee may refuse to sell or serve alcoholic beverages to any person who is unable to produce adequate written evidence that he or she is over the age of 21 years.

"(b) In any criminal prosecution, or proceeding for the suspension or revocation of any license issued under this act and based upon violation of said Section 61, proof that the defendant licensee or his agent or employee demanded and was shown, before furnishing any alcoholic beverage to a minor, a motor vehicle operator's license or a registration certificate issued under the Federal Selective Service Act or other bona fide documentary evidence of majority and identity of such person, shall be a defense to such prosecution or proceeding for the suspension or revocation of any license."

Under this last-quoted section a licensee does not establish an absolute defense by evidence that the minor produced an identification card purporting to show that the person in possession of the card is 21. The defense must be asserted in good faith, that is, the licensee or the agent of the licensee must act as a reasonable and prudent man would have acted under the circumstances. Obviously, the appearance of the one producing the card, or the description on the card, or its nature, may well indicate that the person in possession of it is not the person described on such card. In such a case the defense permitted by section 61.2(b) could not successfully be urged. In the case of Young v. State Bd. of Equalization, 90 Cal.App.2d 256, 202 P.2d 587, this limitation was discussed. In that case the bartender sold liquor to 17-year-old Joe Taylor after Taylor had produced a draft registration card issued to one Glenn Tucker. The bartender looked the card over and asked Taylor to write his name on a piece of paper. Taylor wrote the name of Tucker and the bartender compared this signature with the one on the identification card, and was satisfied with the comparison. Taylor had found the card and had changed certain figures on it to make it appear that the person described was 21. The Board found that the bartender had violated section 61(a) of the Act and had not established a defense under section 61.2(b). The Superior Court reversed the Board. This was affirmed by the Appellate Court. In so holding, the Appellate Court pointed out that the presentation to the bartender of the draft registration card was prima facie evidence, under the section, of the majority and identity of the person presenting it. In so holding, the court stated, 90 Cal.App.2d at page 258, 202 P.2d at page 588: "The clerk, if he acted in good faith and without actual knowledge, gained from the appearance of the pur-

chaser, or otherwise, that the card did not or could not belong to the minor, and if the alteration was with reasonable diligence not discernible or ascertainable, had a right to assume that anyone presenting such a card would not unlawfully possess or use it."

This rule was expanded in Conti v. State Board of Equalization, 113 Cal.App.2d 465, 248 P.2d 31, where a 19-year-old serviceman presented for identification an out-of-state driver's license, not his own, which, on its face, showed that it was issued to a person over 21. There, too, the Board had suspended the license, but the Superior Court reversed. This was affirmed by the Appellate Court. In so holding, the Appellate Court stated, 113 Cal.App.2d at page 466, 248 P.2d at page 32:

"* * * the statute does not impose upon the licensee the duty of determining at his peril whether the driver's license is a bona fide license of the party presenting it. Possession of the license is presumptive evidence that the license belonged to the holder. * * * To hold otherwise would require the attendant to determine at his peril whether the driver's license had been legally issued, whether it had not been revoked or suspended, and whether the party presenting it was in truth and fact the legitimate holder of the paper. * * *

"* * * Unless the personal appearance of the holder of the driver's license demonstrates above mere suspicion that he is not the legal owner of the license the bartender is justified in assuming the validity of the driver's license and in accepting the holder as the legal owner." The court emphasized that the Board had made no finding relating to the presentation and inspection of the license.

[2, 3] How do these statutes and these cases apply to the instant case? In both the cited cases the Board had failed to find on the good faith of the bartender, merely finding that his evidence did not establish a defense under section 61.2(b) of the Act. In the instant case the hearing officer and the Board found the facts as already recounted and then found that "the identification card exhibited by said minor was not such bona fide documentary evidence of majority and identity of the said Rudolph Espinoza as is required to constitute a defense to this proceeding for the suspension or revocation of any license * * * under the provisions of Sec. 61.2(b) of said Act." The trial court found that this finding was supported. It will be noted that there is no finding that the bartender acted in bad faith, or failed to act as a reasonably prudent man would have acted under similar circumstances. In the absence of such a finding we think the rationale of the Conti case requires a reversal. That case expressly withdraws from the licensee or his agent the burden of determining at his peril the legality of the document presented as identification or the legitimacy of the holder's right to possess the document. That case involved an out-of-state driver's license. The present case involves a document prepared by the holder to look like a bona fide official identification card with the holder's picture and fingerprints on it. All of the evidence is to the effect that it was intentionally prepared to look and did look official, and that the bartender believed it to be official. The prosecution did not present the card into evidence, but relied upon its description as given by the witnesses. There is no evidence or finding as to whether Espinoza looked 21 or younger, and no evidence to rebut the testimony of Ruggeri or Espinoza that the card looked like an official identification card, or that Ruggeri believed the card to be an official identification card. The law does not require the bartender to inspect the identification submitted to him at his peril. If he acts in good faith and with diligence he is protected, and that is so whether the document is validly issued by some agency or is made to look like an officially issued document. Where the evidence shows that a document apparently complying with section 61.2(b) has been submitted to him, and he has testified that he believed it was an official identification, the Board and the Courts are without power to suspend the license in the absence of a supported finding that the bartender acted in bad faith and without due diligence.

The trial judge, in his memorandum opinion, commented on the fact that the bartender had not required Espinoza to write his signature so as to compare it with that on the card produced by him. Just what that would have shown does not ap-

pear. Espinoza had signed the simulated identification card and it was his signature on it. Moreover, his picture appeared thereon, which was a better test of identity than would have been a signature.

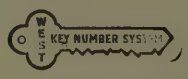
The trial judge also misinterpreted the evidence. He stated, in his opinion, that the evidence "that the bar was dimly lighted certainly was sufficient to justify a finding * * * that bona fide documentary evidence of majority was not submitted to the bartender, and further that the bartender was guilty of neglect in scrutinizing the documentary evidence in a dim light. * *

"* * * Here a careful inspection under proper lighting facilities would have disclosed a self-manufactured I.D. card presented by Espinoza." Thus, the trial judge apparently believed that the record showed that Ruggeri had examined the identification card under poor lighting, and that this explained why he had not discovered its falsity. If this statement by the trial judge were supported by evidence it would have supported a finding, had one been made, of bad faith and lack of diligence on the part of Ruggeri. But there is not one word in the record as to the lighting conditions under which the identifications were checked. The only mention of lighting conditions in the record is the evidence of Ruggeri that on February 28, 1953, the night the offense was committed, he had dimmed the lights in the restaurant-bar about 8:30 p.m. because the restaurant usually stopped serving food at that time. But the identifications were not made on February 28, 1953, but some months prior thereto. The record indicates that the 3 boys, when served drinks, had them with their meals, which would indicate that they purchased drinks before 8:30 p.m. and while the establishment was still serving food. There is not one word in the record as to the time of the day or night the identifications were made, or what the lighting conditions were in the bar on those occasions. As already pointed out, if the evidence were as summarized by the trial judge it might well be that such evidence would have supported a finding, had one been made, that the bartender acted without due diligence. But there was no such evidence, and there is no other evidence of bad faith.

It should also be pointed out that there appears to be a grave inconsistency in the judgment insofar as it exonerates the appellant from the charges involving Lundy and Mango, but finds the licensee guilty of the offense involving Espinoza. Lundy and Mango submitted drivers' licenses of persons other than themselves, describing persons other than themselves. No attempt was made to check the signatures on such licenses. But, according to the record, Espinoza presented what appeared to be, and what had been intentionally prepared to look like, an official identification card. It contained a picture of the very person presenting it, his thumbprints, and his physical description. There was far more reason to be convinced of Espinoza's identification than there was by the licenses presented by Lundy and Mango. Yet the court exonerated appellant as to the Lundy and Mango charges and found appellant guilty of the Espinoza charge.

For the reasons stated, the judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.



130 Cal.App.2d 491

Jesse SONKIN, Plaintiff, Cross-Defendant and Respondent,

v.

Mary HERSHON, Defendant, Cross-Complainant and Appellant.

Civ. 20418.

District Court of Appeal, Second District, Division 3, California.

Jan. 27, 1955.

Rehearing Denied Feb. 23, 1955.

Hearing Denied March 22, 1955.

Action to quiet title. The defendant filed a cross-complaint. From that part of the judgment of the Superior Court, Los Angeles County, A. A. Scott, J., which decreed that plaintiff was the owner of an undivided one-half interest in the realty the defendant appealed. The District Court of Appeal, Vallée, J., held that evi-

dence sustained findings that cotenant was competent at time she executed deed to plaintiff and that the deed was not procured be fraud or undue influence.

Affirmed.

1. Deeds ⇐211(1, 3, 4)

In action to quiet title by holder of quitclaim deed from a joint tenant against cotenant who filed cross-complaint asserting that the quitclaim deed was executed when grantor was incompetent and that it was procured by fraud and undue influence, evidence sustained finding that the grantor was competent and that the deed was not procured by fraud or undue influence.

2. Appeal and Error ⇐1010(1)

The fact that reviewing court might have found the evidence tilting one way rather than the other is no ground for reversing judgment.

3. Appeal and Error ⇐1010(1)

It is not province of reviewing court to present a detailed argument on sufficiency of evidence to support findings where it appears that question is one purely of determining which side shall be believed.

John R. Sahanow, Hollywood, for appellant.

Marvin A. Freeman, Beverly Hills, for respondent.

VALLÉE, Justice.

Appeal by defendant from that part of a judgment which decrees that plaintiff is the owner of an undivided half interest in a parcel of realty.

Plaintiff and Yvette Sonkin were husband and wife. In 1947 Yvette was the owner of the property. On July 25, 1947, she executed a grant deed of the property to herself and Mary Hershon as joint tenants. On July 7, 1952, she executed a quitclaim deed of the property to her husband. She died on July 27, 1952.

Plaintiff sued to quiet title to the entire parcel. Defendant answered, denying that plaintiff had any interest. She also filed a cross-complaint in which she alleged that at the time Yvette executed the deed to plaintiff, she (Yvette) was incompetent; plaintiff paid no consideration for the deed; it was procured by the fraud and undue influence of plaintiff; and the signature on the deed was a forgery. Defendant prayed that title to the entire parcel be quieted in her. The allegation of forgery was not urged at the trial.

The court found that the allegations of the cross-complaint were not true. The judgment was that plaintiff and defendant each owns an undivided half interest in the property. Defendant appeals.

Defendant's claim is that the findings that Yvette was competent at the time she executed the deed to plaintiff and that it was not procured by the fraud or undue influence of plaintiff are unsupported by the evidence.

[1–3] Considering the evidence and the reasonable inferences therefrom in the light most favorable to plaintiff and disregarding conflicting evidence and inferences, our examination of the record reveals that the challenged findings are amply supported by the evidence. The case is merely one in which there is a conflict in the evaluation of evidence. Because we might have found the evidence tilting one way rather than the other is no ground for reversal. The argument made here is one which should have been, and no doubt was, made to the trial court. It is not the province of a reviewing court to present a detailed argument on the sufficiency of the evidence to support the findings where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled. Gillespie v. Gillespie, 121 Cal.App.2d 95, 97, 262 P.2d 607.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James TARANTINO and Rudolph Eichenbaum, Defendants,

James Tarantino, Appellant.

Cr. 3024.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1955.

Rehearing Denied Feb. 11, 1955.

Hearing Granted Feb. 24, 1955.*

Defendant was convicted of extortion and conspiracy to extort. The Superior Court, City and County of San Francisco, Eustace Cullinan, Jr., J., rendered judgment, and defendant appealed. The District Court of Appeal, Bray, J., held that evidence whether victims had paid defendant, a magazine publisher and radio commentator, money under threat of further exposure after defendant had exposed victims' alleged crimes was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law ⇐438

In extortion prosecution, recordings of defendant's conversations, which had been obtained by installation of dictaphone in his room, were admissible. Pen.Code, § 518.

2. Criminal Law ⇐394

Competent evidence is admissible no matter how obtained.

3. Criminal Law ⇐663

In extortion prosecution, wherein transcriptions of recordings of defendant's conversation, taken from a more extensive collection of defendant's recorded conversations, were admitted, trial court properly ruled that only relevant parts of the recordings could be played. Pen.Code, § 518.

4. Criminal Law ⇐627½

The prosecution is not required to give its trial notes to the defendant.

5. Criminal Law ⇐627½

Recordings which police officers had made of defendant's conversation and parts of which were admitted in evidence constituted the prosecution's trial notes, and prosecution was not required to give them to defendant.

6. Criminal Law ⇐627½

A defendant is not entitled to notes taken by prosecution out of court of a witness' version of other conversations in which witness claims defendant engaged, but concerning which witness did not testify.

7. Criminal Law ⇐396(2)

In extortion prosecution, once prosecution offered any portion of a record of a conversation of defendant, defendant was entitled to hear the recording of the entire conversation. Pen.Code, § 518.

8. Criminal Law ⇐438, 589(1), 627½

Where practically all, if not all, of matters which defendant claimed to desire to listen to, were immaterial and irrelevant, and defendant could have asked specifically for any favorable and admissible recording, and defendant refused to devote even a part of out-of-court time to the matter, trial court, under all the circumstances of the case, did not abuse its discretion or deny defendant a fair trial in refusing to order prosecution to give defendant copies of transcriptions of recordings of defendant's conversations, part of which were introduced in evidence, to give continuances to enable defendant to play recordings out of court, or to permit playing of additional recordings before jury.

9. Witnesses ⇐269(1)

Cross-examination may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given on direct examination. Pen. Code, § 1323.

10. Witnesses ⇐277(1)

If a defendant takes the stand and makes a general denial of crime with which he is charged, the permissible scope of cross-examination is very wide. Pen.Code, § 1323.

11. Witnesses ⇐277(4)

A defendant who testifies to a state of things contrary to and inconsistent with the prosecution's evidence, thus indirectly denying the testimony against him, can be cross-examined with respect to facts or denials which are necessarily implied from his testimony-in-chief, as well as with respect to facts which he expressly states. Pen.Code, § 1323.

* Opinion vacated 290 P.2d 505.

12. Courts ⇐90(6)

Judicial disapproval of a case constituted disapproval of case upon which originally disapproved case was based, as well as of case largely based on case disapproved.

13. Witnesses ⇐277(4)

Where defendant in extortion prosecution denied any acts of extortion or conspiracy to extort from named persons, and stated, in effect, that he publicized alleged law violations only to bring them to attention of police or board of equalization, his testimony was equivalent to a general denial of the crime charged, and opened door for cross-examination concerning other purported extortions. Pen.Code, § 518.

14. Criminal Law ⇐444

In extortion prosecution of magazine publisher, back issues of the magazine were admissible upon a showing that defendant was the publisher, without a showing that he had edited or written the articles.

15. Threats ⇐7

In extortion prosecution, back issues of magazine which contained defendant's comments or columns, and the ads which were one of the means used by the defendant to extort money, were admissible, even though issues contained articles attacking certain police officers, the San Francisco police department and others. Pen.Code, § 518.

16. Criminal Law ⇐858(3)

The jury is a constitutional part of the court and they are privileged to take all or any of the exhibits with them.

17. Criminal Law ⇐858(3)

In extortion prosecution of magazine publisher, allowing jury to take to jury room magazines which figured in defendant's actions and which were admitted in evidence was not error. Pen.Code, § 518.

18. Criminal Law ⇐673(4)

Where defendants are tried jointly for participation in the same crime or crimes, evidence inadmissible against one defendant may be admitted against a co-defendant, provided the jury is properly instructed on the subject. Pen.Code, §§ 182, 518.

19. Criminal Law ⇐673(4)

In prosecution of two defendants for extortion and conspiracy to extort, evidence of acts of first defendant, inadmissible against second defendant, was properly admitted upon instruction to jury to disregard evidence as against second defendant. Pen. Code, §§ 182, 518.

20. Criminal Law ⇐422(1)

Acts and declarations of a co-conspirator are admissible after prima facie proof of conspiracy has been made. Pen.Code, § 182.

21. Conspiracy ⇐47

As a general rule, conspiracy can only be established by circumstantial evidence. Pen.Code § 182.

22. Conspiracy ⇐47

It is not necessary, to prove a conspiracy, to show that parties met and actually agreed to undertake the performance of the unlawful acts, nor that they had previously arranged for a detailed plan for execution of the conspiracy. Pen.Code, § 182.

23. Criminal Law ⇐422(1)

In prosecution for conspiracy to extort, conversations indicating that defendant had been engaged in extorting money from others than the persons mentioned in indictment and with aid of persons other than co-defendant were admissible upon a prima facie showing of conspiracy, as the acts and declarations of a co-conspirator. Pen.Code, §§ 182, 518.

24. Criminal Law ⇐422(6)

Once the conspiracy is established all evidence of the substantive crimes becomes admissible against all participants, even though the other conspirators were not present. Pen.Code, § 182.

25. Criminal Law ⇐741(1)

Weight of corroborative evidence is for trier of facts to determine. Pen.Code, § 182.

26. Conspiracy ⇐47

In a conspiracy prosecution, the relationship of the parties and all their acts and conduct may be considered in determining whether there are sufficient corroborating circumstances. Pen.Code, § 182.

27. Criminal Law ⇐369(2)

In prosecution for commission of a particular crime, fact that such crime was

committed in furtherance of the conspiracy to commit a series of like or other criminal acts may be shown, and such evidence is not rendered inadmissible because it shows accused committed other and distinct crimes in furtherance of common object of the conspiracy.

28. Criminal Law ⇐371(1, 12)

Where defendant in extortion prosecution put in issue the motive or intent with which he made his broadcasts and published his magazines, which he had allegedly used to extort, evidence of defendant's attempts to extort money from persons other than those named in indictment and with aid of others than co-defendant was admissible. Pen.Code, § 518.

29. Criminal Law ⇐371(1, 12)

Where evidence of crime tends to prove a motive for commission of crime charged, or where a felonious or fraudulent intent is necessary, evidence of other crimes tends to establish and fix the existence of such motive or intent.

30. Criminal Law ⇐371(1, 12)

In extortion prosecution, defendant's own extrajudicial statements were admissible to prove commission of other offenses tending to prove motive and intent in relation to crime charged. Pen.Code, § 518.

31. Criminal Law ⇐374

In order to admit evidence of other offenses, ground must first be laid implicating defendant in charge under trial, there must be proof that defendant was concerned in commission of the crimes sought to be proven, and there must be identity of person or crime, scienter, intent, system or some integral parts of the exceptions established between charge under trial and that sought to be introduced.

32. Criminal Law ⇐370, 371(1, 12), 372(1)

In prosecution for extortion and conspiracy to extort, defendant's conversations concerning extortion plans in regard to persons other than those named in the indictment and to be executed with aid of persons other than co-defendant were admissible as tending to establish intent, guilty knowledge, motive or a common scheme, plan or system. Pen.Code, §§ 182, 518.

33. Criminal Law ⇐859

In extortion prosecution, wherein recordings of defendant's conversations had been admitted in evidence, replaying records, on jury's request, was not abuse of discretion. Pen.Code, §§ 518, 1137, 1138.

34. Threats ⇐1(1)

That defendant in extortion prosecution had once exposed victim's crimes did not make acceptance of money to prevent another exposure any less the crime of extortion. Pen.Code, § 518.

35. Threats ⇐7

In prosecution for extortion, evidence whether victim had paid defendant, a magazine publisher and radio commentator, money under threat of further exposure after defendant had exposed victim's alleged crimes was sufficient to sustain conviction. Pen.Code, § 518.

36. Criminal Law ⇐865(2)

Keeping jury out four days in a trial which had already consumed forty-four days was not abuse of discretion, even though some jurymen had indicated they would like to be discharged.

37. Criminal Law ⇐865(1)

Trial judge's reminding jurors, who expressed inability to agree, that it was their duty to consult with one another, was not error or coercion of jury.

38. Criminal Law ⇐865(1)

The trial court may properly remind jury that principal purpose of trial is to reach some verdict and that they should not give up without making all possible efforts to do so and that a new trial will be an expense to all taxpayers.

39. Criminal Law ⇐864

Trial judge on disagreement may ask the numerical division of jury but not which number is for conviction.

40. Criminal Law ⇐865(1)

Trial court's remarks and advice to jury, who expressed inability to agree on verdict in extortion prosecution, could not be construed as directing jury to find a verdict of conviction or as an attempt to compel them to change their minds, or to agree one way or the other in the matter.

41. Criminal Law ⇐865(2)

The length of time that a jury should be held for deliberation is ordinarily a

matter within discretion of trial court, and keeping a jury out for a reasonable length of time cannot be regarded as either improper or as an attempt to coerce a jury in reaching a verdict.

42. Criminal Law ⇐1173(2)

Threats ⇐8

Defendant in prosecution for extortion and conspiracy to extort was entitled to an instruction that he was not responsible for representations made by others unless he authorized or sanctioned them, but failure to give instruction was not prejudicial where evidence clearly showed that defendand had either authorized or sanctioned the acts involved. Pen.Code, §§ 182, 518.

Leo R. Friedman, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant and Rudolph Eichenbaum were indicted on four counts (1) conspiracy to commit extortion (violation of Penal Code, § 182); (2) extortion of $200 from Paul Vlasoff; (3) extortion of $50 from John Rourke; (4) extortion of $500 from Leslie Armstrong (the last three counts charged a violation of Penal Code, § 518). After a trial lasting approximately three months a jury convicted both defendants on all four counts. From the judgment and an order denying new trial, defendant Tarantino alone appeals.

Questions Presented.

1. Those arising from the use of tape recordings made in defendant's room without his knowledge: (a) admissibility; (b) alleged denial to defendant of reasonable opportunity to study recordings and transcriptions. 2. Alleged errors in admission of evidence: (a) did cross-examination of defendant extend beyond provisions of Penal Code, § 1323? (b) two hundred plus issues of Hollywood Life Magazine (i) admission, (ii) presence in jury room; (c) evidence admitted solely against defendant Eichenbaum; (d) evidence of similar offenses; (e) replaying of recordings after case submitted to jury. 3. Alleged insufficiency of evidence as to counts 3 and 4. 4. Were the verdicts coerced? 5. Refusal of an instruction.

Recordings.

Defendant, an unmarried man, resided and had his office in a room at the Bellevue Hotel. He was editor and publisher of a weekly magazine, "Hollywood Life." He was what is commonly known as a news commentator and gossip columnist. Every Sunday evening he made a 15 minute radio broadcast over radio station KYA. His codefendant Eichenbaum owned two bars or taverns known as "Gilbey's" and "Gotham" which defendant frequented. The theory of the prosecution was and the evidence proved that Tarantino and Eichenbaum conspired to extort money from individuals, mainly by threatening to expose in Hollywood Life or in a radio broadcast, or both, crimes or secrets involving such individuals.

In December, 1951, the San Francisco Police caused a microphone to be installed in defendant's room with wires running to an apartment nearby where a tape recording machine recorded conversations in the room from about 10 a. m. until the following 2 a. m. daily intermittently for a period of over 14 months. The officers monitoring the machine would listen to the voices coming over the wires from defendant's room, and would record such conversations, or portions thereof, which they considered material to their investigation. Some 200 reels of recording were made. While 42 reels were introduced in evidence, only about 60 extracts therefrom were played to the jury. These extracts were made by plaintiff prior to trial by having the recording or portions thereof played, and a listener would dictate therefrom to a stenographer. If any part were unintelligible a conference would be had by two or more police officers or deputy district attorneys and it would be decided what had been said. After transcription, the transcript would be compared again with the recording, corrections made, and then a conference would be held as to what portion should be eliminated from the transcription. The transcript would be rewrit-

ten deleting such parts as had been decided should be omitted. At the trial a witness would testify that at a certain time he was monitoring the machine, had heard a certain conversation which was recorded, had compared the transcription thereof with the recording and it was true and correct, and conformed to the conversation he had heard over the microphone on the particular occasion. This was the method used in People v. Jackson, 125 Cal.App.2d 776, 271 P.2d 196. Then he would read to the jury the transcription. Subsequently, some of the recordings were played in open court while each juror was given a copy of the transcription to compare with the recording as played. The method of use of the recordings, and the method of testifying with the aid of transcripts, were substantially those approved in People v. Sica, 112 Cal.App.2d 574, 586–588, 247 P.2d 72. See also People v. Kulwin, 102 Cal.App.2d 104, 226 P.2d 672.

The Evidence.—Rourke Case.

John W. Rourke testified that he had two cigar and liquor stores, selling cigars, cigarettes, novelties, souvenirs, magazines, liquor and art pictures. He did business under the name of Johnny O'Rourke. On August 31, 1952, he heard defendant's radio program.[1] Rourke then looked in Hollywood Life to see who was advertising in it who might intercede for him with defendant. He found a Mr. Gene Werner. He talked to Werner. Later Werner told him that defendant had said that Rourke was not handling defendant's publication. Rourke said he would sell the magazine and the next day copies of Hollywood Life were delivered to his stores. Through Werner, Rourke met Eichenbaum, who said that Rourke was getting away with murder in selling "those art pictures" and in running dice games wide open. Rourke asked what could be done about the publicity he was getting. Eichenbaum then said that defendant wanted Rourke to handle Hollywood Life and take an ad in it for $100. Rourke asked Eichenbaum to call up defendant and tell him to get off Rourke's back. Eichenbaum talked on the phone to some one, telling Rourke it was defendant. Eichenbaum told the person that Rourke had agreed to handle his publication and take a $50 ad. Rourke, besides agreeing to the ad, gave Eichenbaum $100. Eichenbaum then said that it was a good thing Rourke got in touch with "us" that day or "We would have really blasted you tomorrow." Eichenbaum made the ad contract retroactive to include the previous as well as the present month. Eichenbaum had defendant come down to the Gotham bar to meet Rourke. Defendant stated that he was glad everything was straightened out. Rourke told Eichenbaum he would take a blood bank ad as he did not think it would be a good idea for his name to appear in the magazine following the blast. Thereafter he received monthly bills of $50 for the ad.

Defendant testified that on the Saturday following his broadcast referring to Rourke's place Eichenbaum phoned him but did not say that Rourke had agreed to take an ad for $50 and to handle his magazine. Eichenbaum did say that Rourke wanted to put an ad in Hollywood Life, but nothing was said about price. Defendant did not tell Eichenbaum that he was going to blast Rourke or his place of business again. While defendant admits going to the Gotham bar at Eichenbaum's request and meeting Rourke there, he denied the material parts of the conversation as related by Rourke.

Armstrong Case.

Leslie Armstrong and his wife Peggy had a police record for many misdemeanors. He owns a tavern and restaurant on Post Street. He also owns property at 1869 Sutter. He had known Eichenbaum for 6 or 7 years and had met defendant in 1948 or 1949, at which time defendant was a customer of his. At one time Armstrong had an ad

1. "Attention, George Reilly, head of the Board of Equalization * * *. Right on Market Street in San Francisco * * *. Three liquor and cigar stores, named John O'Rourke are selling naked and obscene pictures openly very openly to customers, which may also include minors * * *. The same John O'Rourke liquor licensed stores have dice games, claw machines and pinball machines; George, Huh! I could hardly believe my own eyes."

appearing in Hollywood Life for a period of 3 or 4 months. September 4, 1952, a recording of a portion of a conversation between defendant and one Bennie Barrish contained the following: " 'You see, Jimmy, I give him his last chance only he didn't accept yet, but he's gotta come up. Lookit with Peggy Armstrong and all of 'em.' And Tarantino replied: 'Yeah.' And Mr. Barrish said: 'She can't afford to be closed.' And Tarantino said: 'That's right.' And Mr. Barrish said: 'And she can't squawk. It's good business.' " September 7th, defendant broadcast "Attention vice squad members," that he had "just received two letters and two reports of open prostitution at * * * 1869 Sutter Street * * *" The next day Peggy informed Leslie of this broadcast. Two tenants at that address left. Leslie phoned Eichenbaum to meet him as he wanted Eichenbaum to do a favor for him. He had seen defendant and Eichenbaum together on several occasions. Meeting Eichenbaum at the Gotham Bar, he asked what was wrong with defendant, stating that he had never had trouble with him and asked if there was anything Eichenbaum could do about it. Eichenbaum said he would phone defendant. In Leslie's presence Eichenbaum used the phone, stating to the person answering that he had a friend who owned the property at 1869 Sutter who said he wanted to do something about these broadcasts. Eichenbaum asked "How many fingers have you got on your right hand?" Eichenbaum then said "Five." Eichenbaum continued to converse with the man on the phone about their going to Palm Springs that evening. Eichenbaum hung up the phone, turned to Leslie and said, "I think we can get it straight for five hundred dollars." Leslie left to get the money, Eichenbaum telling him to hurry back. Returning, Leslie gave Eichenbaum $500. To Leslie's knowledge 1869 Sutter was never mentioned again on the broadcast. Leslie paid the $500 because of the publicity as he thought the only way he could stop it "was to go to someone that could stop" defendant. September 10th a phone conversation was recorded between Eichenbaum and defendant in which Eichenbaum mentioned Les Armstrong and then about getting $500 from "him" and stating that when "we need some money sometime, we will march around and I will get another five hundred" and then said "Scratch this 1869 Sutter off the list." A little later that evening there was another phone conversation between Eichenbaum and defendant concerning their going to Palm Springs together that evening.

Defendant denied having any conversations with Eichenbaum or Armstrong as testified to by the latter, or receiving any money purporting to come from Armstrong. Defendant claimed that the recorded "five finger" conversation was with one Brenna and not with Eichenbaum and that the reference to the figure was to how many persons were going to Palm Springs with them.

Vlasoff Case.

Vlasoff was a bar operator with a record of misdemeanors. He knew Eichenbaum and defendant since 1950. That year he was operating a bar known as the Club Continental. Some time in March Eichenbaum told Vlasoff that because he was operating his bar after the legal closing hour, Vlasoff would have to pay him $200 each month to be able to continue doing so. Vlasoff made one payment. In April Eichenbaum raised the amount to $300 per month which Vlasoff paid until the first part of 1951. In February, 1951, Vlasoff was notified by the State Board of Equalization of an infraction of the liquor law. Vlasoff showed the notice to Eichenbaum who said he could straighten it out for $500. Vlasoff paid him. Vlasoff received from the board a notice of indefinite postponement. In a conversation in June with Eichenbaum the latter told him to put an ad in the Hollywood Life Four Year Book about to be issued. Vlasoff said he did not care to advertise his place in defendant's magazine. Eichenbaum suggested that instead he put in a blood bank ad. Vlasoff agreed and gave $25 for the ad to Jimmy Jaye who was present with Eichenbaum. In 1951 Vlasoff was operating. In July or August Eichenbaum told Vlasoff that defendant was "awfully mad" at him and the next day would blast him on the air, and suggested that Vlasoff talk to defendant and straighten it out. Eichenbaum then dialed defendant's private

phone number, and Vlasoff talked to defendant. Defendant was "real mad" at Vlasoff, saying that the latter was getting away with murder, booking horses, and a crap game, and was "popping off" about defendant and that defendant would blast him the next day. Vlasoff asked what he could do to make up and not be blasted the next day. Defendant told him to talk to Eichenbaum. Eichenbaum took the phone and talked with defendant. Eichenbaum then told Vlasoff that he thought he had it all fixed up. "We'll chop my fingers off, and he won't blast you." Eichenbaum explained this meant that Vlasoff should pay five $100 bills and defendant would forget the incident and not bother Vlasoff. Vlasoff said he could not pay that much. Eichenbaum said he would talk to defendant although he did not think he would go for less. A few minutes later Eichenbaum returned and asked what was the best Vlasoff could do. Vlasoff said $200. Eichenbaum said that Vlasoff would have to put in an ad, and he thought defendant would accept $200. Vlasoff said he did not want to advertise the card room "or the book." Eichenbaum said to put in an ad for the Club Continental. Vlasoff agreed to put in the ad at $50 per month. Eichenbaum's and defendant's conversations with Vlasoff constituted the first and second overt acts charged in the first count. Apparently the $200 was paid the next Monday, but, although billed for the ad for a couple of months Vlasoff did not pay for it. Vlasoff was indicted on two felony charges. Thereafter he appeared before the Grand Jury testifying against defendant. Six days thereafter the indictment was amended to "gambling, or something like that, some simple thing." To this he pleaded guilty and was given a six months suspended sentence. It did not occur to Vlasoff that there was any connection between the charge against him and his appearing before the Grand Jury. Eichenbaum from time to time had loaned Vlasoff money. He admitted signing two promissory notes to Eichenbaum, one for $1,100, the other for $300.

Defendant denied that the conversation between him and Vlasoff as testified by the latter ever took place. Defendant also denied any conversation with Eichenbaum about Vlasoff or in which chopping off "my" fingers was mentioned, or concerning any of the matters testified to by Vlasoff.

Similar Offenses.

(a) Davis.

Ted Davis was a partner and manager of the Silver Rail bar. It was a "gay bar," that is, one catering to homosexuals. Defendant visited the bar and asked Davis to take an ad at $100 per month in his magazine, saying that it would do Davis a lot of good and that then defendant would let Davis and his bar alone. Davis took such ad for a period of five months, at the end of which time he sold his interest in the bar. Davis took the ad because defendant was a broadcaster and publisher of Hollywood Life and Davis did not want defendant to blast the bar on the air or put anything in the magazine about the homosexual bar.

(b) Action Sales.

On June 22, 1952, defendant broadcast "Attention Better Business Bureau and the Chamber of Commerce," that he had received four complaints against stores on Market between Fifth and Eights Streets holding "action" sales as misrepresenting merchandise and prices and that "this new action sale gimmick does require immediate investigation." (The third overt act charged in the conspiracy count.)

Harold Cossman and Theodore Cossman operate two jewelry stores, Lords and Mayfair, both between Fifth and Sixth Streets. Both stores conducted "action" sales during June, 1952. Harold Cossman contacted one Bennie Barrish, who he knew was acquainted with defendant. Barrish went to see Cossman at Lords Jewelers. Cossman told Barrish about the broadcast, asked him to contact defendant and tell him they were not doing anything illegal. Barrish said he would try to contact defendant and find out about it. A few days later Barrish returned and told him defendant would take Cossman's word for it and forget about the letters of complaint, and there would be no more broadcasts. Barrish, in turn, said he was soliciting books for veterans and asked Cossman to purchase copies of the anniversary issue of Hollywood Life. Cossman gave Barrish a $200 check in payment for

the magazines. Cossman gave Barrish the check for $200 in order to prevent adverse publicity from appearing in Hollywood Life magazine.

In September, 1952, one Al Sigle visited Lords Jewelers and talked with Drew, an employee of the Cossmans. Sigle said, "my boss is going to close you guys up next month, you know." Drew told the Cossmans and Drew got in touch with Barrish that same evening at the Trocadero. Drew asked Barrish to speak to defendant about what Sigle had threatened. (Prior to this time Sigle had tried to sell ads to the Cossmans, but they would not buy.) Several days after the conversation between Drew and Barrish, Sigle came around again, and Cossman told him he would like to speak to defendant personally. Cossman met defendant at Ferrari's in the presence of Ted Cossman and Sigle. Cossman explained to defendant that they were running an honest business, but defendant pointed out that he still had the letters of complaint. Cossman agreed to take some kind of ad. Sigle returned the following morning and Cossman gave him an ad for $25 per month. Thereafter, Cossman continued the ad.

Charles Maroosis and Louis Hirsch were copartners in a jewelry business known as the Tower of Jewels, located at Market near Sixth. During June, 1952, they conducted "action" sales. Shortly after June 22, 1952, Hirsch was informed about defendant's broadcast and discussed its effect with Maroosis. Hirsch then called Bennie Barrish, who he knew to be a friend of defendant's. Hirsch asked Barrish if he could do anything about stopping defendant's broadcasts. A few days later Barrish returned and told Hirsch that if he and Maroosis bought 100 year books to be sent to veteran's hospitals, defendant would stop the broadcasts. Hirsch gave Barrish a check for $100 to pay for the 100 books. His motive was to have the broadcasts stopped. On June 27, 1952, a conversation between Barrish and defendant was picked up by microphone in defendant's hotel room. Defendant suggested to Barrish that Maroosis be talked into buying 200 year books to be given veterans. That same evening the same two were detected in a second conversation during which Barrish told defendant, "I made 'em give me a check first." In the course of this conversation the name Maroosis was mentioned.

(c) Other evidence regarding similar cases:

Blast over the radio concerning stripteases in several clubs in the International Settlement; recorded conversation between Barrish and defendant about getting $1,000 from one Dorothy Ryan, apparently a prostitute; a telephone discussion regarding getting money from the owner of the Domino Club on October 28, 1954; a telephone conversation of October 30, 1954, in which the claimed improper marriage of one Charley Anderson (of the Domino Club) is discussed; threat of forcing Yellow Cab to take an ad; evidence of shakedowns of unidentified establishments.

In addition to the above, certain evidence was admitted against Eichenbaum only. One Tommy Vasu, a woman, testified that in the year 1949 she managed a hotel and bar at 299 Broadway; that she received a notice of suspension from the State Board of Equalization and that she talked to a friend of hers, Jack Ehrlich, as to what could be done; that Ehrlich told her he had spoken to some one and that if she gave him $1,000 and $300 a month in the future, she could stay in business. A couple of weeks later Eichenbaum and another man came into her place of business and said to her, "So, you don't want to pay three hundred a month?" that she started to pick up the telephone; that it was knocked out of her hand and pulled off the wall by Eichenbaum and that she got hit several times. Eichenbaum denied the story and Jack Ehrlich likewise denied it.

State witnesses Joseph Harvey and Jack Flanagan testified that they operated the Paramount Tavern in 1951; that in July, 1951, Eichenbaum and another man came in, and the other man showed a badge and said he was from the State Board. Eichenbaum told Flanagan that he would have to pay off $50 a month to keep the place open. They paid $50 to the other man.

1. Issues Arising from the Tape Recordings.

(a) Admissibility.

[1, 2] Defendant contends that defendant's constitutional rights were infringed by the installation of a dictaphone in his room and the use of recordings of his conversations, and that as this evidence was illegally obtained it was inadmissible. He cites Irvine v. People of State of California, 1954, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561, in which the United States Supreme Court in effect invited reconsideration of the rule in a number of states, including California, that competent evidence is admissible no matter how obtained. See People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, so holding. In People v. Perez, 128 Cal.App.2d 750, 276 P.2d 72, we pointed out that we, as an intermediate court, are bound by the rule of the Mayen case. That still holds true.

(b) Was defendant denied reasonable opportunity to study recordings and to receive copy of transcriptions?

Some 200 reels of recordings were made by the officers. Forty-two reels were admitted in evidence from which only about 60 extracts were read into evidence. Portions of seven reels were played and heard by the jury. (These portions are included in the above mentioned 60 extracts.) Early in the trial it appeared that transcripts of the recordings of the conversations heard over the dictaphone had been written up. Then under the supervision of the district attorney portions were eliminated which were not considered germane to the case, and a transcript so modified rewritten. Defendant requested a copy. The court stated that defendant was entitled to it and the district attorney promised to give it to defendant. Apparently the request and the promise referred merely to transcripts of those conversations, any portion of which had been introduced in evidence and not to transcripts of all reels. About the middle of the trial when asked for the transcript the district attorney stated that no more than three days after making this "improvident, inadvertent promise" he had informed defendant he could not provide the transcripts, that it was a "hopeless job" in the time that was available to get them out; that, however, plaintiff would at any time specified by counsel, play the recordings, or allow them to be played by counsel. While further requests were made for the transcripts, including transcripts of the 200 reels, the court was not asked to order their production. Early in the trial plaintiff stated that the reels were available to counsel. At that time defense counsel stated that he had no curiosity concerning them. The court then asked the district attorney if he would have the recordings available "in case counsel wants it?" The district attorney stated he would. On October 2nd when the witness Kind was testifying to a portion of a recorded conversation the district attorney stated: "The whole recording will be available to you and if anything is left out that you consider should be in, we will consider it" and that if counsel desired it they could listen to the entire 500 hours of recordings. At this time the reel containing the conversation was in court marked for identification. After plaintiff's witnesses had testified to recorded conversations a discussion arose between court and counsel, in which the court stated that the tape recordings were there for defendant's inspection. Defense counsel then stated that he had listened to three "of these so-called tape recordings of conversations" and then asked that the recording of the conversation as to which the witness was testifying be produced and that a continuance, "probably a week," be granted to give defendant a chance to examine the recording, before the witness testified further concerning the conversation. Again, the district attorney stated that the recordings were available at any time. The court denied the request "now" but stated in effect that if any parts of the conversation pertinent to the case were left out they could be placed in evidence. Again, during the examination of the same witness defendant renewed his objections to the admission of the conversation until defendant had an opportunity "of becoming conversant with what is on these tapes * * *" The court said, "Same ruling. You are going to be conversant with it." On Friday, October 9th, defendant asked the court for a 60 day continuance

of the trial to enable counsel to examine and play the 31 reels which included all the conversations testified to up to that time. The court then stated that the request for a continuance of two months raised the very practical question that in two months the jury might have forgotten much of the testimony it had already heard. The district attorney stated that the reels would be available to counsel "At any time, day or night, week-ends or holidays," but that there would have to be some one designated by plaintiff present at all times. The district attorney then pointed out that there were "three holidays coming up, Saturday, Sunday and Monday" and suggested that defendants start their auditor listening, and that by Tuesday morning defendants would know how many more reels they wanted to hear. He further suggested that any action on the motion for continuance be deferred until Tuesday. Defense counsel stated they would not work on holidays. The following then occurred: "The reel, an offer has been made that you hear—Mr. Friedman [defense counsel]: I reject the offer that was made. The Court: All right, then, it is rejected." This occurred on the eleventh day of the trial (excluding days spent in selecting the jury). The actual trial exclusive of time of selection of jurors and of argument took 38 days. Later the same day defendant objected to any further testimony based on the recordings until defendant had an opportunity to hear them. Then ensued a discussion in which the court stated that defense counsel had refused the opportunity to hear them over the week end, and that defendant's request for 60 days was unreasonable. Defendant then stated he would modify his request and asked for a "reasonable time." The court then said: "If these recordings are to be played they will have to be played repeatedly in your personal hearing, and if not on Sundays and holidays, this case would have to be continued six to nine months," and suggested that defense counsel could get some one to audit the reels for them. The court said: "I suggest you try some reels between now and the next time the Court convenes, and I suspect it will be quite an ordeal for you to listen to these recordings personally over a period of months. However, I will take the motion for a continuance under submission." On the 22nd day of the taking of evidence, the defendant had been playing some of the recordings before the jury. The district attorney stated that he had been informed that defendant Eichenbaum's counsel intended playing all of the 200 recordings and then moved that before any more were played defendant point out their relevancy. He pointed out that the portions of the recordings offered by plaintiff were admitted as containing admissions against interest, that 95 per cent of the whole recordings had nothing to do with the case and would be inadmissible for that reason, and further would be nothing but self-serving declarations. The district attorney then stated, "Counsel have had an unlimited opportunity to hear these recordings played." The court then stated that it would not permit all 200 recordings to be played before the jury. "You had opportunity to test the relevancy of what has been played, and I don't think the jurors should be subjected to just an indiscriminate audition of records which, as far as you and their associate counsel or other defense counsel are concerned, if you don't know what is in them, whether there is no relevancy or whether there is, I don't think that you or the jury should be subjected to what I call and would call 200 records and 200 tapes, a rather brutal experience." Defense counsel agreed that it would not be right to require the jury to listen to the recordings and stated that he had previously moved for a continuance for a reasonable time to enable him to hear them, and that he should be permitted to hear them out of the presence of the jury. The court stated: "There are ways in which you can." The district attorney then stated: "There have been many week-ends and holidays; since that time we offered then and we have offered twice since then to play these recordings at any time that counsel might designate, at any place they might designate, any hour of the day or any week-ends or holidays notwithstanding, and he has had a full opportunity. The Court: And that offer was peremptorily rejected. Mr. Friedman: It was rejected and it will be rejected

again if made under the same terms and conditions. There is other things to be done in this trial besides using the evenings and Saturdays and Sundays in listening to the recordings." Further discussion followed as to playing all the recordings before the jury. Then the court said: "Now, we have, on our own time, I mean yours and mine and counsel, and not the jurors, can't we hear these recordings? I am available at any time out of the presence of the jury, and determine whether there is any relevancy or whether there isn't. Without having the jury subjected, and it is no reflection so far, to hearing a lot of recordings which may or may not have anything to do with the issues on trial." Without replying to this defense counsel asked that the recordings of four specified days be played. (They were later.) Nothing further was said at this time concerning playing the recordings out of court. Some discussion was had concerning the previous refusal of the district attorney to give defendant copies of the transcripts of the recordings which ended when Eichenbaum's counsel stated that "the law doesn't compel it * * *" Later the same day the court stated that the jury could hear the rest of the recording then being played and then court would adjourn. "Now, we can hear the rest of this; I will be available from eight o'clock in the morning on—from now until as long as you can stand it, but these recordings are going to be played out of the presence of the jury, and you can decide what you consider appropriate and what you do not. * * * Well, first, and at the very start, I was available at all times outside the court to listen to these recordings with counsel. We did listen once or twice and over a period of eight weeks there was a great opportunity to listen to records out of the presence of the jury." Discussion then occurred concerning whether the jury should hear the rest of the recording which was then being played or merely the conversations which had theretofore been introduced into evidence. In discussing this question the court said: "Don't you think we could save time by hearing them privately?" Defense counsel thought not and stated that the recordings of September 14th and 21st were "all I ask." The court permitted these to be played.

On the 28th day, the court again stated that no more recordings would be played unless "outside of the presence of the jury." Defendant then asked for the transcriptions and for an opportunity to play the recordings. The district attorney stated: "For almost two months the prosecution has made every recording in this case available to Mr. McGovern [Eichenbaum's counsel]. He hasn't deemed it necessary to listen to any of them." The court then requested plaintiff to turn over the transcriptions, stating it could not compel plaintiff to do so. It also pointed out that to spare the jury from listening to records which might have nothing to do with the case, the records would have to be played out of the presence of the jury. Defendant then asked for a 30 day recess to hear the records played but indicated he would be willing to take less time. The court stated, "We did have a recess of a week and nothing was done in that respect." The district attorney then stated that in the almost two months of the trial defendant had week ends, holidays, evenings and ten days of recess during all of which time the records were available, that two of the three alternate jurors selected for the trial were now in the jury box, and that delays might cause a situation in which there might no longer be twelve jurors available. A discussion was then had about the transcriptions in which the court agreed that it had not ruled that defendant was not entitled to see them but that the court had no authority to compel their production.

Defendant had theretofore conceded that the court had no power to order the production of the transcripts and at this time seemed to acquiesce in the court's statement. People v. Stevenson, 103 Cal.App. 82, 284 P. 487, cited by defendant to support his present contention that he was entitled to a transcript of all the recordings does not support it. The Stevenson case dealt with the refusal of the district attorney to allow defendant to see the transcript of testimony before the grand jury which the prosecution had used in the ex-

amination of certain witnesses. "The district attorney had exhibited portions of the transcript to several of the people's witnesses and also to the defendant himself during his cross-examination, and had questioned them concerning statements shown therein to have been made by them at the grand jury investigation, and had read excerpts from the testimony in the transcript into the record." 103 Cal.App. at page 88, 284 P. at page 490. This situation was entirely different from that in the instant case.

The next mention of the playing of the recordings occurred on the 31st day of the trial when the district attorney in the cross-examination of Eichenbaum wanted to play five lines of tape. Mr. McGovern called attention to the court's previous ruling that no more recordings were to be played before the jury and objected to this portion being played. The court sustained the objection. Later in the cross-examination of defendant, certain portions of the recordings were played by the district attorney to get defendant's explanation of their contents.

[3] Was defendant deprived of a fair trial by the court's refusal to order plaintiff to give defendant copies of plaintiff's transcriptions of the recordings, to give continuances to enable defendant to play the recordings out of court and to permit the playing of additional recordings before the jury? Certainly the court did not abuse its discretion or deny defendant a fair trial, in refusing to permit the playing of recordings of conversations and occurrences which had nothing to do with the matters on trial. Recordings of relevant conversations were played. But the court found after one or two whole reels were played to the jury that the reels related to matters which were not relevant to the case. A reel took two hours and 20 minutes to play. In many instances it was difficult if not impossible to understand what was being said. To require the jury to sit through day after day of listening to immaterial matters would have unduly prolonged the case and would have been punishment on the jury. Moreover, listening day after day to a continuance of the filthy language used by defendant as shown by the conversations in evidence, would have injured more than helped defendant. The court properly ruled that only relevant parts of the reels could be played.

[4–6] As to the transcriptions, we know of no rule of law which requires the prosecution to give its trial notes to the defendant. Plaintiff gave defendant copies of the transcriptions of all conversations either testified to or played in evidence by plaintiff. The transcriptions which plaintiff refused to give were those made of conversations at other times in defendant's room. As such they constituted plaintiff's trial notes. While under the circumstances of this case, in view of the fact that plaintiff first promised them to defendant, it would have been better to give them to defendant, plaintiff was under no legal compulsion to do so. After all, and this applies to the recordings as well as the transcripts, the plaintiff was offering primarily the testimony of live witnesses who testified to the particular conversation. The recordings were offered to show the accuracy of the testimony. Take the ordinary trial situation. A witness is called by the prosecution to relate a certain conversation which the witness overheard defendant engage in and in which the prosecution claims admissions against interest were made. Defendant would not be entitled to notes taken by the prosecution out of court of the witness' version of other conversations in which the witness claims the defendant engaged, but concerning which the witness did not testify. That is the situation here.

[7] As to the recordings, there can be no question but that once the plaintiff offered any portion of a conversation, defendant was entitled to hear the recording of the entire conversation. In several instances that was done here, the entire conversation being played for the jury (excerpts from seven reels). At no time when a conversation was testified to, and defendant asked that the recording of that conversation be played to determine if the whole of the conversation were given, and given correctly, was there an instance when it was not played. Defendant's complaint is that he was not given the opportunity to hear the rest of the recordings taken the same

day and subsequent days, most of which had no bearing on the case. But at no time was he refused the right to hear all the recordings. Time after time it was stated by both the prosecution and the court that defendant was entitled to hear them. The question of whether he was denied the opportunity to hear them depends upon the solution of the question as to whether the defendant had a right to a recess during trial to hear the recordings or whether he should have heard them after hours during the progress of the trial. In determining this question, we must bear in mind what the reels contained. As pointed out above, plaintiff played all conversations which it considered relevant and defendant had the opportunity of determining whether the whole of such conversation was played. But defendant wanted to hear all the rest of all the reels to determine if in some other conversation something was said which might be favorable to defendant; in other words, whether there was some other conversation in which defendant engaged which might be self-serving. Defendant argues that he could not know if there were other matters in the reels favorable to him or explanatory of the parts introduced by plaintiff. Why would he not know? After all, he was the person doing the talking on them. True, he might forget the details of a particular conversation, due to the passage of time, but he would remember generally about the conversations and whether or not their subject matter might be favorable to him.

[8] Time after time defendant was told that he ought to start listening to the records between court sessions and on week ends and holidays. But defendant refused to even start unless he was given a continuance. This case, as it was, lasted from September 22nd to December 18th, practically three months. The record indicates that defendant's strategy was to use the request to hear the recordings as an excuse for protracting the trial. In the trial of any important action the parties must expect considerable "burning of the midnight oil." Realistically speaking, it is doubtful if counsel who were trying the case would have listened to the reels themselves had a continuance been granted. They would have had some one of their staff do it for them. As pointed out by the court, they could have had that done while they were going on with the trial. In any event, we can see no reason why some part of the time, after court sessions and on week ends, could not have been used and a start at hearing the recordings could not have been made. Had a reasonable portion of such time been consumed and found insufficient a refusal of an application for further time might have caused a far different situation. In view of the fact that practically all, if not all, of the matters which defendant claimed to desire to listen to would have been immaterial and irrelevant; the fact that defendant himself would know most of what other conversations he engaged in, and if favorable and admissible, could have asked for the recordings of that day; and the fact that defendant refused to even devote a part of out-of-court time to the matter, plus all of the other circumstances of the case, we cannot say that the court refused defendant a reasonable opportunity to study the reels nor that by the court's action in this respect, defendant was denied a fair trial.

2. Admission of Evidence.

(a) Cross-Examination of Defendant.

Very carefully defendant attempted to limit his direct examination to the circumstances dealing with the Vlasoff, O'Rourke and Armstrong matters and to those dealing with the circumstances under which Vlasoff received $700 from defendant for repudiating his testimony before the grand jury.

[9–11] Plaintiff opened defendant's cross-examination by asking him concerning a conversation with one Anderson, the recording of which plaintiff played and which indicated defendant was threatening Anderson for purposes of extortion. Then followed questions concerning other purported extortions, generally admissible under the "other crimes" rule hereafter discussed. Defendant contends that this cross-examination extended beyond the scope of that permitted by section 1323, Penal Code which provides that a defendant may be cross-examined "as to all matters

about which he was examined in chief." The extent of cross-examination of a defendant who takes the stand has been greatly broadened in recent years. The latest case on the subject is People v. Zerillo, 36 Cal.2d 222, 223 P.2d 223, in which is cited many cases supporting its ruling. There the defendant was charged with offering a bribe to a food inspector, to secure the passing of impure tomato paste. The defendant denied offering the bribe. On cross-examination the defendant was asked about his knowledge of chemist's reports and certain letters. The defendant contended this exceeded the scope of the direct examination. In holding that the cross-examination was properly permitted, the court said that the language above quoted from section 1323 does not mean "that the cross-examination must be confined to a mere categorical review of the matters, dates or times mentioned in the direct examination. See People v. Wilson, 25 Cal.2d 341, 351, 153 P.2d 720; People v. King, 13 Cal.2d 521, 527, 90 P.2d 291; People v. Mammilato, 168 Cal. 207, 213–214, 142 P. 58; People v. Buckley, 143 Cal. 375, 388–389, 77 P. 169; People v. Teshara, 141 Cal. 633, 638, 75 P. 338; People v. Dole, 122 Cal. 486, 491, 55 P. 581 [68 Am.St.Rep. 50]. It may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given by him on his direct examination. People v. Kynette, 15 Cal.2d 731, 753, 104 P.2d 794; People v. Creeks, 170 Cal. 368, 379, 149 P. 821; People v. Buckley, 143 Cal. 375, 388–389, 77 P. 169. * * * If a defendant takes the stand and makes a general denial of the crime with which he is charged the permissible scope of cross-examination is very wide. See People v. Gallagher, 100 Cal. 466, 473–476, 35 P. 80; People v. Creeks, 170 Cal. 368, 378–380, 149 P. 821. Moreover, as stated in People v. Teshara, 141 Cal. 633, 638, 75 P. 338, 340, 'A defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but without testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies. He can be cross-examined with respect to facts or denials which are necessarily implied from the testimony-in-chief as well as with respect to facts which he expressly states.' See also People v. Mayen, 188 Cal. 237, 257–258, 205 P. 435 [24 A.L.R. 1383]; 13 Cal.L.Rev. 384–387. Language to the contrary in People v. Arrighini, 122 Cal. 121, 127, 54 P. 591, must be deemed to have been impliedly overruled by later cases." 36 Cal.2d at pages 228–229, 223 P.2d at page 227.

[12] The decision in People v. McCarthy, 88 Cal.App.2d 883, 200 P.2d 69, cited by defendant, is based largely upon the Arrighini case and People v. O'Brien, 96 Cal. 171, 31 P. 45, upon which the Arrighini case is based. As the Zerillo case expressly disapproves the Arrighini case, the O'Brien case would necessarily be likewise disapproved, as well as the McCarthy case.

In our case defendant on direct examination not only denied any acts of extortion, or conspiracy to extort, from Vlasoff, Rourke or Armstrong, but stated, in effect, that it was his practice to use his broadcasts and Hollywood Life to bring violations of the law to the attention of the police or the Board of Equalization and not for extortion purposes. Again he stated in effect that when he learned there was prostitution going on he "held nothing back" but gave names on his broadcasts. He testified that Brenna, one of the men who appeared from the recorded conversations to be a collector of extortion money for defendant, was merely a "friendly informer" who brought him information. The situation here was similar to that in People v. Kynette, 15 Cal.2d 731, 104 P.2d 794, where Kynette, as did defendant here, opened the door by his statements on direct examination that he acted purely from laudable motives. "* * * in an effort to refute the theory underlying the prosecution, Kynette on his direct examination attempted to establish, in effect, that the surveillance of Raymond was in the performance of legitimate police activity and that the function and activities of the intelligence unit were confined to legitimate police work. Under the circumstances, there was no error in the rulings of the court below which

permitted the prosecution on cross-examination to interrogate the witness concerning other activities of the intelligence unit, of which he was in command, with respect to persons who apparently had been hostile to the city administration. The district attorney clearly declared the purpose of such cross-examination, which unquestionably was related to the direct examination and to Kynette's knowledge of the purpose and activities of the intelligence unit." 15 Cal. 2d at page 752, 104 P.2d at page 805.

[13] As said in People v. Zerillo, supra, 36 Cal.2d 222, at page 229, 223 P.2d 223, at page 228, this type of testimony was "equivalent to a general denial of the crime charged and opened the door for examination as to his intent and motives."

(b) Issues of Hollywood Life.

(i) Admissibility.

[14, 15] Five volumes, covering most of the weekly issues from 1949 through 1952 (approximately 200) were found in defendant's room at the time of his arrest, and offered in evidence. Defendant's only objection then was that there was no showing that defendant edited them or wrote the articles in them. As the evidence already showed that defendant was the publisher, the objection was properly overruled. Later, defendant moved that the court set aside the admission of the five volumes and that only such portions be admitted as either side might from time to time offer. One issue dealing with the Vasu incident (the beating of a woman by Eichenbaum) and an attack on San Francisco's mayor and the editor of the Examiner, was eliminated by the court, but otherwise the motion was denied. The issues were admissible. They contained defendant's comments or columns, the blood bank ads giving no names of sponsors, and were one of the means used by defendant to extort money. The fact that they contained articles by defendant and others attacking certain police officers, the San Francisco Police Department and others, did not prevent their admission. They were competent evidence to show that the magazine was an instrumentality used by defendant to "blast" people.

(ii) Hollywood Life in the Jury Room.

[16, 17] After the jury had been out about a half an hour, the foreman sent word to the court asking if the jury might have the Hollywood Life issues. Thereupon the court ordered the five volumes to be sent into the jury room, where they remained until the end of the jury's deliberations. "The jury is a constitutional part of the court and they are privileged to take all or any of the exhibits with them." People v. Horowitz, 70 Cal.App.2d 675, 704, 161 P.2d 833, 849. Being in evidence the jury was entitled to see them. Concededly they did defendant no good, but neither did any of defendant's other actions evidencing his extortion methods. There was no error in this action.

(c) Evidence Solely Against Defendant Eichenbaum.

[18, 19] This consisted of testimony to the effect that Eichenbaum and another (not defendant) came to Tommy Vasu's place and physically beat her because she would not pay $300 per month to keep in operation; testimony to the effect that Eichenbaum threatened Harvey and Flanagan to have their saloon closed if they did not pay $50 per month; testimony of Vlasoff concerning a payment to Eichenbaum of protection money and testimony of Armstrong concerning a certain conversation with Eichenbaum. At the time of the admission of each incident the court sustained defendant's objection to its introduction against him and strongly admonished the jury that it was admitted solely against the codefendant. Typical of these admonitions is the following: "First, I admonish the jury, and this is a very important admonition, ladies and gentlemen, that all this conversation has nothing to do with the defendant Tarantino; and as far as he is concerned, erase it from your minds. It may be difficult to do, but under your oath as jurors you are required to do it." In its final instructions the court again strongly admonished the jury on the subject. It is well settled that where defendants are tried jointly for participation in the same crime or crimes evidence inadmissible against one defend-

ant may be admitted against a codefendant, provided the jury is properly instructed on the subject. See People v. Trawick, 78 Cal.App.2d 604, 178 P.2d 45; People v. Wade, 71 Cal.App.2d 646, 163 P.2d 59 and cases cited therein. Here "in the instant case it appears that the trial court was fully cognizant of this rule and properly apprised the jury of its duties in the premises." People v. Wade, supra, 71 Cal.App.2d at page 653, 163 P.2d at page 63. Counsel have presented no authority for the contention that the rule is, or should be, different because one of the crimes charged is that of conspiracy.

(d) Evidence of Similar Offenses.

The prosecution introduced evidence of conversations in which defendant participated which indicated that defendant was engaged in extorting money from others than the three mentioned in the indictment and was using other persons than Eichenbaum to do the collecting. Thus, a recording of three broadcasts by defendant accusing specified International Settlement taverns of violating the law by serving liquor to minors, etc., and conversations by defendant with one Sigle relative to getting ads from these taverns to prevent them from getting what defendant called "the Tarantino treatment" were put in evidence. Also recordings of defendant's half of a telephone conversation in which defendant told of a meeting he had with one Anderson in which defendant told Anderson, in effect, that if he took blood bank ads in the magazine defendant would not blast Anderson about the latter's claimed improper marriage. There were other conversations of similar nature with other persons. In these conversations no mention was made of Eichenbaum nor was there any direct evidence that he was involved in them or that he knew any of the persons with whom defendant was conversing. Defendant contends that for that reason and because he claims they had no bearing on the crimes charged, they were inadmissible.

[20–26] A prima facie case of conspiracy between defendant and Eichenbaum had been made out, among other things, by (1) the testimony of Vlasoff that Eichenbaum told him to put an ad in defendant's Hollywood Life, that then Vlasoff talked to defendant urging defendant not to blast him on his broadcast. Defendant told Vlasoff to talk to Eichenbaum who demanded $500. (2) Rourke, after being blasted by defendant, gave $100 to Eichenbaum for an ad in Hollywood Life, and later was told by defendant that everything was straightened out. (3) Defendant broadcast that Armstrong's property was being used for prostitution. Armstrong consulted Eichenbaum, who phoned defendant. Armstrong then paid Eichenbaum the $500 which the latter demanded. Eichenbaum told defendant he had received $500 and told defendant to scratch Armstrong's property "off the list." These conversations were admissible from two standpoints: (1) Acts and declarations of a coconspirator after prima facie proof of the conspiracy has been made. The evidence in the Vlasoff, Rourke and Armstrong matters definitely showed that defendant and Eichenbaum conspired together to extort money through the threat of the use by defendant of his broadcasts and Hollywood Life, even though there was no direct evidence of an agreement between them to do so. "As a general rule, a conspiracy can only be established by circumstantial evidence 'for, as the courts have said, it is not often that the direct fact of an unlawful design which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts, bearing more or less closely or remotely upon the common design (5 Cal.Jur. 521); and it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts (citing authority), nor that they had previously arranged a detailed plan * * * for the execution of the conspiracy (citing authority).' People v. Sampsell, 104 Cal.App. 431, 438–439, 286 P. 434, 437." People v. Steccone, 36 Cal.2d 234, 237–238, 223 P.2d 17, 19. A prima facie showing of the conspiracy having been made, the acts and declarations of the conspirators were admissible. See People v. Steccone, supra, 36 Cal.2d

at page 238, 223 P.2d 17. While Eichenbaum was not directly tied into the extortions of other persons than the three mentioned in the indictment nor with the collections made by other apparent agents of the defendant, the jury could very well have inferred from the conversations of defendant with Eichenbaum and the other evidence in the case that he, too, had some relationship to the other extortions. "Once the conspiracy is established all evidence of the substantive crimes becomes admissible against all participants, even though the other conspirators were not present." People v. Pierce, 110 Cal.App.2d 598, 610, 243 P.2d 585, 593. "The weight of the corroborative evidence is for the trier of the facts to determine. People v. Trujillo, supra, 32 Cal.2d [105] at page 112, 194 P.2d 681. The relationship of the parties and all their acts and conduct may be considered in determining whether there are sufficient corroborating circumstances." People v. Frankfort, 114 Cal. App.2d 680, 692, 251 P.2d 401, 409.

[27-29] (2) In any event, they were admissible against defendant under the rule of similar crimes to show scheme, plan or system to conspire and commit extortion. "It is now definitely settled as the law of this state that upon the trial of an accused for the commission of a particular crime, the prosecution may show as a part of its case that such crime was committed in furtherance of a conspiracy to commit a series of like or other criminal acts, People v. Schmidt, 33 Cal.App. 426, 165 P. 555; People v. Arnold, 199 Cal. 471, 250 P. 168; and such evidence is not rendered inadmissible because it shows that the accused committed other and distinct crimes in furtherance of the common object of the conspiracy." People v. Braun, 31 Cal.App.2d 593, 604, 88 P.2d 728, 733. Defendant put in issue the motive or intent with which he made his broadcasts and published his magazine. One of the well recognized situations in which evidence of another crime is admissible is "where evidence of the crime tends to prove a motive for the commission of the crime charged; where a felonious or fraudulent intent, being a necessary element in the crime charged, the evidence of other crimes tends to establish and fix the existence of *such motive or intent*". People v. Hermes, 73 Cal.App.2d 947, 957, 168 P.2d 44, 49; Emphasis added.

[30] Defendant contends that other offenses cannot be proved by his extrajudicial statements, and cites People v. Baird, 105 Cal. 126, 38 P. 633, and People v. Hinshaw, 40 Cal.App. 672, 182 P. 59. In the Baird case, the defendant was charged with forgery of a certain note. To prove guilty intent the prosecution introduced other notes claimed to be forgeries. "The only evidence tending to show that these notes were forgeries consisted of proof of the extrajudicial admissions of defendant to that effect." 105 Cal. at page 128, 38 P. at page 634. On appeal the defendant contended that the admission of the defendant was not sufficient to permit the introduction in evidence of the notes. The Supreme Court referred to section 111 of volume 3 of Greenleaf on Evidence (the section dealing with forgeries) which supported that contention, stated "this seems to have been so held in Rex v. Forbes, 7 Car. & P. 224", 105 Cal. at page 129, 38 P. at page 634, and without further discussion stated, "Conceding that under this rule the proper foundation was not laid for the introduction of these notes in evidence * * *." It then held that the defendant had not properly objected to the offer of the notes in evidence and upheld the conviction. In the Hinshaw case, the court said, 40 Cal.App. at page 674, 182 P. at page 60: "It is true that extrajudicial confessions of defendant alone would not be sufficient evidence of the forgeries to render them admissible in evidence. People v. Baird, 105 Cal. 126, 38 P. 633." It further stated, 40 Cal.App. at page 674, 182 P. at page 60: "As to the admission of evidence of another forgery, it first appeared as a part of the confession of appellant of the commission of the crime charged in the information. It was embodied in his voluntary statement made to the sheriff, and it was so closely connected with the recital as to the main offense that the confession was hardly divisible. At any rate, in this class of cases, evidence of other

similar offenses is admissible for the purpose of showing guilty intent and of rebutting the theory of accident or good faith * * *" and ended up by saying, 40 Cal. App. at page 674, 182 P. at page 60: "And it may be that the court committed a technical error in overruling the objections of appellant as to the other forgery; but other evidence in the nature of exemplars of his handwriting was subsequently received, so that the error, *if any,* was cured" (emphasis added), and affirmed the conviction. In neither of these cases was it held that the defendant's extra-judicial statements concerning the other forgeries were not admissible. It should be pointed out that as to the action sales transactions there was considerable evidence to prove the extortions in addition to defendant's conversations concerning them.

Defendant contends that the evidence was insufficient to establish the action sales transactions as similar offenses because no mention is made of Eichenbaum in any of the testimony related thereto. The evidence clearly establishes that defendant, after blasting action sales stores on Market Street, used Sigle and Barrish to extort money by way of ads in Hollywood Life from the store owners to prevent further blasting. The court instructed that count 1 of the indictment only charged a conspiracy between defendant and Eichenbaum and that no other persons were involved in that charge. As there was no direct evidence to tie Eichenbaum into the action sales matters, defendant contends defendant's conduct with other agents constituted separate conspiracies under the principle of Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557. The court stated that it was in accord with that principle but properly admitted the evidence as distinct acts of one of the conspirators to show defendant's scheme, design and intent and plan. See People v. Cassandras, 83 Cal.App.2d 272, 280, 188 P. 2d 546. It must be remembered that defendant "apparently actuated by a desire to place himself in an especially favorable light before the jury, injected into the case in the course of his direct examination", People v. Westek, 31 Cal.2d 469, 476, 190 P.2d 9, 13, his motives for calling attention to the alleged violations of law, claiming he was acting in aid of law enforcement.

In People v. Lisenba, 14 Cal.2d 403, 94 P.2d 569, appears a review of the California cases on the quantum of proof required where evidence of other crimes is offered to prove intent, motive, common design, etc. It is there said, 14 Cal.2d at page 431, 94 P.2d at page 583: "'In effect, we recently held in People v. Thorne, 10 Cal.2d 705, 708, 76 P.2d 491 [493], that evidence which merely *tends* to show an attempt to commit or the commission of other offenses is admissible to prove common scheme or plan even though it falls short of proving the *corpus delicti* of such other offenses. * * *

"'We also there quoted from People v. Sindici, 54 Cal.App. 193, 196, 201 P. 975, to the effect that "Where the very doing of the act charged is in issue [as here] and is to be evidenced, one of the essential facts admissible is the person's plan or design to do the act. This plan or design itself may be evidenced by his conduct, and such conduct may consist of other similar acts * * * so connected as to indicate a common purpose including in its scope the act charged. * * *"

"'In People v. Baker, 25 Cal.App.2d 1, 76 P.2d 111, 112, it is declared in part that "It is not essential that such similar transactions shall have resulted in the commission of a crime. * * *"'"

[31, 32] In People v. Consigli, 105 Cal. App.2d 104, 106, 232 P.2d 526, it was held the other offenses need not be proved to a moral certainty. People v. Albertson, 23 Cal.2d 550, 145 P.2d 7, 21, contains the elements required in proving the other offenses, all of which elements are present in the instant case: "'* * * (a) Ground must first be laid implicating the accused in the charge under trial, and unless sufficient evidence of this has been, in the opinion of the trial judge, first adduced, all evidence of other offenses must be excluded; (b) the collateral offense cannot be put in evidence without proof that the accused was concerned in its commission; (c) there must be identity of person or

crime, scienter, intent, system, or some integral parts of the exceptions established between the charge under trial and that sought to be introduced, that clearly connects the accused, showing that the person who committed the one crime must have committed the other. In other words, some connection between the other crime and the crime charged must be shown, and it must be shown with reasonable certainty that the accused committed the other crime.'" The conversations in question were admissible as tending "to establish intent, guilty knowledge, motive, a common scheme, plan, or system * * *." People v. Burnett, 21 Cal.App.2d 613, 619, 69 P.2d 1028, 1031.

(e) Replaying of Recordings.

[33] Recordings of three conversations of defendant with Eichenbaum on the afternoon of September 10th were played to the jury during the trial. These referred to the Armstrong transaction and his payment to Eichenbaum of $500. Both defendants denied that two of these conversations were between defendant and Eichenbaum, defendant claiming they were with other persons. The jury retired to deliberate at 11:40 a. m. At 3:10 it requested that the recordings of the three conversations be played. The jury also requested that Eichenbaum's testimony as to his whereabouts at this time be read. The jury's request was granted. In about 40 minutes the jury asked to hear the recording at the time that afternoon when Eichenbaum claimed to be in defendant's room and the first five minutes after he left. This was done. During the four days of deliberation the jury returned four times and had played, at its request, either all or some of these three conversations. On another occasion it returned for the reading of a portion of Armstrong's testimony. On one of the above occasions it requested and had the recording of one of the conversations played three times and on another certain portions played twice. Defendant at no time prior to the fourth request objected either to the reading of testimony or the playing of the recording. In fact, at the time of the first request, defendant suggested that the transmitter be moved as close to the jury as possible. On the fourth occasion, defendant, for the first time, objected to any further playing of the recordings. The court overruled the objection, stating it considered playing a recording was the practical equivalent of reading the testimony to the jury. Defendant contends that playing a recording violated section 1138 of the Penal Code, which provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony * * * the information required must be given * * *" in effect, in open court. We see no violation of this section. The recordings were a type of demonstrative evidence. The jury had heard them played during the trial and had the right to determine whether the voice other than defendant's was that of Eichenbaum. Section 1137, Penal Code, provides that the jury may take into the jury room "all papers (except depositions[)] which have been received as evidence in the cause, or copies of such public records or private documents * * *." These recordings were not depositions, and we know of nothing in the law which would have prevented the jury from having in the jury room the recordings which had previously been read to them. The practical problem of the necessity of an operator being present and mechanical difficulties precluded such a possibility. Hence the proper place to play them was in the courtroom. Moreover, as pointed out, it was only on the last occasion that defendant objected. The court did not abuse its discretion in complying with the jury's request to have the recordings repeatedly replayed.

3. Insufficiency of Evidence, Counts 3 and 4.

Count 3 charged defendants with extorting $50 from Rourke by threatening to impute to him a disgrace and crime and to expose a secret affecting him. Defendant contends that the exposure of Rourke had already been made, that the threat which was made was merely to injure his property and that Rourke did not act under fear of further exposure.

[34, 35] It needs no discussion to show that defendant's broadcast that Rourke's three liquor stores were selling "naked and obscene pictures" openly to customers including minors, and that dice games were

being conducted, was more than an attack on Rourke's property. It was a charge that Rourke was violating the law. True, Rourke had already been exposed by this broadcast, but Eichenbaum told him, after getting a $50 ad out of him and phoning defendant to that effect, "it's a good thing you got in touch with us today or we really would have blasted you tomorrow." Later the same day defendant told Rourke he was glad everything was straightened out. The fact that defendant had once exposed Rourke's crimes, would not make the acceptance of money to prevent another exposure, any less the crime of extortion. The evidence clearly shows that Rourke paid the $50 under threat of fear of further exposure and that defendant committed the crime as charged.

Count 4 charged defendants with extorting $500 from Armstrong by threatening to accuse him of the commission of crime and to expose and impute to him disgrace and crime and to expose a secret affecting him. Armstrong owned the property at 1869 Sutter which defendant broadcast was being used for prostitution. This was more than an attack on property; it was a charge that a crime was being committed there. Three days before the broadcast defendant told Barrish defendant was giving Armstrong his last chance, and then pointed out that Armstrong's wife could not afford to be closed. Armstrong could read the handwriting on the wall, and to prevent further broadcasting that he as well as his wife were committing a crime he contacted Eichenbaum, who then called defendant asking what Armstrong could do about the broadcasts. Defendant agreed that for $500 the matter would be straightened out. Eichenbaum told defendant that he got the $500 from Armstrong and that when he and defendant needed more money they would march around and get another $500. Eichenbaum then told defendant to scratch 1869 Sutter off the list. Clearly the evidence discloses that Armstrong paid the $500 to keep from again being charged with the crime of operating a house of ill fame, and that defendants committed the crime as charged.

4. Were the Verdicts Coerced?

The case went to the jury on the morning of December 18th. The verdicts were returned the night of the 22nd. December 19th, 4 p. m., the jury returned to the courtroom after sending the judge a note, "We cannot agree on any count of the Indictment." The foreman stated they stood 9 to 3 (which way did not appear). The recording which the jury had previously requested was then played, and the jury retired to the jury room. December 21st, 11 a. m., the jury returned to the courtroom, the foreman having written the judge, "We took another ballot at 9:45 a. m. and still stand 11 to 1, and no chance of a change," with a postscript signed by Juror Hennington, "Any further argument is very likely to result in bodily harm to one or more jurors." The court then implored the jury to consider the case dispassionately and not to allow anger or personal animosity to interfere with their calm deliberation, "And, as a further remark, I might just say, and this is not a threat, that if any juror inflicts any bodily harm on any other juror, I certainly would take care of that situation and deal with it in a manner that would make the offender very sorry that the incident occurred, if it does occur. Now, that is not a threat; that is just a rather blunt statement, but I beg all of you to put aside any ill feeling that you might have, if you have any * * * The attitude and conduct of jurors in their deliberations are a matter of considerable importance. It is rather [not] productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict; and when one does that at the outset his sense of pride may be aroused, and he may hesitate to recede from an announced position if it is shown that it is fallacious. You are not partisans or advocates, but judges. Now, if—don't let any feeling of pride or feeling of personal hurt or animosity prevent you from discussing this case with calmness and with equanimity." It continued on the jury's duty of discussing the case and of ascertaining and disclosing the truth, and repeated an instruction given earlier to the

effect that it was in the interests of both the state and the defendant if a verdict be returned with a conclusion of the case. "Now, I ask that you relax, and if possible discuss this case further, but with calmness and deliberation, and no threats of bodily harm because even the threat of bodily harm would have to be dealt with by me. I have never seen in my experience any indication that such a thing might occur, but I wish to be sure that it does not occur here. Now, please don't—don't discuss this in a mood of anger or resent[ful]ness. Try to arrive at a conclusion with calmness and deliberation. So, I will ask that you retire again." Defendant then moved that the court reread an instruction originally given to the effect that each juror is entitled to abide by his personal conviction. This was done.

December 22nd, the judge received three notes. One written by the foreman the night before at 8:05 p. m. read: "Since noon today and at this time all misunderstanding leading to ill feeling has been completed [completely] removed and deliberation is proceeding in a friendly atmosphere. We are determined to continue in this manner whether we eventually reach a verdict or not." One signed by Juror Mrs. Brizzolara read: "The opposed juror states he is withholding information from us until tomorrow morning. He states he is protecting three interests, the State, the defense and the jury." The other signed by the foreman read: "We have followed the Court's instruction to the best of our ability. We have not deliberated since shortly after our last appearance in court. We are not deliberating now and have not been deliberating during many long periods of time previous to this. The vote stands 11 to 1 and has been this way since Sunday morning. We are deadlocked and cannot arrive at a unanimous decision in reaching a verdict. It is the opinion of every one that we cannot do any more. We cannot and are not deliberating because there is no avenue of approach left and all others have been rejected. If there is no deliberation then no verdict may be forthcoming and there is no argument or approach tried that has not been definitely rejected." Both of these notes were dated 3:35 p. m. of the 22nd. A motion in chambers by defendant for a mistrial was denied. The court called the jury in to the courtroom at 4:30, stated that he had received these notes, and stated: "Now, it is your duty, under your oaths as jurors, to deliberate, and to refuse to discuss the case further is a violation of your oaths as jurors. I know that you have been very patient and have been here a long time, and maybe tempers wear thin, but it is your duty to deliberate until the court excuses you." It then pointed out that the jurors were not required to be in accord on all counts as to both defendants, and asked them to deliberate "somewhat further * * * even though it is a hardship on you," and asked the bailiff to take the jurors to dinner about 6 o'clock. At 8:45 the same evening (December 22nd) the jury returned with their verdicts.

[36, 37] In support of his contention that the jury was coerced defendant cites, among others, People v. Carder, 31 Cal.App. 355, 160 P. 686, which is readily distinguishable from our case. There, the judge used such language as he didn't want to decide any question of fact for the jury, " 'though it seems very plain to me.' " "How many contrary ones are there?" " 'there oughtn't to be any trouble. It's a case you ought to decide, ought to agree upon, and don't make up your minds that you can't agree, don't get contrary * * *.' " 31 Cal.App. at page 356, 160 P. 686. The appellate court stated, 31 Cal.App. at page 357, 160 P. at page 687: "We think it quite apparent that from the statements of the learned trial judge the jury must have concluded that he was convinced of the defendant's guilt and that as honest men it was their duty to so find. * * * It was proper for the presiding judge to admonish the jury of their duty to consult together, to listen to argument, and to endeavor earnestly to reach an agreement, and, although of somewhat questionable propriety to remind the jury of the expense of a new trial, such remark could not justly be held sufficient ground for reversal, nor perhaps even for criticism; but to characterize the two dissentient jurors as 'contrary' and to declare that there should be no trouble about agreeing upon a case like this, and that it simply called for the sensible reasoning of

men according to the evidence, transcends the proper limits of judicial discretion and authority." Nothing the judge said in our case gave the jury any ground for concluding what his opinion of the guilt or innocence of defendants was. He only admonished the jury of their duty to consult together. He did tell them that he would not countenance physical violence, which, of course, it was his duty to do. It does not appear that keeping a jury out four days in a trial which had already consumed approximately 44 days was an abuse of discretion, even though some of the jury indicated they would like to be discharged. Nor did the judge err in reminding the jurors that it was their duty to consult with one another. In other cases cited by defendant the situation was also markedly dissimilar from the one in this case. In People v. Walker, 93 Cal.App.2d 818, 209 P.2d 834, 838, after finding out that the jurors stood 10 to 2 for conviction, which ratio had never changed, the court said, " 'there are twelve of you,—and ten one way and two the other,—that is coming pretty close to an agreement.' " As we said, the jury there well could have believed that the judge intended that the jury was close to an agreement only if the two for acquittal would join the majority. Similarly in People v. Crowley, 101 Cal.App. 2d 71, at pages 74, 76, 224 P.2d 748, at page 751, the judge made statements such as he felt that the evidence was " 'plain and clear' ", " 'as I say the evidence is clear although conflicting' ", which the appellate court held: "These statements meant that the court was of the opinion that although there was conflicting evidence either that upon which the People relied, or the testimony of the defendant was unworthy of belief and should be rejected or, in other words, that there was no basis in the evidence for a reasonable difference of opinion as to the guilt of the defendant." In People v. Kindleberger, 100 Cal. 367, at page 368, 34 P. 852, at page 853, the judge said, among other improper statements, "in view of the testimony in this case, the court is utterly at a loss to know why twelve honest men cannot agree in this case."

[38–41] As we pointed out in People v. Walker, supra, 93 Cal.App.2d 818, 822, 209 P.2d 834, 836: "1. It is proper for the court to remind the jury that the principal purpose of the trial is to reach some verdict, and that they should not give up without making all possible efforts to do so. [Citations.] 2. It has been held proper for the court to remind the jury that a new trial will be an expense to all taxpayers [citations] although such statements have been characterized as 'hazardous.' [Citation.] 3. The judge may ask the numerical division of the jury [citation], but cannot ask which number is for conviction. [Citation.]" In all these matters the judge here acted properly. "We do not find anything that the court said that could be construed as directing the jury to find a verdict of conviction or any attempt to compel them to change their mind, or to agree one way or the other in the matter." People v. Hall, 25 Cal.App.2d 336, 340, 77 P.2d 244, 246. "The length of time that a jury should be held for deliberation is ordinarily a matter within the discretion of the trial court. Keeping a jury out for a reasonable length of time cannot be regarded as either improper or as an attempt to coerce a jury in reaching a verdict." People v. Wooley, 15 Cal.App.2d 669, 673, 59 P.2d 1065, 1067.

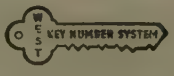
5. Defendants' Proposed Instruction No. 1.

[42] It instructed in substance that defendant was not responsible for representations made by Eichenbaum, Barrish, Sigle or Jaye unless he authorized or sanctioned them. Concededly, this was a proper instruction. See In re Marley, 29 Cal.2d 525, 527, 175 P.2d 832, which so holds. The trial court refused the instruction on the ground that it was covered by other instructions. In the instructions given by the court there are general statements such as "Guilt must originate in a man's own heart and it must be established by his own acts. It cannot be fastened upon him solely by the acts, conduct or admissions of the others" and that no person charged with belonging to a conspiracy is "bound by or liable for any act or declaration of a person who was not a member of the conspiracy, although the latter person may have performed an act or acts which tended to promote the object of the alleged conspiracy. Evidence

of an act which furthered the execution of the design of an alleged conspiracy is not, in itself, sufficient to prove that the person committing the act was a member of such a conspiracy. Neither is evidence that such person or any person was in the company of or associated with one or more alleged conspirators, in itself, sufficient to prove that he was a member of the alleged conspiracy." We do not find any language to the effect that defendant is only responsible for the statements of Eichenbaum and the others if he authorized or sanctioned them. The instruction should have been given. However, the failure to give it could not possibly have been prejudicial. In every instance of testimony concerning acts of Eichenbaum and the others (with the exception of certain acts of Eichenbaum admitted solely against him) the evidence clearly showed that defendant either authorized or sanctioned their acts. It is not reasonable to assume, in view of the evidence, that the giving of this instruction would have in anywise affected the verdict.

The judgment and the order denying new trial are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



130 Cal.App.2d 521

ESTATE of Elka V. WITTING, deceased.

Thomas A. HANNA and Johanna Steensen Wilken, Petitioners and Appellants,

v.

J. Howard STEENSEN, Trustee, Contestant and Respondent,

J. Howard Steensen, Individually, et al., Legatees and Respondents.

Civ. No. 20360.

District Court of Appeal, Second District, Division 3, California.

Jan. 31, 1955.

Proceeding in the matter of the estate of deceased, wherein life beneficiaries of testamentary trusts filed a petition for an award of $12,500 to be paid for services of their attorney eleven years before in presenting objections to the sale of stock, which comprised part of the assets of the trusts, and which thereafter greatly increased in value. The Superior Court of Los Angeles County, Orlando H. Rhodes, J., entered an order denying the petition, and the life beneficiaries appealed. The District Court of Appeals, Shinn, P. J., held that evidence sustained finding that denial of application for sale of stock did not result from efforts of attorney of life beneficiaries.

Order affirmed.

1. Trusts ⇐274(3)

On petition by life beneficiaries of testamentary trusts for award of $12,500 to be paid for services of their attorney eleven years before in presenting objections to sale of stock, which comprised part of the assets of the trusts, and which thereafter greatly increased in value, life beneficiaries had burden of proving that efforts of their attorney resulted in denial of application for sale of stock. Probate Code, § 1120.

2. Trusts ⇐274(3)

On petition by life beneficiaries of testamentary trusts for award of $12,500 to be paid for services of their attorney eleven years before in presenting objections to sale of stock, which comprised part of the assets of the trusts, and which thereafter greatly increased in value, evidence sustained finding that denial of application for sale of stock did not result from efforts of attorney of life beneficiaries. Probate Code, § 1120.

Hall & Kent, Cameron & Perkins, Simpson, Wise & Kilpatrick, George E. Wise and John R. Kent, Long Beach, for appellants.

Fogel, McInerny & West, Moe M. Fogel and William J. Taft, Santa Monica, for respondent J. Howard Steensen, as Trustee and individually.

Frank J. Kanne, Los Angeles, for respondent Childrens' Home Society of California.

Joseph J. Burris, Los Angeles, for respondent Los Angeles Orthopaedic Foundation.

SHINN, Presiding Justice.

By decree of distribution under the will of Eika V. Witting, deceased, two trusts were established which provided for the payment of income to life beneficiaries and disposed of the remainders. J. Howard Steensen was appointed trustee of each trust. Among the assets were 350 shares of stock of Jergins Oil Company in one trust and 200 shares in the other. No provision for sale of stocks was made in the decree of distribution. In March 1942, the trustee petitioned the court (Judge Paonessa presiding) for instructions relative to the sale of securities and reinvestment of the funds, § 1120 Probate Code. It was alleged in the petition: "That as to the Jergins Oil Company stock, the fact that it is closely held, not saleable on the open market, and operated without the usual quarterly statements, required of stocks sold on the exchanges, might make its sale difficult in times of stress and its price fluctuation hard to follow." At the time of the hearing, Johanna Steensen Wilken by her attorney, Dean Perkins of Cameron & Perkins, resisted the petition by answer which denied the allegations with respect to the Jergins Oil Company stock and certain other stock of Southern California Edison Company, and prayed that the petition for sale of those stocks be denied. Mr. Perkins was employed by Johanna Steensen Wilken and presented the opposition on her behalf. He was not employed by and did not represent the trustee. By an order which recited "* * * it appearing to the Court that it is not for the best interests of the Trust Estates that any sale of securities be made at this time," the trustee was given power to sell the securities if the court gave approval upon a hearing after notice to the beneficiaries of the time and place of any hearing for the sale thereof.

The Jergins Oil Company stock was appraised at $40 per share, or a total of $22,000. In April 1951, the stock of both trusts was sold for a total of $246,092, or about $450 per share. April 3, 1953, Thomas A. Hanna and Johanna Steensen Wilken, life beneficiaries, filed a petition seeking an award of $12,500 to be paid proportionately by the two trusts for the services of Mr. Perkins rendered in 1942 in presenting objections to the sale of the oil company stock. It was alleged in the petition that Mr. Perkins had consulted with various authorities and had come to the conclusion that the stock was underpriced at $40 per share, that it would be unwise to sell the same, that in his investigations and research he had devoted more than 90 hours and that he was active and instrumental in consummating sales in 1951 for a total of $246,092. The trustee filed an answer denying generally the allegations of the petition although it was not denied that Mr. Perkins through his firm filed an answer to the petition of the trustee for sale of the stock in 1942. Los Angeles Orthopaedic Foundation and The Children's Home Society of California, as residuary legatees and beneficiaries as to the remainder, appeared in opposition to the petition for the compensation of Mr. Perkins.

Following a hearing before Judge Rhodes, the court found that the trustee acted in good faith in March 1942 in requesting instructions relative to the sale of securities and reinvestment of funds; that Johanna Steensen Wilken filed an answer in opposition after Mr. Perkins had devoted 90 hours to legal research, investigation, consultation and correspondence and in investment analysis respecting the Jergins Oil Company and had concluded it would be to the best interests of Johanna Steensen Wilken and the trusts that the stock be not then sold. It was found: "That it is not true that as a direct result of the efforts of Dean Perkins, Esq., the Court on May 27, 1942, made its order in effect requiring the retention of the Jergins Oil Company stock in the Trust, and preventing the sale thereof except upon the filing of a subsequent petition for authority to do so." It was also found that in the year 1943, Mr. Perkins negotiated with the trustee and the latter's attorney relative to the sale of

Homestake Mining stock and the reinvestment of proceeds in securities recommended by Mr. Perkins. It was further found that all the services rendered by Mr. Perkins relative to the trusts and the assets thereof were performed solely on behalf of and at the instance of the beneficiaries, Thomas A. Hanna and Johanna Steensen Wilken, and not at the request of the trustee nor for the benefit of the trust; also that the time and efforts spent by Mr. Perkins as aforesaid did not result in the preservation of the trust assets nor a benefit to the trust estate and the beneficiary remaindermen and "That none of the trust funds of the Hanna or Wilken trusts were recovered, protected, preserved or increased by the time and effort expended by the law firm of Cameron & Perkins, through Dean Perkins, Esq., while representing the life beneficiaries Thomas A. Hanna and Johanna Steensen Wilken. * * * That the increase in value of both of the Trust Estates was due solely to the appreciation in value of the Jergins Oil Company stock held by said trusts, and not by reason of the time and effort expended by the law firm of Cameron & Perkins, by Dean Perkins, Esq. * * * That the appreciation in value of the said Jergins Oil Company stock was due solely to conditions and events beyond the control of either of the petitioners or their attorneys." It was concluded that no allowance should be made for the services of the attorneys and that their claim was barred by the provisions of Subdivision 1, Section 339 of the Code of Civil Procedure. The petition was denied, and petitioners appeal.

The crucial question is whether the findings respecting the services of Mr. Perkins find support in the record. There is no dispute as to the nature and extent of the services and the conditions under which they were rendered. We shall pass for the moment the question whether the services would have been compensible had the court found that the efforts of Mr. Perkins accomplished preservation of the trust assets or created a fund which increased the trust assets and shall address ourselves to the question whether the court was warranted in finding that the services of Mr. Perkins were of no substantial value to the trust estate or the remaindermen.

It was stipulated that the highs and lows for the oil company stock were as follows:

"1942 high, $ 30.00. Low, $ 25.00.
1943 high, $ 42.00. Low, $ 32.00.
1944 high, $ 40.00. Low, $ 40.00.
1945 high, $ 42.50. Low, $ 40.00.
1946 high, $ 42.50. Low, $ 42.50.
1947 high, $ 80.00. Low, $ 75.00.
1948 high, $100.00. Low, $ 90.00.
1949 high, $147.50. Low, $147.50.
1950 high, $275.00. Low, $150.00.
1951 high, $421.50. No record of the low."

It will be seen that it was in the fifth year after the hearing before Judge Paonessa that an appreciable increase in the value of the stock took place. It was four years later that the stock was sold for the sum of $246,092. In their petition for compensation of Mr. Perkins and throughout the ensuing proceedings, the appellants have based their claim upon the appreciation in value of the stock in the nine years following the rendition of the services. They have contended that this was the measure of the benefit which they say resulted from the efforts of Mr. Perkins. They endeavor to bring themselves within the rule stated in the In re Estate of Reade, 31 Cal.2d 669, 671, 191 P.2d 745, 746: "A plaintiff who has succeeded in protecting, preserving or increasing a fund for the benefit of himself and others may be awarded compensation from the fund for the services of his attorney. This is to compel those for whose benefit the action or proceeding was taken to bear their share of the expenses of the litigation; and this rule is equitable and just. [Citing cases.]" Respondents deny that the rule has application and we are constrained to agree with that view.

The determinative findings are that the order denying the application for immediate sale of the stock did not directly result from the efforts of Mr. Perkins and that the time and effort expended by Mr. Perkins did not result in the preservation of

the trust assets or a benefit to the trust estate and the beneficiary remaindermen. It was also found that none of the trust funds were "recovered, protected, preserved or increased by the time and effort expended by the law firm of Cameron & Perkins, through Dean Perkins, Esq."

[1, 2] It cannot be questioned that the decision of Judge Paonessa that the Jergins Oil Company stock should not be sold at the time permission to sell was sought effected protection and preservation of trust assets and resulted in benefit to the beneficiaries. That was the very purpose of the refusal to sanction an immediate sale. Appellants say the findings that Mr. Perkins' efforts did not result in benefit to the estate cannot stand in view of the great increase in value that took place while the stock was held in the trusts. This contention evidences a misunderstanding of the findings. Appellants came to court with the proposition that Mr. Perkins was entitled to full credit for preventing a sale of the stock and they endeavored to convince Judge Rhodes that such was the fact. It was a difficult undertaking. In the hearing before Judge Paonessa no evidence was introduced. Mr. Perkins stated his views, the attorneys for the trustee stated theirs and there was argument on the opposing opinions of counsel as to the advisability of a sale. Judge Paonessa, so far as shown by the record, did not state his reasons for the order that he made. Appellants contended before Judge Rhodes that the argument of Mr. Perkins to Judge Paonessa had persuasive force and that but for the objections of Mr. Perkins, the judge would probably have permitted a sale to be made. Judge Rhodes was not convinced. His finding was to the direct contrary. It was an obvious fact that Judge Paonessa may have had reasons of his own. It is generally known that in 1942 prices were depressed. The market price of the Jergins stock was from $25 to $30 a share or from $10 to $15 less than the appraised value. Either of these facts would have been a sound reason for the order. The evidence before Judge Rhodes as to the proceedings before Judge Paonessa utterly failed to prove that Judge Paonessa did not make the order for some reason or reasons other than the objection and argument of Mr. Perkins. Judge Rhodes did not find, as appellants argue, that the trust estates had not been benefited; he found only that no benefit resulted from the efforts of Mr. Perkins. Since there was a deficiency in the proof of appellants to establish the effectiveness of Mr. Perkins' efforts, and since the burden of proof was upon appellants, Judge Rhodes properly declined to find the existence of a fact that had not been established to his satisfaction, and the only alternative was to find that denial of the application for leave to sell and the benefit from the later increase in value of the stock did not result from the efforts of Mr. Perkins. His services, of course, were to be evaluated as of the time they were concluded, and not under conditions existing nine years later. These findings were justified by the evidence and are sufficient to support the order.

The argument of appellants for application of the rule heretofore quoted from In re Estate of Reade, 31 Cal.2d 669, 191 P.2d 745, supra, is premised upon the proposition that the efforts of Mr. Perkins resulted in a gain to the estate of some $224,000 and it is claimed that he should have a share of that profit as his compensation. The contention is fully discussed in the briefs but it does not call for further consideration. The findings we have discussed, and which we hold were justified by the evidence, dispose of all of the contentions of the appellants.

We do not believe that Judge Rhodes could properly have found the facts in accordance with the contentions of the appellants. He could have found that the efforts of Mr. Perkins probably contributed in some degree to the result, but he certainly was not required to find that the court would have permitted a sale to be made if Mr. Perkins had not made his objections. Although it was quite evident that the judgment of Mr. Perkins was better than that of the trustee, who sold 550 shares of his own stock in 1942 at $30 per share, it was not the province of Judge Rhodes to be generous with the funds of

the estates and to express appreciation for the efforts of Mr. Perkins by way of monetary compensation in addition to the thanks, if any, which he had received from the beneficiaries.

The order is affirmed.

We concur.

PARKER, WOOD and VALLÉE, JJ., concur.



130 Cal.App.2d 461

Rolland OLDIS, Plaintiff and Respondent,

v.

LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE, a corporation, W. E. Cunha, Benjamin S. Page, Alfred C. Daniels, W. Lister Rogers, William P. Gilbert, Honora Sheeran, Mary Salter, and Florence Dumelow, Defendants and Appellants.

No. 16078.

District Court of Appeal, First District, Division 1, California.

Jan. 27, 1955.

Rehearing Denied Feb. 25, 1955.

Hearing Denied March 22, 1955.

Action by hospital patient for burns sustained during period of post-operative care. The Superior Court, City and County of San Francisco, William F. Traverso, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeals, Fred B. Wood, J., held, inter alia, that evidence sustained finding that each of the defendants, including physician who had referred patient to surgeon and who had made calls during critical period, had had control of patient's body and of the instrumentalities which might have injured him, during the critical period.

Judgment affirmed.

1. Hospitals ⇐7

Physicians and Surgeons ⇐15(12)

Where plaintiff entered hospital for operation, it was duty of defendant doctors and nurses in whose custody he was placed to exercise ordinary care to protect plaintiff from unnecessary harm and liability attached to each defendant for failure in such regard.

2. Physicians and Surgeons ⇐18(6)

Where a plaintiff receives unusual injuries while unconscious and in course of medical treatment, all those defendants who had any control over his body or instrumentalities which might have caused the injuries may properly be called upon, under doctrine of res ipsa loquitur, to meet inference of negligence by giving an explanation of their conduct.

3. Hospitals ⇐8

Physicians and Surgeons ⇐18(6)

Where hospital patient was in great pain as result of operation and his senses were dulled by administration of pain-relieving drugs, so that he could not know specific cause of burn which he sustained, he could rely, in suit to recover damages for burn, upon doctrine of res ipsa loquitur, even though he was not unconscious throughout the critical period.

4. Hospitals ⇐8

Physicians and Surgeons ⇐18(8)

In action by hospital patient for burn sustained while he was recuperating from surgery, evidence was sufficient to support finding that patient, during critical period, was in a helpless, semi-conscious condition and was ignorant of the cause of the burn.

5. Negligence ⇐121(2)

In res ipsa loquitur cases, test is right of control rather than actual control.

6. Physicians and Surgeons ⇐16

Mere fact that physician referred patient to surgeon would not, of itself, give physician such element of control over or responsibility for patient during operation or period of post-operative care as would render him liable, under res ipsa loquitur doctrine, for unexplained injury received during post-operative care.

7. Hospitals ⇐8

Physicians and Surgeons ⇐18(8)

In action by hospital patient for injury sustained during period of post-operative care, wherein patient invoked doctrine

of res ipsa loquitur, evidence sustained finding that each of the defendants, including physician who had referred patient to surgeon and who had made calls during critical period, had had control of patient's body and of the instrumentalities which might have injured him, during the critical period.

8. Negligence ⇐142

Finding, in res ipsa loquitur case, that defendants had been guilty of negligence causing the injury implied finding of defendants' failure to show either a satisfactory explanation of accident, in which there was no element of negligence, or such care in all possible respects as necessarily led to conclusion that accident could not have happened from want of care, but must have been due to some unpreventable cause.

9. Hospitals ⇐8
Physicians and Surgeons ⇐18(8)

In action by hospital patient for burns sustained during period of post-operative care, wherein patient invoked doctrine of res ipsa loquitur, evidence supported implied finding that defendants had not come forward with a satisfactory showing as to the cause of the burn.

10. Trial ⇐393(1)

Opinion which trial court filed some 25 days before findings were prepared, signed and filed could not be used to impeach or annul findings which were later made and filed.

11. Trial ⇐393(1)

No antecedent expression of the judge, whether casual or cast in form of an opinion, can in any way restrict his absolute power to declare his final conclusion in findings of fact and conclusions of law.

12. Appeal and Error ⇐1010(1)

On review of negligence case, wherein appellant challenged findings for insufficient support in evidence, only question for reviewing court was whether findings had sufficient legal support in evidence and such inferences as might reasonably be drawn therefrom.

Hadsell, Murman & Bishop, San Francisco, for La Societe Francaise de Bienfaisance Mutuelle, W. E. Cunha and Benjamin S. Page.

Lamb, Hoge & Killion, San Francisco, for William P. Gilbert.

Phil F. Garvey, San Francisco, for Honora Sheeran.

Peart, Baraty & Hassard, George A. Smith, Alan L. Bonnington, San Francisco, for Albert C. Daniels, and W. Lister Rogers.

Keith, Creede & Sedgwick, John S. Howell, San Francisco, for Florence Dumelow.

Heller, Ehrman, White & McAuliffe, Appel, Liebermann & Leonard, San Francisco, for respondent.

FRED B. WOOD, Justice.

During or shortly following a major operation performed November 6, 1951, plaintiff sustained a third degree burn which considerably extended the period of his hospitalization. He sued doctors, nurses and the corporation which owned and operated the hospital, recovering damages in the sum of $16,000 after a trial before the court without a jury.

He tried the case upon the theory that the doctrine of res ipsa loquitur as expounded in such cases as Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258, is applicable. The court found that "following said operation, for a period of the next four days, plaintiff was confined to a bed in said hospital, virtually helpless, drowsy, in a semi-conscious state with his perception of pain lessened from the effect of said operation and the administration at regular intervals of pain relieving drugs and sedatives"; that during said period "defendants, and each of them, carelessly, negligently and unskillfully cared for and treated plaintiff"; and that "as a proximate result of the negligence and carelessness and lack of skill on the part of defendants, and each of them, plaintiff was caused to and did sustain the following injuries: A deep and severe third degree

burn on his abdomen, and a severe nervous and physical shock."

Question: Does the evidence support the findings? Our examination of the record convinces us that the answer is "Yes."

Plaintiff went to surgery in the morning of November 6th. He returned from surgery shortly after noon of that day. The burn was discovered on November 9th, following, about 10:00 a.m. Sometime during that period the injury must have occurred. He testified he did not and does not know what caused the burn; testimony which, in support of the findings, we must assume the trial court believed.

[1,2] These facts brought the doctrine of res ipsa loquitur into play. As said in Ybarra v. Spangard, supra, 25 Cal.2d 486, 154 P.2d 687, "Every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him and each would be liable for failure in this regard. Any defendant who negligently injured him, and any defendant charged with his care who so neglected him as to allow injury to occur, would be liable", 25 Cal.2d at page 491, 154 P.2d at page 690; "[i]t should be enough that the plaintiff can show an injury resulting from an external force applied while he lay unconscious in the hospital; this is as clear a case of identification of the instrumentality as the plaintiff may ever be able to make", 25 Cal.2d at pages 492–493, 154 P.2d at page 690; "where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct." 25 Cal.2d at page 494, 154 P.2d at page 691.

The ruling in the Ybarra case was later summarized by our Supreme Court in Summers v. Tice, 33 Cal.2d 80, 86–87, 199 P.2d 1, 4, 5 A.L.R.2d 91, and expressed in these words: "* * * a patient injured while unconscious on an operating table in a hospital could hold all or any of the persons who had any connection with the operation even though he could not select the particular acts by the particular person which led to his disability. Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258. There the Court was considering whether the patient could avail himself of res ipsa loquitur, rather than where the burden of proof lay, yet the effect of the decision is that plaintiff has made out a case when he has produced evidence which gives rise to an inference of negligence which was the proximate cause of the injury. It is up to defendants to explain the cause of the injury."

[3] Those principles are applicable in our case even though the plaintiff herein was not "unconscious" throughout the critical period. He was in great pain as a result of the operation and his senses were dulled by the administration of pain-relieving drugs. That makes the more credible his testimony that he did not know what caused the burn, nor when it happened; testimony it might be difficult to believe if he had at all times been in full possession of his faculties.

It was quite natural for the court in the Ybarra case to include the "unconscious" state of the plaintiff therein as an element in its holding, for he was in fact unconscious at the time of his injury. But we do not think the court intended it to be regarded as an indispensable element in all cases, particularly in view of the following comment which the court made in the Ybarra case: "The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely not more entitled to an explanation than the unconscious patient on the operating table." At page 490 of 25 Cal.2d, at page 689 of 154 P.2d. The same may, we think, be said of the patient who, as found in the instant case, was injured while confined to a bed in a hospital, virtually helpless, in a semi-conscious state, with his perception of pain lessened from the effect of an operation and the administration of pain-relieving drugs and sedatives.

This question was factually involved in Milias v. Wheeler Hospital, 109 Cal.App. 2d 759, 241 P.2d 684, a decision of this court, opinion by Presiding Justice Peters. There the patient was in a semi-comatose condition and did not feel the overhot applications. We upheld the giving of instructions on the doctrine of res ipsa loquitur upon the ground that if the jury had found certain facts the doctrine would have been applicable. Indeed, a patient's knowledge that a burn followed the application of a heating pad does not necessarily amount to knowledge of the specific cause of the burn in the absence of knowledge whether "the heating pad was defective or improperly adjusted, or that the compresses had been dipped in some harmful solution, or excessive temperature, or several other causes." Foster v. Delgrave, 129 Cal.App.2d 525, 277 P.2d 408, 410. However, the facts of our case do not require us to go that far for the basis of our decision. We hold that plaintiff's semi-conscious condition and his ignorance of the specific cause of the burn bring this case within the purview of the holding in the Ybarra case.

Plaintiff's Helpless Semi-Conscious Condition and Ignorance of the Cause of the Burn.

Plaintiff was unconscious during surgery and for a short time thereafter. During the remainder of the period, because of post-operative pain, he received 1/8th grain of morphine sulphate, hypodermically administered, every two hours around the clock, 34 injections during the three days following the operation. There is evidence that morphine dulls the mentality, slows the reactions and cuts down the feeling of pain, makes the patient sleepy and drowsy; repeated doses have a cumulative effect and could prevent a patient from feeling the pain caused by a third-degree burn. Plaintiff's resultant condition during this period was described as groggy, tired, confused mentally, quite confused; at times he blacked out. During this three-day period plaintiff was severely ill, very sick. He was recovering from one of the most painful operations known to medical science, the cutting out of the sympathetic nerves next to the spinal column. Oxygen was administered through a tube in the nose from time to time; and intravenous injections were administered to raise the blood pressure. There was a drainage tube inserted into the chest cavity, through the incision in his back, and connected to an underwater suction apparatus. At times a rectal tube was inserted. Through November 9th he had a relatively high fever and was at intervals injected with doses of penicillin. He lay helpless, unable to move except when shifted by a nurse. The bed was not cranked up. The first two days he was unable to talk; he just moaned.

The burn was severe, of the third degree, and located on the right lower quadrant of the abdomen a little below the belt line. Yet, plaintiff did not know he had been burned, nor how it happened. On the morning of November 9th he told the attending nurse "he had a cramp on the right side." He told her he had lain on that side. He referred to it as "a muscle cramp." He said it bothered him a little, but he didn't complain particularly and didn't say it was painful. The nurse examined the area, discovered it red and blistered, and notified two of the doctors. It was some time after November 9th and before November 22nd that plaintiff learned he had been burned. His remark to the nurse on November 9th about a muscle cramp was his first intimation to anyone of anything wrong on the right side of his abdomen. Plaintiff testified that before he learned he had been burned: "I had pain in the general region of my abdomen, particularly in the right side, and I didn't know what was causing it, had no idea whatsoever." "I do not know how it actually happened."

[4] This summary of some of the evidence which tends to support the trial court's implied finding on this subject demonstrates that it is amply supported. There was conflicting evidence, including inconsistent statements by plaintiff upon deposition. But those conflicts were resolved by the trial court in favor of the plaintiff and the record furnishes a reviewing court no basis for disturbing that determination.

Defendants' Control over the Plaintiff and the Instrumentalities Which Might Have Caused the Injury.

[5] There is evidence that during the three-day period in question, the control, at one time or another, of one or more of the various agencies or instrumentalities which might have harmed plaintiff was in the hands of every defendant or his employees or temporary servants. This placed upon them the burden of initial explanation. The test has become the "right of control rather than actual control." Ybarra v. Spangard, supra, 25 Cal.2d 486, 493, 154 P.2d 687, 691, 162 A.L.R. 1258.

Defendant Dr. Daniels was the surgeon in charge during the operation and subsequently. Defendant Page, an interne employed by the hospital, attended during surgery and participated in the post-operative care under the supervision of Dr. Daniels. Dr. Viscaino, Dr. Delaplaine and certain other employees of the hospital attended at surgery but were not made parties to the action. Defendant Dr. Rogers, an associate of Dr. Daniels, assisted the latter in the post-operative care. Defendant Dr. Cunha, surgical resident employed by the hospital, participated in the post-operative care under the supervision of Dr. Daniels. Defendants Sheeran, Salter and Dumelow were special nurses employed by plaintiff during this three-day period. There was one eight-hour interval when no special nurse was in attendance. During that interval and during temporary absences of special nurses (as when absent for a meal) plaintiff was under the charge and control of staff nurses employed by the hospital. As to a hospital's responsibility when its staff nurses are thus temporarily in charge of a patient, see Timbrell v. Suburban Hospital, Inc., 4 Cal.2d 68, 70–71, 47 P.2d 737.

[6] Defendant Dr. Gilbert was the physician who referred plaintiff to Dr. Daniels for surgery. That would not, of itself, give Dr. Gilbert any element of control over or responsibility for the patient during the operation or during the period of post-operative care. But there is evidence that he did exercise control. Plaintiff entered the hospital for the first stage of the operation on October 22, 1951, and continued there until nearly two months after the second stage of the operation. On October 30th, Dr. Gilbert made an order prescribing Desenex powder for a fungus infection in the area of the patient's groin. Although disavowing responsibility for the care of plaintiff, Dr. Gilbert said in explanation of the making of this order, "the only reason I wrote that order was because he [plaintiff] said he had some irritation and that wasn't a surgical problem and so I wrote an order for Desenex"; he diagnosed it as a fungus infection; when he saw the patient a day or two later this condition was improving, it did not look as irritated; he did not later write an order discontinuing his order of October 30th; that order continued in effect until plaintiff went to surgery again on November 6th, it being the practice to treat as cancelled, upon return of a patient from surgery, any orders made prior to surgery, and to issue new orders for his medication and care.

Dr. Gilbert also testified that he called in to see this patient frequently; almost every day. He said "I just stopped in to see him, but I wasn't taking care of him." But when asked "you are not trying to infer that the visits that you made out there at the hospital were other than visits in a professional nature, are you?" he said "I am not trying to infer that." Asked if he saw the plaintiff between the time of the second operation [November 6th] and the day the evidence of the burn was brought to his attention [November 9th], he said "I don't think I did." He said he didn't remember as to those dates "but the record will show"; that he keeps records in his business office in connection with the visits he makes to the various people for whom his insurance organization provides medical service [plaintiff was such a person]; that those records should show each time he called in to see a patient; and that he did not consult those records before coming out as a witness in this case. We find nothing in the record to indicate that he produced any of those records at any time during the trial.

Nurse Dumelow testified that after she discovered the burn Dr. Gilbert was the first doctor to come in; she had gone out of the room looking for Dr. Daniels; she saw Dr. Gilbert, told him the patient had blisters and would he come in and take a look; he did so; he stayed a few minutes, asked the patient how he was feeling, looked at the abdomen, and then went out. She had first attempted to call Dr. Page or Dr. Cunha and having asked if Dr. Daniels was in, was told he was in surgery and she expected him at any time. Dr. Gilbert testified that Dumelow told him plaintiff had been burned from hot packs; that she had notified Dr. Daniels who was in surgery and would be up as soon as he got out of surgery. She asked if Gilbert would take a look. He did so. He did not inquire if any other physician had been there earlier that day. The nurse told him that they had been putting hot packs on, had been having continuous hot packs. That fact and the definite burned area which he observed led him to conclude that something too hot had been there. He said he diagnosed it as a burn, but did not prescribe treatment for it because the nurse had told him Dr. Daniels was going to be out of surgery in about 15 or 20 minutes. (Inferentially, if Dr. Daniels had been unavailable, Gilbert might have prescribed without even inquiring as to the availability of Drs. Rogers, Cunha or Page, all of whom were assisting Dr. Daniels in the post-operative care of the patient.)

It is apparent that the trial judge deemed the conduct of Dr. Gilbert, his actual exercise of dominion and control, weightier and more persuasive than his mere words of disavowal of authority and responsibility. We would be improperly invading the function of the trier of the facts were we to undertake to substitute our appraisal for his of the credibility and weight of the evidence on that issue.[1]

[7] We conclude that the evidence amply supports the finding that each of the defendants, including Dr. Gilbert, had control of the body of the plaintiff and of the instrumentalities which may have injured him, during the three-day period in question.

The Showing which Defendants Made in Explanation of the Accident.

[8] The finding that "defendants, and each of them," negligently cared for plaintiff and thereby caused the burn, implies a failure on their part to make a " 'showing either (1) of satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres, or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory in the sense that it covers all causes which due care on the part of the defendant might have prevented.' " Dierman v. Providence Hospital, 31 Cal.2d 290, 295, 188 P.2d 12, 15.

Two possible explanations as to the cause of the burn were offered. Neither of them was found satisfactory by the trial court.

Most of the defendants claim that the burn was caused by hot applications prepared and administered by special nurse Sheeran during the period 8:30 p. m. to 10:00 p. m. on the 7th of November. The evidence would support a finding either way.

1. This evidence concerning Dr. Gilbert, whether it came in before or after his several motions for nonsuit, is a complete answer to his claim that the trial court erroneously denied the motions for nonsuit which he made upon plaintiff's opening statement and again upon the close of plaintiff's case in chief. See Lowe v. San Francisco, etc., Ry. Co., 154 Cal. 573, 575–576, 98 P. 678; Peters v. Southern Pac. Co., 160 Cal. 48, 52–53, 116 P. 400; Carter v. Canty, 181 Cal. 749, 753, 186 P. 346; Housh v. Pacific State Life Ins. Co., 2 Cal.App.2d 14, 18, 37 P.2d 741; Reiman v. Moore, 30 Cal.App.2d 306, 309, 86 P.2d 156; People v. Keith Railway Equipment Co., 70 Cal.App.2d 339, 345–346, 161 P.2d 244.

In support of the negative finding made by the trial court is the testimony of Miss Sheeran that the temperature of the hot water bottle was 120 degrees and that she could not possibly have burned plaintiff. There is evidence that the standard heat for a hot water bottle is 120 degrees and that such temperature is well within the limits of safety.

Miss Sheeran testified that the hot water bottle she applied was less than half full and conformed in contour to plaintiff's abdomen. It was applied right on the center of the abdomen over the whole abdomen area. Plaintiff lay prone on his back. The hot water bottle measured 6 x 12 inches. Dr. Rogers testified that the burned area "redness, blisters and all" on November 10th or 11th covered an area of only one inch by three inches, in the lower right quadrant of the abdomen.

There was evidence that heat sufficient to cause a third-degree burn would cause redness of the skin, if not immediately, then within two to four hours, certainly not much longer than three or four hours; and blisters in from a few minutes to 24 hours; and that the redness would persist until the burn turned into a scab or slough. Yet, there is evidence that none of these signs followed nurse Sheeran's application of the hot pack and hot water bottle. When she removed them (they had been in place from 8:30 p. m. to 10:05 p. m. on November 7th), she observed that plaintiff's skin was in good condition; there was no redness there. During the early part of nurse Salter's shift (11:00 p. m. November 7th to 7:00 a. m. November 8th) she observed that there was no redness, no blistering and no burned area. About 5:00 a. m. on November 8th she again examined the patient's abdomen and saw nothing abnormal. Nurse Dumelow gave the patient a bath between 9 and 10 a. m. on the 8th and testified there was no redness, blisters or burn at that time; nor at 2:00 p. m. of that day when she again had occasion to observe.

This seems a sufficient summary of some of the testimony which shows that the hot application in question was not proven as the cause of the burn by evidence that is "clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved"; hence not "established as a matter of law." Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868, 870. See also Leet v. Union Pac. R. Co., 25 Cal.2d 605, 621–622, 155 P.2d 42, 158 A.L.R. 1008.

The other possible explanation offered by one of the defendants is that a Bovie cautery unit used during the operation may have caused the burn. From the standpoint of the time element it was possible because Dr. Daniels testified that the burn, when first seen by him on the morning of November 9th, could have been anywhere from several hours to several days old. This cautery unit involved the use of a metal plate 4 x 6 inches, grounded on the patient's skin. The plate could have been applied under the thigh or between the legs. In an operation of this type the patient is on his side throughout. The plate is usually, but not always, fastened securely with a few rolls of gauze. A Bovie cautery generates considerable heat and the plate can and has been known to cause burns. Dr. Daniels was of the opinion that the Bovie cautery did not cause the burn because "where the heat is disseminated over that large an area [4" x 6"] it's just not enough heat to burn." Dr. Rogers was of the opinion that the plate of the Bovie unit had not caused the burn because he examined plaintiff's abdomen November 7th, before ordering hot applications, and found no burn. Obviously, it was not established as a matter of law that the Bovie cautery unit was instrumental in causing the burn.

There is a possibility that the burn may have been caused by the application of a hot pack with hot water bottle at any time during the three-day period. The order for hot applications made by Dr. Rogers on November 7th was of a continuing nature and was not revoked by him during this three-day period. Also, there was evidence tending to prove that hot packs had been continuously applied to the patient. Such evidence, of course, did not establish as a matter of law that any of those hot applications was the actual cause of the burn.

[9] It is apparent that the trial court impliedly found that the defendants did not come forward with a satisfactory showing as to the cause of the burn. Nor can we, as a reviewing court, find that they did. Accordingly, the judgment must be affirmed.

A Certain Opinion Filed by the Trial Judge Cannot Be Used to Impeach and Annul the Findings which He Later Made and Filed.

Most of the defendants rely heavily upon an opinion which the trial court filed some 25 days before findings were prepared, signed and filed. They would use it to "explain" the findings. That opinion,[2] they say, shows the court's reasoning process and demonstrates that the findings, as signed and filed, are based upon implied findings (1) that the burn was caused by the negligence of defendant Sheeran and intensified by the negligence of defendant Salter; (2) that each of the defendants was negligent in not sooner discovering the burn; and (3) therefore, all are liable for failing to explain satisfactorily their failure to sooner discover the burn. This, they say, is a non sequitur because the evidence shows that the delay, if any, in discovering the burn has no bearing upon its causation; wherefore, the evidence does not support the express finding that plaintiff sustained the burn "as a proximate result of the negligence and carelessness and lack of skill on the part of the defendants, and each of them." They then invoke Ware v. Culp, 24 Cal.App.2d 22, 74 P.2d 283, in which, contrary to the instant case, the trial court found the specific cause of the injury.

[10, 11] The fallacy of this argument is that it uses the opinion to impeach and annul the findings. It overlooks the possibility that further consideration during the weeks that intervened between the rendition of the opinion and the formulation and filing of the findings well may have convinced the judge he should revise his appraisal of the evidence. "No antecedent expression of the judge, whether casual or cast in the form of an opinion, can in any way restrict his absolute power to declare his final conclusion in the only manner authorized by law, to wit, by filing the 'decision' (findings of fact and conclusions of law) provided for by sections 632 and 633 of the Code of Civil Procedure." Scholle v. Finnell, 173 Cal. 372, 376, 159 P. 1179, 1181.

[12] In such a case the inquiry is not the speculative one of endeavoring to ascertain whether or not assertedly erroneous concepts putatively indicated by the opinion persisted in the mind of the judge and infected the findings which he later formulated and filed. Instead, the "*only question* [as in all other cases in which an appellant challenges the findings for insufficient support in the evidence] for us [as a reviewing court] *is whether these findings have sufficient legal support in the evidence and such inferences as may reasonably be drawn therefrom.*" Goldner v. Spencer, 163 Cal. 317, 320, 125 P. 347, 348. (Emphasis added.)

Thus, in DeCou v. Howell, 190 Cal. 741, 214 P. 444, the trial court had found that a certain deed lodged with a notary had been delivered, making it presently effective. The Supreme Court, convinced

2. In that opinion the trial court declared (a) that "the burn had its onset shortly after 8:40 p. m. on November 7th [1951], when a stupe with a hot water bottle imposed thereon was applied to plaintiff's abdomen by defendant Sheeran, a special nurse, who went off duty at 11 p. m. on that evening. There is evidence that the burn which started as above described was aggravated or intensified by the application of a hot water bottle to plaintiff's abdomen by defendant Salter, the special nurse who relieved Miss Sheeran at 11 p. m."; (b) that "the abdominal condition complained of could and should have been discovered by each of the defendants before it was, and that the reasonable care to which plaintiff was entitled required a prior discovery"; and (c) that "under the foregoing circumstances, the court is of the opinion that the defendants have failed to explain satisfactorily their failure to sooner discover plaintiff's burn, and that therefore they are all liable to him."

that there was sufficient evidence (though not entirely without conflict) to support that finding, affirmed. Appellant urged that an opinion the trial judge had rendered indicated that the judge entertained a mistaken notion concerning the competency of certain evidence and thus had erroneously excluded that evidence from consideration when making his findings. The Supreme Court ruled that the opinion could not be considered "as indicating what operated upon its [the trial court's] mind in coming to a conclusion as to the ultimate facts of the case. * * * The deliberations of the court are conclusively merged in the judgment. The findings of fact and conclusions of law constitute the decision which is the final, deliberate expression of the court." 190 Cal. at page 751, 214 P. at page 448.

Similarly, in Strudthoff v. Yates, 28 Cal. 2d 602, 170 P.2d 873, the appellants unsuccessfully urged consideration of an opinion which, they claimed, showed that the trial judge did not base certain findings as to value upon the evidence in the case. The reviewing court first examined the record and discovered that it contained evidence sufficient to support the questioned findings. It then rejected consideration of the opinion, saying: "The long established rule that the opinion of the trial judge cannot be substituted for nor used to modify the findings or judgment * * * is a complete answer to the plaintiffs' contention concerning the determination as to the value of the orange groves." 28 Cal. 2d at page 615, 170 P.2d at page 881.

In Stone v. Los Angeles County Flood Control Dist., 81 Cal.App.2d 902, 185 P.2d 396, the trial judge had granted a new trial and the question was whether or not he had thereby abused his discretion. The appellants contended that an opinion the trial judge had written and filed contained inconsistent statements and showed that he had inaccurately analyzed the evidence and incorrectly applied the law. The reviewing court overruled this contention, saying: "We need not consider this contention. While an opinion of the judge of the trial court will aid the appellate court in ascertaining the process by which a judgment has been reached it will not be considered in determining whether or not the verdict of the jury or the findings of the court are supported by the evidence." 81 Cal. App.2d at page 907, 185 P.2d at page 399.

These are not isolated decisions. They are illustrations of a long line of decisions that uniformly adhere to this rule.[3]

There are cases in which the trial judge's opinion has been properly used to explain the process of reasoning by which he arrived at his findings, but they are not this case. We refer particularly to Coakley v. Ajuria, 209 Cal. 745, 290 P. 33; Union Sugar Co. v. Hollister Estate Co., 3 Cal. 2d 740, 47 P.2d 273, and Noble v. Kertz & Sons Feed, etc., Co., 72 Cal.App.2d 153, 164 P.2d 257.

In the Coakley case, plaintiff had been nonsuited. The review of the evidence showed that there were sufficient facts to go to the trier of the facts unless it could be said, as a matter of law, that plaintiff's intoxicated condition per se barred recovery under every conceivable set of circumstances. An opinion which the judge had given showed his process of reasoning: contributory negligence of the plaintiff in being intoxicated, going upon the street, and falling down on the street and laying there in a drunken, helpless condition, acts which the writer of the opinion deemed negligence per se.

Concerning the opinion, the reviewing court said: "We think the learned trial judge took an erroneous view of the law applicable to the facts, as is made apparent from an oral opinion which he delivered directing the order of nonsuit. While the reasons of a trial court so given do not in a strict sense constitute a part of the

3. The following are a few of this line of decisions: In re Estate of Felton, 176 Cal. 663, 667, 169 P. 392; Huth v. Katz, 30 Cal.2d 605, 609, 184 P.2d 521; Buckhantz v. R. G. Hamilton & Co., 71 Cal. App.2d 777, 781, 163 P.2d 756; Redsted v. Weiss, 73 Cal.App.2d 889, 167 P.2d 735; Williams v. Kinsey, 74 Cal.App.2d 583, 601, 169 P.2d 487; Larson v. Thoresen, 116 Cal.App.2d 790, 797–798, 254 P.2d 656; Eley v. Curzon, 121 Cal.App.2d 280, 285, 263 P.2d 86.

record on appeal, yet, where they furnish, as in this case, the basis of the court's action, and really constitute the only grounds upon which the judgment may be affirmed, it is proper to give them special consideration." At page 749 of 209 Cal., at page 35 of 290 P. Indeed, the opinion served to confirm what the reviewing court had already determined from its review of the record; quite different from the use of such an opinion to impeach findings despite or dehors the record.

In the Union Sugar Co. case, the findings specified the amount of damages which the respondent had sustained but did not show how that amount had been computed. The trial judge had previously filed a written opinion in which he expressed approval of a certain method of computation, using certain factors. By use of this method the reviewing court arrived at the identical total which appeared in the findings. It was certain therefrom that the judge did use the method set forth in his opinion. That method was erroneous for failure to deduct certain items of cost which were subject to mathematical calculation, demonstrating that the amount set forth in the findings was excessive in a certain amount. Accordingly, the reviewing court deducted that amount from the original judgment, and then affirmed. Of this the court said: "The written opinion of the trial judge in the instant case clearly shows the process by which judgment was reached, or the basis on which the court computed the damages of the respondent under its counterclaim. It shows that the court simply took the number of tons of beets which the respondent lost by reason of appellant's improvident farming methods, and the price these beets would have brought had they been produced, and by multiplying this tonnage by the price arrived at the loss or damage sustained by respondent. By this process the court found the damages sustained by respondent to be the precise amount which in its findings of fact it found the respondent had been damaged by appellant's improper farming methods. The opinion of the trial court does not, therefore, impeach any of its findings of fact in the sense that any statement therein is in conflict with any fact found by the court. It simply explains the formal findings and shows the basis on which the court arrived at the amount of damages as fixed." At pages 750–751 of 3 Cal.2d, at page 278 of 47 P.2d.

In the Noble case certain findings were "directly contrary to the evidence introduced at the trial." At page 155 of 72 Cal. App.2d, at page 258 of 164 P.2d. The court commented: "If we look only at the findings it necessarily follows that it must be held that the basic finding under discussion is contrary to the evidence." At page 158 of 72 Cal.App.2d, at page 259 of 164 P.2d. It happened that the trial judge had filed an opinion from which it appeared that he had taken an unauthorized view of the premises and observed facts which (contrary to the duly admitted evidence in the case) supported the finding in question. That was truly an explanatory use of an opinion, explanatory of a finding which the reviewing court, independently of the opinion, determined was without support in the evidence; not, as most of the defendants urge in the instant case, the use of an opinion to impeach and annul findings which are amply supported by the evidence.

In Silvers v. Wesson, 122 Cal.App.2d 902, 266 P.2d 169, two opinions written by the trial judge proved very helpful to us in ascertaining from the record what the issues really were during the trial. Based upon that record we affirmed an order granting a new trial. That was a truly explanatory use of those opinions, not at all the use of an opinion to infect with error an order for new trial which the record amply supported.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.

130 Cal.App.2d 543

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Albert CAMARGO, Defendant and Appellant.

Cr. 2570.

District Court of Appeal. Third District. California.

Feb. 1, 1955.

Prosecution of father who was charged with involuntary manslaughter of his infant son. From judgment and order of Superior Court, Butte County, Dudley G. McGregor, J., denying a new trial and granting probation, the father appealed. The District Court of Appeal, Warne, J., pro tem., held that the evidence was sufficient to sustain the conviction.

Judgment and order affirmed.

1. Criminal Law ⇐1081

Where defendant's motions in arrest of judgment and for new trial were denied but sentence was suspended and defendant was granted probation, and no judgment was entered or pronounced, order granting probation would be deemed to be final judgment and notice of appeal would be treated as an appeal from that judgment as well as order denying motion for new trial. Pen.Code, § 1237.

2. Homicide ⇐228(1, 2), 234(7)

In prosecution of father, who was charged with involuntary manslaughter of his infant son, both corpus delicti and father's guilt could be proved by circumstantial evidence but it was also necessary that there be evidence from which it could reasonably be inferred that external force causing death was applied by another and was not self inflicted or result of an accident.

3. Criminal Law ⇐1159(6)

Where inference drawn by jury from direct and circumstantial evidence presented was a reasonable one, jury's conclusion would not be disturbed on appeal.

4. Homicide ⇐255(2)

Evidence was sufficient to sustain conviction for involuntary manslaughter.

5. Criminal Law ⇐1159(2)

Judgment of trial court will not be set aside unless the record clearly shows that upon no hypothesis is there sufficient substantial evidence to prove the crime charged and reviewing court cannot reverse a conviction merely because there exists a reasonable doubt as to defendant's guilt.

Paul S. Garstang, Chico, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier & F. G. Girard, Deputies Atty. Gen., for respondent.

WARNE, Judge, pro tem.

[1] Appellant was accused by three counts of an amended indictment with involuntary manslaughter of his infant son, in violation of section 192, subdivision 2, of the Penal Code. Count I alleges a violation of the Penal Code section, with the additional words "while wilfully causing or permitting said child to suffer." Count II (alternative) alleges a violation of the same subdivision of the Penal Code section in the language of the statute, and adds the words "while inflicting upon said child unjustifiable physical pain. Count III (alternative) also alleges a violation of said Penal Code section and said subdivision in the words of the statute with the additional words "while permitting or causing the life or limb of such child to be endangered." Appellant was tried by a jury and acquitted upon the first and second counts, and was convicted upon the third. Motions in arrest of judgment and for a new trial were made by the appellant, and denied by the court; however, sentence was suspended and appellant was granted probation. Appellant appeals "from the judgment therein entered * * * on the 25th day of June, 1954, and from an order denying a new trial, and from the whole thereof." Since no judgment was entered or pronounced, the order granting probation must be deemed to be the final judgment for the purpose of this appeal. Penal Code section 1237 as amended in 1951. It is apparent that such was the intent of the appellant because he starts his opening brief with the

caption: "Appeal from the order granting probation * * * and from the order denying defendant's motion for a new trial." In the case of People v. Robinson, 43 Cal. 2d 143, 271 P.2d 872, 873, the court laid down the following rule: "A notice of appeal will be liberally construed to permit a hearing on the merits and avoid a dismissal because of some technical defect or irregularity." We will therefore construe the notice as an appeal from the final judgment as well as the order denying the motion for a new trial.

Appellant contends that the evidence is wholly insufficient as a matter of law to support the verdict of the jury finding defendant guilty of manslaughter, and also that the corpus delicti of manslaughter was not established by the prosecution.

Appellant's two months old infant son died in his mother's arms at approximately 3:00 o'clock in the afternoon of February 14, 1954, as he was being rushed to an Oroville hospital by his parents. On the following morning an autopsy, performed by a doctor who specialized in pathology, revealed the infant's death had been caused by a brain concussion with traumatic intracranial hemorrhages; i. e., hemorrhages of the brain produced by violence. The autopsy surgeon also testified that the deceased baby had suffered multiple bruises in the vicinity of the head and face, including one across the top of the scalp which measured ½ by ⅜ inches. Some of the bruises around the left eye were associated with small lacerations of the skin. There were six external injuries on the body. He also testified that the deceased baby had suffered a number of serious and severe injuries including a potentially fatal rupture of the liver. Eleven ribs had been broken, and there was extensive hemorrhage area surrounding the brain. There was bleeding in the lung and beneath the lining of the lung cavity on the right side beneath the area of injury. There were also hemorrhage areas in the heart, kidneys, adrenal glands, bladder, rectum, thalamus, breast bone, and larynx. The doctor further testified that the pathological studies which he made established that the brain concussion was sustained between 24 to 72 hours prior to the death; that the injury to the lungs and the liver was nearer 72 hours prior to the death, and the ribs had been broken many hours or days prior to death. He also testified none of the injuries could have been caused within 1 hour or less prior to death. The medical testimony in respect to the time element is of special significance because it was the theory of the prosecution that severe and multiple injuries had been inflicted upon the baby by the appellant over a period of several weeks. In support thereof evidence was introduced that appellant on several occasions endeavored to "exercise" and "toughen up" his young son by dropping him on a bed, bouncing him up and down, throwing him into the air, holding him up by the thumbs, and squeezing him until his head turned reddish purple. Appellant denied any mistreatment in his handling of the infant, but admitted that in playing with him he bounced him up and down on the bed, and that he once suspended him by the thumbs to demonstrate his strength. Appellant disclaimed any intent to harm his child, and all of the witnesses admitted that he never displayed any anger towards the baby or seemed to feel that he was being brutal. At the trial appellant and his wife testified that on the afternoon, between 1:00 and 3:00 o'clock, preceding the baby's death, the appellant accidentally dropped him on his head on the floor, but that the baby did not seem to suffer any ill effects therefrom. Later on, around 7:00 o'clock or a little later, they attended a show and took the baby with them. During the time that the child was in the show there was nothing unusual about its behavior; however, they testified that the following afternoon the baby suddenly became seriously ill and discharged a quantity of mucus from its nose and mouth, struggled for breath and appeared to be choking to death, and that appellant tried to keep the baby breathing by slapping and spanking it vigorously and applying artificial respiration. When his efforts appeared to be unsuccessful, they started for the hospital to obtain medical aid, but the baby died just as they reached the hospital. In a statement made to the investigating officers four days after the

baby's death, appellant stated that when the baby kept gasping for breath he became excited and must have hit him too hard. He claims he could not recall how many times he struck the baby, but "it might have been a dozen, might have been a half a dozen. It seemed like everything happened so quickly." The prosecution contends that the baby's fatal injuries could not have been caused at that time, or on the preceding afternoon when it fell to the floor, as the autopsy surgeon testified that none of the serious injuries could have been incurred less than 24 hours prior to death, and that the child could not have choked to death as there was no obstruction of the mouth, nose, windpipe or lungs, and that there was no abnormal amount of mucus which should have been present if the baby had had the seizure or attack described by appellant and his wife. However, there was no testimony as to whether or not such a fall to the floor, approximately 24 hours before death, could have caused the fatal brain concussion. It is appellant's contention that it did, and he testified at the trial that he could not explain the broken ribs and other external injuries other than that they were incurred when he endeavored to give the baby artificial respiration. A Mrs. Maynard was called by the prosecution as a witness, and testified that she was employed at appellant's home, commencing on Monday the 18th of January, to and including Friday, the 22nd. She testified that the first night she was in the kitchen and heard a terrific pounding on the bed in the bedroom, and an impact, and immediately thereafter the baby screamed like it was being hurt. At this time the witness further testified that the same evening the appellant held the baby on his lap, and squeezed him. "I could see the top of the baby's head. He held it until it didn't cry any more, the cries got fainter and fainter until it stopped crying," and at that time the color of the baby's head changed to a deep red or purple. On the following day she remonstrated with appellant as to the treatment of the baby, and the occurrence was not repeated. This witness also testified that she saw appellant toss the baby in the air. "Whether it turned over more than once, I don't know, but I know it left his hands and he caught it again." She also testified that once when appellant was holding the baby she "saw him pull back his hand like that" (indicating) "and then I heard an impact and the baby cried. I couldn't see him hit —strike the baby." However, Mrs. Maynard admitted that she never could see any bruises on the baby although she particularly looked. There was no testimony that the events which she related caused or could have caused the fatal brain concussion from which the baby died three weeks later. To the contrary, as noted above, the autopsy surgeon testified that it was incurred between 24 and 72 hours prior to death, and appellant's family physician, who examined the baby five days before its death, testified at that time it was growing, doing fine, did not show any evidence of mistreatment, and that he certainly would have known at that time if it were suffering from any internal injuries.

[2–4] We agree with appellant's contention that it cannot be inferred from the evidence of his conduct three weeks prior to the baby's death as testified to by Mrs. Maynard, that the fatal injuries were then inflicted. In fact there is no evidence of the baby having suffered any injury at that time. It is also true that although both the corpus delicti and the defendant's guilt can be proved by circumstantial evidence, People v. Murillo, 119 Cal.App. 59, 63–64, 5 P.2d 897; People v. Cullen, 37 Cal.2d 614, 624, 234 P.2d 1; People v. Huizenga, 34 Cal.2d 669, 675–676, 213 P.2d 710; State v. Kader, 201 Ore. 300, 270 P.2d 160; State v. Plunkett, 62 Nev. 258, 142 P.2d 893, 149 P.2d 101, 107, there must be evidence from which it can reasonably be inferred that the external force or violence causing the death was applied by another and was not self-inflicted or the result of an accident. Hall v. Superior Court In and For Sacramento County, 120 Cal.App.2d 844, 849, 262 P.2d 351. On the other hand, appellant admitted that between 1:00 and 3:00 o'clock on Saturday afternoon, he accidentally dropped the baby on its head on the floor, which was not less than 24 hours prior to its death at approximately 3:00 o'clock on Sunday afternoon. It was within the time

the autopsy surgeon testified the fatal brain concussion was sustained. While we believe that it could be reasonably inferred that the fall on Saturday was the external force which caused the fatal brain injury, we also feel that it could be reasonably inferred that appellant dropped the baby, not as he testified when he was reaching for a spoon, but while engaged in the same kind of maltreatment he had been seen to inflict upon it, such as bouncing the baby up and down on the bed, tossing it into the air and catching it in his hands, and squeezing it to stop its crying. There was evidence of a course of conduct in the handling of the baby which, coupled with the serious injuries which it had received, would warrant the jury in concluding that the child had been injured by such conduct. The baby's injuries themselves speak loudly to the point. Further, there was admitted in evidence, without objection, the statement made by appellant to the investigating officers four days after the baby's death, wherein he admitted that his handling of the baby had resulted in its death. Said he: "I know whatever I done was wrong. I killed my son." The jury was not compelled to accept the testimony of either the appellant or his wife given at the trial. By its verdict it rejected appellant's contention and inferred that appellant's unlawful treatment of the infant occasioned its many injuries and its death. As the inference drawn from the direct and circumstantial evidence presented was a reasonable one, the jury's conclusion will not be disturbed on appeal. People v. Clark, 116 Cal.App. 2d 219, 223, 253 P.2d 510.

In People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779, the court sets forth the standard which appellate courts must follow where there is evidence, circumstantial or otherwise, that a crime has been committed, and that the defendant was the perpetrator thereof, as follows: "The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * *' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury."

[5] In People v. Lindsey, 90 Cal.App.2d 558, 563, 203 P.2d 572, 575, the rule is reiterated: "Not even the appellate court's conviction of an appellant's innocence will outweigh the determination by the trial court which is the constitutional arbiter of facts. People v. Pruitt, 55 Cal.App.2d 272, 275, 130 P.2d 767. Its judgment will not be set aside unless the record clearly shows that upon no hypothesis is there sufficient substantial evidence to prove the crime charged. People v. Lindley, 26 Cal.2d 780, 791, 160 P.2d 227." See also People v. Perkins, 8 Cal.2d 502, 66 P.2d 631; People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911.

The cases cited by appellant, particularly People v. Elmore, 167 Cal. 205, 138 P. 989; People v. Lamson, 1 Cal.2d 648, 36 P.2d 361; and People v. Staples, 149 Cal. 405, 86 P. 886, in so far as they are authority that an appellate court can reverse a conviction if there exists a reasonable doubt as to the defendant's guilt, no longer represent the law. The Lamson and Staples cases were expressly disapproved in People v. Newland, supra.

The judgment and the order denying a new trial are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

130 Cal.App.2d 598

William G. WALTERS, Plaintiff and Respondent,

v.

J. R. DAVISON and H. A. Leatart, Defendant and Appellants.

Civ. 5028.

District Court of Appeal, Fourth District, California.

Feb. 4, 1955.

Action to collect royalties allegedly due under terms of mining lease. The Superior Court, Inyo County, John P. McMurray, J., gave judgment for lessor. Lessees appealed. The District Court of Appeal, Mussell, J., held that where lease provided that lessees would pay royalties of at least $150 per month on mining claims, and that lease could be terminated by lessees on 30 days notice, on return of claims to lessor, and lessees claimed in answer that they had an interest in the claims, evidence was sufficient to support court's finding that lessees had not terminated lease and returned the claims up to date of trial, and lessor was entitled to royalty payments until claims were returned.

Judgment affirmed.

1. Mines and Minerals ⇐79(7)

In action to collect royalty payments allegedly due under mineral lease which required lessees to return claims to lessor upon cancellation, findings that claims were not returned to lessor by lessees, and that lessor had not ejected lessees from the premises, were supported by substantial evidence.

2. Mines and Minerals ⇐79(3)

Where lease of mineral claims provided for royalty payments of at least $150 a month, and that lease could be terminated by lessees upon 30 days' notice on the return of the claims to the lessor, but defendants failed to return claims to lessor, and retained possession of property under terms of lease, lessees were liable for minimum royalty payments under lease until claims were returned.

Mark P. Robinson, Los Angeles, for appellants.

Jess G. Sutliff, Independence, for respondent.

MUSSELL, Justice.

This is an action to quiet title to mining claims in Inyo county and to collect money alleged to be due to plaintiff under the terms of a lease. It was stipulated at the trial by defendants (appellants here) that judgment be entered in favor of plaintiff quieting his title to the claims involved, and the only dispute here is as to the amount of the money judgment awarded to plaintiff.

The lease, dated October 8, 1951, is between plaintiff as lessor and defendants as lessees and is for a period of five years and as long thereafter as the lessees shall continue to mine and remove tungsten or other minerals from the premises in commercial quantities. The lessees agree therein to keep accounts of ore mined and sold and pay lessor a royalty of 10% on the mineral or minerals in all ore sold, except that when the tungsten content of ore sold shall exceed 1%, then lessees shall pay to lessor a royalty of 12% on said tungsten. Royalties to be paid on the price received at the mill or stockpile. Lessees agree to pay lessor all royalties due from sale of ore in any calendar month upon the 15th day of the month following. In the event the royalties realized by the lessor in any calendar month do not equal $150, then the lessees shall pay to the lessor an advance royalty equal to the difference between the amount actually realized and $150. All advance royalties so paid shall be deducted from royalties when and if paid in subsequent months. The lessees agreed to enter upon the claims and to work the same in a manner necessary to good and economical mining. The lessees have the right to cancel the lease "upon 30 days written notice to lessor and to move all portable property." The lease further provides:

> "In the event of the lessor taking exception to the manner in which above mentioned claims are operated, or to other alleged violations of this

agreement, lessor may serve upon lessees by registered mail written notice addressed to lessees at said lessees' designated place of business, setting forth said violations. If said allegations are found to be correct then the lessees shall correct the practices complained of within thirty (30) days from date of said notice, or this agreement shall be cancelled and claims returned to lessor with the exception of portable property which shall be retained by lessees."

Defendants took possession of the property under the lease and made the monthly payments to Walters of $150 per month for each of the months beginning October, 1951, through May, 1952, paying a total of $1,200. No further payments were made by defendants. In February, 1952, plaintiff wrote to them complaining about their failure to develop the property and again on June 3, 1952, wrote to them stating, among other things, that the lease would be terminated unless the assessment work was begun by June 9. Defendants completed the assessment work by June 30, 1952, and upon completion thereof gave orders to their workman to cease all further operations on the claim and to return the key to the claim site cabin to plaintiff. No notice was given to plaintiff by defendants that they intended to cancel the lease or that they were in fact abandoning the property. On July 5th the workman (Bronson) delivered the cabin key to Walters and told him that he (Bronson) had been instructed to discontinue all work on the claims. No further work was done on the property and no payments were thereafter made as provided in the lease.

On October 29, 1952, Walters served on defendants a notice of default stating, among other things, that:

"The undersigned does hereby give notice pursuant to the terms of said agreement that the same is now terminated to take effect at the expiration of thirty (30) days after this written notice shall have been served upon you by registered mail unless the above mentioned default shall have been corrected within said thirty (30) day period and if not so corrected, the said lease will be terminated as aforesaid and demand is made upon you to execute and deliver to the undersigned a Quit Claim Deed covering the mines and mining claims described in said lease."

Defendants failed to correct the default and did not execute the quitclaim deed demanded. Plaintiff then filed the present action.

[1] The trial court found that "J. R. Davison and H. A. Leatart failed and refused to pay to the plaintiff the sum of $150.00 per month as provided in said lease, for the months commencing July 15, 1952, to and including December 15th, 1952, or, six months, amounting to the sum of $900.00, and failed to pay plaintiff $150.00 per month as provided in said lease commencing January 15th, 1953, to the date of trial, to wit July 21st, 1953, or seven months and six days amounting to $1080.00, making a total of $1,980.00." The court further found that defendants failed and refused to return to plaintiff the said mining claims or any part thereof and that it was not true that plaintiff had ejected defendants from the premises. Judgment was entered against defendants for the sum of $1,980, and appellants' sole contention is that the judgment is erroneous in part, in that it purports to award minimum monthly royalty payments of $150 per month for the months of December, 1952, through July, 1953, or an excess of $1,080. It is argued that nowhere in the findings of fact is it found that appellants had failed to return said mining claims beyond the date of the filing of the complaint on January 23, 1953. This argument is not supported by the record for the court found that the allegations of paragraph six of the second cause of action were true and it is therein alleged that defendants have refused to return said mining claims to plaintiff. The complaint alleged the amount due plaintiff to the approximate time of the filing of the action and plaintiff prayed for the amount then due together with $150 per month from January 15, 1953, until the said mining claims were returned to plaintiff. Since the findings that the claims were not

returned to plaintiff and that plaintiff had not ejected defendants from the premises are supported by substantial evidence and since the undisputed evidence is that defendants made no payments on the property after December 15, 1952, the judgment awarding plaintiff $1,080 for delinquent payments to the time of trial was proper. The evidence indicates that the defendants held the mining claims to the date of trial and in their amended answer and counterclaim they admitted that they then claimed an interest in the property. Under such circumstances they were obligated to pay the monthly minimum payments specified in the lease.

[2] Appellants argue that the lease was terminated pursuant to the notice of default on November 29, 1952, and that they were not thereafter liable for the minimum monthly payments. However, one of the provisions of the lease relating to cancelation is that "If said allegations (of alleged violation) are found to be correct, then the lessees shall correct the practices complained of within 30 days from the date of said notice or the agreement shall be canceled and claims returned to the lessor with the exception of portable property which shall be retained by lessees." One of the conditions of cancelation was that the claims be returned to plaintiff. Defendants failed and refused to perform this condition and continued to retain the property under the terms of the lease, thereby incurring liability for the minimum royalty payments in dispute. The lessees were also given the right under the lease to cancel it "upon 30 days written notice to lessor and to remove all portable property." There is no indication in the record that defendants sought cancelation of the lease under this provision. Defendants were liable to pay the minimum monthly royalty until they had restored full and complete possession of the property to the lessor. Schilling v. Holmes, 23 Cal. 227, 230; Vucinich v. Gordon, 51 Cal.App. 2d 434, 437, 124 P.2d 868.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

130 Cal.App.2d 498

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Carl E. FIGUEREDO and William R. Hagan, Defendants,

William R. Hagan, Appellant.

Cr. 5098.

District Court of Appeal, Second District, Division 3, California.

Jan. 28, 1955.

Hearing Denied Feb. 24, 1955.

Defendant was convicted of robbery of the first degree. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered judgment and defendant appealed from the judgment and the order denying his motion for a new trial. The District Court of Appeal, Parker Wood, J., held that the disclosure before jury that defendant who had admitted prior felony convictions at conference in chambers had been convicted of a felony required the granting of a new trial.

Reversed and remanded for new trial.

1. Criminal Law ⇐706, 1171(1)

In prosecution for armed robbery of tire store having employee who testified, bringing former employee into courtroom in custody of deputy sheriff and asking employee questions concerning former employee prevented defendant from having fair trial so as to require a new trial where there was conflict in evidence as to identity of robber and bringing in the former employee created improper inferences not supported by competent evidence that former employee, who was an ex-convict acquaintance of defendant, and defendant were involved in the robbery.

2. Criminal Law ⇐706, 1171(1)

Where defendant accused of armed robbery admitted prior felony convictions at conference in chambers and was assured that prior convictions would not be known by jury, references in testimony of arresting and investigating officer to defendant having been in prison were unnecessary and were calculated to disclose that defendant was an ex-convict and constituted grounds for new trial.

David W. Agnew, Washington, D. C., for appellant.

Edmund G. Brown, Atty. Gen., and James D. Loebl, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

William R. Hagan, the appellant herein, and Carl E. Figueredo were charged in Count I of an information with robbery, committed on March 27, 1953; and it was alleged also that they were armed with a revolver at said time. In Count II Hagan was charged with robbery, committed on April 3, 1953; and it was alleged that he was armed with two revolvers at said time. (Other charges of robbery in the information were against Figueredo.) It was also alleged that Hagan had been convicted previously of four felonies and that he had served terms of imprisonment therefor in the state prison. Hagan admitted the allegations as to his prior convictions. Upon motion by defendants, there was a separate trial for each defendant. In a jury trial, Hagan was convicted of robbery of the first degree as charged in both counts, and it was found that he was armed at the times the robberies were committed. Hagan appeals from the judgment and the order denying his motion for a new trial.

In filing his opening brief, appellant appeared in propria persona. Thereafter, pursuant to request of appellant that counsel be appointed to represent him, this court appointed Mr. David E. Agnew (member of the Los Angeles Bar Association Committee on Criminal Appeals) to represent appellant. Mr. Agnew accepted the appointment and has filed a reply brief on behalf of appellant.

Appellant contends that the deputy district attorney was guilty of prejudicial misconduct in having Figueredo brought into the courtroom, in custody of a deputy sheriff, and then asking a witness, who was a victim of the robbery referred to in Count II (where only Hagan was charged), if Figueredo was formerly employed by him. Appellant also contends that it was prejudicial misconduct of the deputy district attorney to offer, and it was prejudicial error of the court to receive, in evidence a statement by a witness (police officer) that Hagan said that he did time in San Quentin with Figueredo.

With reference to Count I, Mr. Gettman, who was a clerk in a grocery store, testified that on March 27, 1953, about 7 p.m. while he and another employee Mr. Lynch were in the stockroom of the store, defendant Hagan entered the room with a revolver in his hand, "put the gun on" them, and told them to go into the restroom; they went into that room; Hagan asked which one knew the combination to the safe; Mr. Lynch replied that he knew it; Hagan gave Mr. Lynch a grocery sack and told him to go to the front of the store, open the safe, and put the money in the sack; he also said that another man would go there with him; then Mr. Lynch left; Hagan stayed with Mr. Gettman in the restroom about five minutes and during that time they were facing each other; also during that time Hagan said, "I don't want any of your personal money, all we want is the money out of the safe"; then Hagan told him to sit on the toilet and not come out for 20 or 25 minutes; then Hagan left, and Mr. Gettman stayed there about 5 or 10 minutes, until Mr. Lynch returned.

Mr. Lynch testified that on said March 27, while he and Mr. Gettman were in the back room of the store, two men came in and one of them had a gun in his hand, said it was a holdup, and do as they said or they would shoot to kill; the man with the gun ordered them (two employees) into the washroom and asked who knew the safe combination; then Mr. Lynch replied that he had the combination; the man with the gun gave him a paper sack and told him to go with his partner (the other man) to the front of the store and put the money in the bag; they went to the safe and the man told him to open it; when the safe was open, the man told him to put the money in the bag; he put about $800 in the bag; then the man took the bag and went out the front door; Mr. Lynch went to the back of the store to see Mr. Gettman; since that time he (Lynch) learned that the man who went to the safe

was Figuieredo. He also testified that he could not identify Hagan as the man who had the gun.

With reference to Count II, Mr. Joseph Bonelli, an employee of a tire store, testified that on April 3, 1953, about 8:40 p.m., while he was in the store, the defendant Hagan who was wearing khaki pants, brown leather jacket, brown hat, and glasses, came in and "pulled a gun" and told him to step back into the office (where Mr. Norwood was); when Mr. Bonelli went into the office, Hagan said, "I want the little green box you keep the money in." Then the deputy district attorney asked Mr. Bonelli if he knew Figuieredo. He replied that Figuieredo was a former employee of the store. Then he was asked (by the deputy) if he remembered when Figuieredo left that employment. He replied that it was a few years back. Then the deputy said, "May we ask the bailiff to bring Mr. Figuieredo to where Mr. Bonelli is so he could see him. I want to be sure of the identification." Counsel for Hagan asked what was "the materiality of identifying him, the man who is not charged?" The deputy said that he expected to show Mr. Bonelli some articles that were found in Figuieredo's car. Counsel for Hagan said, "I object to this. I can't understand what the connection can be." The judge said, "While these men are being tried separately, it is always permissible and relevant to show an association for the purpose—." Counsel for Hagan said, "All right, then." The judge said, "The objection is overruled. Bring in Mr. Figuieredo." Then there were statements and questions as follows:

"Mr. Cochran [deputy district attorney]: That is far enough, Mr. Figuieredo. State your name, please.

"Mr. Figuieredo: Carl Figuieredo.

"Mr. Cochran: Thank you.

"Q. Mr. Bonelli, did you see Mr. Figuieredo who was just brought into the courtroom? A. Yes, sir.

"Q. Is that the person who was formerly employed by you? A. Yes, sir.

"Q. When did he sever his connection? A. Oh, like I say, it must have been around 1949 or 1950.

"Q. Now, we have reached the point where you went back into the office that Mr. Norwood was in. Go ahead from there. A. Then he said, 'I want the little green box you keep the money in.' I told him it was in the other office and so he says, 'Go get it, and bring it out and lay it on the counter.'

"Q. Did you have such a box? A. Yes.

"Q. Had you had a little green box for some period? A. We have always had that.

"Q. Did you have it when Mr. Figuieredo was employed there? A. Yes. I went back and got the green box and put it on the counter."

Then Hagan told Bonelli to scoop out the paper money. Bonelli took about $255 in paper money from the box and handed it to him. Hagan asked which one knew how to open the safe. Bonelli replied that it was open. Hagan then "got out" a second gun and, with both guns in his hands, marched Bonelli and Norwood to the safe which was open and in which there were some stamps. Hagan did not take the stamps, but he did take $9 from Bonelli's wallet and $4 from Norwood's wallet. Then, after telling them to stay in the back room 15 minutes, Hagan left. Bonelli also testified that glasses (Exhibit 8) and a hat (Exhibit 5) were similar to glasses and a hat worn by Hagan at the robbery; and that he was certain that Hagan was the man who held him up.

Mr. Norwood, the credit manager of the tire store, testified in substance the same as Mr. Bonelli testified. He also testified that he was certain that Hagen was the man who robbed him.

Officer Simon testified that he and another officer arrested Hagan on April 6, 1953, and at that time they found a loaded revolver on his person. The next evening Officer Simon asked Hagan if he knew anyone by the name of Gene while he was serving time in San Quentin. Hagan replied in the negative. Counsel for Hagan then (in a "Consultation at the bench") said that he thought the answer regarding San Quentin was prejudicial and a ground for a new trial, and he moved

that the answer be stricken out. The motion was denied. Officer Simon testified further that shortly after the arrest of Figuieredo on April 10, Hagan and Figuieredo had an opportunity to see each other in the jail. On April 11, Hagan said to Officer Simon, "I see you got Gene. I didn't want to get him involved before." Officer Simon said to him, "Is this Gene that you did time with, the last time in San Quentin?" Hagan replied "Yes." Officer Simon asked how long he knew him, and he replied, "Approximately two years." Officer Simon testified that when Figuieredo was arrested he (officer) found three hats (one light blue, one dark blue, one khaki), a blue jacket, and a pair of glasses in the automobile that Figuieredo had been driving.

Mrs. Truehill, called as a witness by defendant, testified that on April 3, 1953, about 7 p.m., she went to Hagan's home to pay Mrs. Hagan for taking care of her children; she stayed there an hour or more, and during that time Hagan was there; she returned to her home about 8:30 p.m.

Mr. Henkel, called as a witness by defendant, testified that on April 3, 1953, at 7.30 p.m., he called the telephone number at defendant's apartment and talked to him; that about an hour later he called defendant again by telephone at that number and talked to him.

Mrs. Henkel testified that on March 27 defendant (her brother) came to her home about 3 p.m. and stayed there until about 9:30 p.m.

It was stipulated that if defendant's wife were called as a witness she would testify that on March 27 she and defendant had dinner with the Henkels and the Henkels took them home later that evening; and that on April 3 her husband was home with her in the apartment all evening.

Defendant did not testify.

[1] It was prejudicial error to permit the deputy sheriff to bring Figuieredo into the courtroom. When Mr. Bonelli, as a witness regarding Count II (tire store), said that Hagan asked for the little green box, the deputy district attorney asked Bonelli if he knew Figuieredo. When Bonelli replied that Figuieredo had been an employee of the tire store a few years previously, the deputy asked the bailiff to bring Figuieredo in because he (deputy district attorney) wanted "to be sure of the identification." Up to that time, Bonelli had not referred to Figuieredo. Up to that time, and thereafter, there was no competent evidence which tended to connect Figuieredo with either robbery. As to Count I, neither of the victims (Gettman or Lynch) identified Figuieredo as the other man who took Lynch to the safe. Lynch did say that he had learned later that Figuieredo was the other man. That, however, was not competent evidence. As to Count II, Figuieredo was not charged with that offense, and neither of the victims (Bonelli or Norwood) or anyone referred to Figuieredo as having had any connection with the robbery. The deputy district attorney asserted, as an explanation of his request that Figuieredo be brought in, that he expected to show the witness some articles that were found in Figuieredo's car. (Prior to that request, a hat (Exhibit 5), had been shown to him.) After such request, the only article shown to him was a pair of glasses. It was not necessary to have Figuieredo identified before the jury by Bonelli or anyone as a former employee of the tire store, or identified at all, as a foundation for asking Bonelli whether he could identify the articles as having been worn by Hagan at the robbery. Any or all of the articles could have been shown to witness Bonelli, for the purpose of ascertaining whether he could identify them, without having Figuieredo brought before the jury. As above stated, the deputy district attorney had shown Exhibit 5 (the khaki hat found in the car) to witness Gettman, prior to having Figuieredo brought before the jury. The statement of the deputy district attorney that he wanted to be sure of the identification of Figuieredo tended to create the impression that identification of Figuieredo was material for some important purpose in the trial. The identification of him was immaterial. The question by the deputy, as to whether Bonelli knew Figuieredo, came immediately after Bonelli said that Hagan

asked for the little green box. The asking of that question at that time, the request that the bailiff bring Figuieredo in, and the bringing him in by the bailiff, when considered in connection with the evidence that Figuieredo was a former employee of the tire store and that Hagan knew him in San Quentin, tended to create inferences as follows: that Figuieredo, an ex-convict acquaintance of Hagan and former employee of the store, was connected in some way with Hagan's asking for the little green box; that Figuieredo was in custody of the sheriff upon a criminal charge that was connected in some way with Hagan; and that Hagan was an associate of Figuieredo. Also, the statement of the trial judge that Hagan and Figuieredo were being tried separately (which was made in ruling upon the request to bring Figuieredo in) tended to create an inference that Hagan and Figuieredo were jointly involved in the commission of a crime. There was no competent evidence in support of such inferences.

On behalf of plaintiff, there was testimony by Gettman, Bonelli and Norwood that Hagan was the robber. On behalf of defendant there was testimony that at the time one robbery was committed Hagan was at the home of the Henkels, and at the time of the other robbery he was at his home. In view of such conflict in the evidence as to the identity of the robber, the errors in creating the derogatory inferences against defendant were significant. In People v. Robarge, 111 Cal.App.2d 87, 244 P.2d 407, wherein the charge was robbery, there was a close question as to identity of the robber and there was strong evidence in support of the defense of alibi. A witness therein was testifying concerning one of the robbers (not appellant therein) and as to his ability to identify him if he should see him again. Then the deputy district attorney requested the court to order the bailiff to bring one "Robearge" into court. The order was made and thereafter the judge said that "somebody" has been brought from the county jail. The deputy district attorney asked the witness if he recognized the man who had been brought in by the bailiff. The witness replied in the affirmative. Thereafter a deputy sheriff, who was present when the man was in court, was called as a witness and was asked by the deputy district attorney if he knew the name of the man. He replied that his name was "Robearge." On appeal therein it was said, 111 Cal.App.2d at page 94, 244 P.2d 407, that the record was barren of any purpose for producing the man in court unless it was to create the impression upon the jury that there was a relationship of brother between them (the name of the man and the name of defendant having the same pronunciation) and the positive identification of the man from jail as a participant in the robbery would serve to strengthen the somewhat uncertain identification testimony on behalf of the People. The court therein also said, 111 Cal.App.2d at page 94, 244 P.2d 407, that the procedure was improper and calculated to prejudice the rights of defendant; that, 111 Cal.App.2d at page 96, 244 P.2d 407, the erroneous procedure may have turned the scale in favor of the prosecution, and it prevented defendant from having a fair trial. The judgment of conviction therein was reversed. In the present case, the aforesaid improper inferences, created by bringing Figuieredo before the jury, prevented defendant herein from having a fair trial.

[2] Appellant also contends, as above stated, that it was prejudicial misconduct of the deputy district attorney to offer, and it was prejudicial error of the court to receive, in evidence testimony of Officer Simon that Hagan had said that he did time in San Quentin with Figuieredo. Prior to impaneling the jury, a conference was held in chambers regarding the allegations of prior convictions. At the conference the judge, the deputy district attorney, defendant and his counsel, and the reporter were present. The judge asked defendant what his desire was with reference to the allegation of prior convictions. Defendant asked the judge to clarify that for him, and asked "Will that not be brought out in court?" The judge said, "No. That is the purpose of coming in here, so it will not get to the ears of the jury." The deputy district attorney said that the judge should explain the possibilities if defendant takes the stand.

The judge told him that if he took the stand the district attorney could ask him whether he had been convicted of a felony; and if he did not admit the priors then the allegations of priors would be read to the jury. The judge also said that if defendant admitted the priors and did not take the stand the district attorney had no way of showing that he had been convicted of a felony. Defendant said, "I see, with the understanding that the priors could not be read in front of the jury?" The judge said, "They could not, if you admit them here now." The deputy district attorney said, "If you don't take the stand, and admit them now, the jury will never know anything about your priors. Is that clear?" Defendant said, "Yes, sir. I wanted it clarified." The deputy said, "I want to be sure you do understand it. What is your desire?" Defendant said, "Well, I am admitting the priors."

When Officer Simon was testifying on direct examination the deputy district attorney asked him if he had any conversation with Hagan as to whether he knew Figueiredo. The officer replied in the affirmative, and the deputy asked him to relate the conversation. The officer said he asked Hagan if he knew anyone by the name of Gene; that Hagan replied "No"; then the officer asked him if he knew anyone by the name of Gene while he was serving time in San Quentin. Counsel for defendant moved that the answer be stricken out. The motion was denied. Officer Simon also testified on direct examination that he asked Hagan, "Is this Gene [referring to Figueiredo] that you did time with, the last time in San Quentin?"; that Hagan said "Yes." The officer was an arresting and investigating officer in the case, and it is reasonable to assume that he knew that defendant had admitted the prior convictions. His references in his testimony to defendant having been in San Quentin were unnecessary and were calculated to disclose that defendant was an ex-convict. Such references constituted grounds for a new trial. In view of the context of the questions and answers on direct examination of the officer regarding conversations with defendant, it is reasonable to assume that the deputy district attorney knew that the conversation to be related by the officer would show that Hagan and Figueiredo had been in San Quentin. In view of the assurance which the deputy district attorney gave defendant that if he admitted the priors and did not testify his prior convictions would never be known by the jury, the questions by the deputy under circumstances which would permit references to serving time in San Quentin constituted prejudicial misconduct. The references by the officer to San Quentin deprived defendant of a fair trial.

The bringing of Figueiredo into the courtroom and the disclosure that Hagan had been convicted of a felony were unnecessary from any legal viewpoint. The trial judge should have granted a new trial.

The judgment and the order denying a new trial are reversed, and the cause is remanded for a new trial.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.



130 Cal.App.2d Supp. 874

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Scott BEAMER, Defendant and Appellant.

Cr. 36.

Appellate Department, Superior Court, Alameda County, California.

Jan. 17, 1955.

Prosecution for violation of the Vehicle Code by driving an automobile upon a public street at 35 miles an hour in a prima facie 25 mile zone. From a judgment of the Municipal Court of Oakland-Piedmont Judicial District, Homer W. Buckley, J., the defendant appeals. The Appellate Department of the Superior Court, in and for the County of Alameda, Ralph E. Hoyt, J., held that an electromagnetic radar speed

meter was not a "speed trap" within the Vehicle Code provision prohibiting the use of evidence obtained by a speed trap.

Affirmed.

Wagler, P. J., dissented.

Automobiles ⊂354

An electromagnetic radar speed meter mounted on the trunk of a police car parked at a street curb, both of which were in full view of persons traveling along the street, and which determined speed through space without reference to the highway was not a "speed trap" within the Motor Vehicle Code prohibiting the use of evidence obtained from maintenance or use of a speed trap and hence evidence obtained from the use of the device was admissible in prosecution for speeding. Vehicle Code, §§ 510, 751, 752.

See publication Words and Phrases, for other judicial constructions and definitions of "Speed Trap".

Kennedy Jackson, Oakland, for appellant.

J. F. Coakley, Dist. Atty. of Alameda County, Oakland, and L. E. Dayton, Asst. Dist. Atty. of Alameda County, Oakland, for respondent.

HOYT, Judge.

This is an appeal from a judgment of conviction of a violation of Section 510 of the Vehicle Code by driving an automobile upon a public street at thirty-five miles an hour in a prima facie 25 mile zone. The only evidence concerning appellant's speed was obtained by use of a device known as an electromagnetic radar speed meter. This evidence was admitted over the defendant's objection that it was inadmissible under Sections 751 and 752 of the Vehicle Code.

The evidence shows that the speed meter was mounted on the trunk of a police car. The police car was parked at the street curb and was painted a distinctive color as prescribed by law. Both the police car and the speed meter were in full view of persons traveling along the street. The officer who determined appellant's speed and the arresting officer were both in the regulation uniform of a traffic officer.

Three experts testified as to the electronic principles underlying the operation of this device. Their testimony was to the effect that basically it consists of an ultra high frequency radio transmitter and receiver operating on a frequency of 2445 megocycles, a visual speed indicator calibrated to show miles per hour, and a graphic recorder on which speed in miles per hour is recorded.

Electromagnetic waves traveling at the speed of light are beamed from the transmitter by means of a directional antenna. The crests of these waves are approximately 2.1 inches apart. When these waves hit a solid object they are reflected or bounced back to the receiver. The reflected waves travel at the same speed as the outgoing waves. If the object reflecting the waves back to the receiver is standing still, the same number of waves are received per second by the receiver as are transmitted per second by the transmitter. If the object reflecting the waves is moving away from the transmitter and receiver, each succeeding transmitted wave travels a slightly greater distance than the preceding wave, and each reflected wave travels the same increased distance, with the result that the number of reflected waves returning to the receiver in any given time period is decreased in direct proportion to the speed with which the reflecting object is moving away from the transmitter and receiver. The device then electronically compares the transmitter frequency with the decreased frequency with which reflected waves return to the receiver, and from this comparison registers the speed with which the reflecting object is moving away from the transmitter and receiver on a visual dial calibrated in miles per hour.

Similarly, when the reflecting object is moving toward the transmitter and receiver, the distance traveled by each succeeding wave is reduced in direct proportion to the speed with which the reflecting object is moving toward the device, with the result that the number of reflected waves returning to the receiver in any given time

period is increased in direct proportion to the speed with which the reflecting object is moving toward the transmitter and receiver. The device then electronically compares the transmitter frequency with this increased frequency with which reflected waves return to the receiver and determines from this comparison the speed with which the reflecting object is moving toward the transmitter and receiver, and registers that speed on the visual dial. The speeds obtained are likewise recorded upon the graphic recorder.

The device will work equally well whether the reflecting object is approaching or moving away from it. It is not necessary for the device to be stationary. If it is moving, the speed of its movement must be added to or subtracted from the speed of the reflecting object as registered on the speed indicator, depending upon whether the device is moving toward or away from the reflecting object.

The only contention made by appellant is that the radar device in question is a speed trap within the meaning of Sections 751 and 752 of the Vehicle Code. This is a novel question so far as the appellate courts of this state are concerned.

Section 751, so far as pertinent, reads as follows:

> "(b) A speed trap within the meaning of this chapter is a particular section of a highway measured as to distance and with boundaries marked, designated or otherwise determined in order that the speed of a vehicle may be calculated by securing the time it takes said vehicle to travel such known distance.
>
> "(c) No evidence as to the speed of a vehicle upon a highway shall be admitted in any court upon the trial of any person for an alleged violation of Division IX of this code when such evidence is based upon or obtained from or by the maintenance or use of a speed trap."

Section 752, so far as pertinent, provides: "(a) In any prosecution under Division 9 of this code upon a charge involving the speed of a vehicle every officer or other person shall be incompetent as a witness if the testimony of such officer or person is based upon or obtained from or by the maintenance or use of a speed trap."

As defined in Section 751 of the Vehicle Code a speed trap consists of four elements: (1) A particular section of a highway, (2) measured as to distance, (3) with boundaries marked, designated or otherwise determined, and (4) in order that the speed of a vehicle may be calculated by securing the time it takes said vehicle to travel such known distance.

The evidence of the experts in this case shows that the radar device in question determines the speed with which an object is moving toward or away from the device through space. It makes no difference whether the object in question is moving upon the surface of the ground or in the air, and it makes no difference whether the object is moving vertically or horizontally, or at any angle between the verticle and the horizontal.

The determination of speed is made without reference to any particular section of a highway and, in fact, without reference to any highway at all. The distance measured by this radar device is the distance the reflecting object travels through space and not a measured distance on the highway. Highway boundaries, marked or otherwise determined, are not involved in the operation of this device.

Appellant contends that this radar device is a speed trap because it measures time and distance and actually measures the distance a vehicle travels on the highway. Every determination of speed through space or over the ground involves a determination of time and distance because speed equals distance divided by time. This argument could be applied with equal force to the speedometer in the traffic officer's car when he pursues a speeder along the highway. It is too well established for argument that the officer's speedometer in his automobile is not a speed trap, even though the speedometer is actuated by the movement of the tires of the car along the particular portion of the highway which it

is traveling, and incidentally measures the length of such portion.

For the reason that the electromagnetic radar speed meter here involved determines speed through space without reference to the highway, it would seem to be clear that it is not a speed trap within the meaning of Section 751 of the Vehicle Code and the judgment of conviction must be affirmed.

Judgment affirmed.

LEDWICH, J., concurs.

WAGLER, Presiding Judge.

I dissent. The majority opinion fails to take into consideration the applicable rules of statutory construction. When viewed in the light of these rules, the record in my opinion discloses a violation of both the spirit and the letter of Sections 751 and 752 of the Vehicle Code.

"It is a cardinal rule that statutes are construed according to the intention, or at least according to the apparent or evident intention or purpose of the law makers. Such intention controls, if it can be reasonably ascertained from the language used. Indeed, it has been said that the legislative intent in enacting a law is the law itself. Accordingly, the primary rule of statutory construction, to which every other rule as to interpretation of particular terms must yield, is that the intention of the legislature must be ascertained, if possible, and when once ascertained must be given effect, even though it may not be consistent with the strict letter of the Statute." 23 Cal.Jur. 725 et seq.; County of Alameda v. Kuchel, 32 Cal.2d 193, 195 P.2d 17; Dickey v. Raisin Proration Zone No. 1, 24 Cal.2d 796, 802, 151 P.2d 505, 157 A.L.R. 324; Dempsey v. Market Street Railway Co., 23 Cal.2d 110, 113, 142 P.2d 929; Burns v. Massachusetts Bonding and Insurance Co., 62 Cal.App.2d 962, 971, 146 P.2d 24.

Statutes are to be construed not only with their intent and purpose in view, but also with regard to the mischief or evil at which they are aimed. Buckner v. Vetterick, 124 Cal.App.2d 417, 418, 269 P.2d 67; Evans v. Selma Union High School Dist., 193 Cal. 54, 57, 222 P. 801, 31 A.L.R. 1121.

The legislative intent underlying the enactment of these statutes has been judicially determined. In construing Section 155 of the Vehicle Code (the predecessor to Vehicle Code §§ 751 and 752) the Supreme Court of this state has pointed out that the section in question was enacted as a "means of stamping out what the Legislature evidentally regarded as the speed trap evil". See Fleming v. Superior Court, 1925, 196 Cal. 344, 350, 238 P. 88, 90. The evils attendant upon the use of speed traps and the abuses which the legislature sought to correct are well known to those who operated motor vehicles upon our highways prior to 1923. See 14 Cal.Law Review 142.

In discussing the purposes underlying the enactment of the speed trap law, the Supreme Court said in Fleming v. Superior Court, 196 Cal. 344, 348, 238 P. 88, 89: "'"The Legislature concluded that the public safety, the obvious purpose of numerous regulations contained in the act, would best be served by requiring traffic officers to spend their hours of duty in patrolling the public highways; that the presence of such officers upon the highways would constitute a far greater deterrent to excessive speed, and would insure a more universal observance of the many rules of the road than would a concealment of said officers in speed traps located off the highway. The Legislature did not expressly prohibit the maintenance or use of speed traps, but it did render their maintenance and use wholly ineffectual for all purposes, by expressly prohibiting the introduction of speed trap testimony. The legislative purpose is disclosed in that portion of section 155 which prohibits the introduction of any testimony from any officer or officers arresting or participating or assisting in the arrest of such person if any speed trap was used in such arrest, or if such officer or officers, or any of them, were not at the time of such arrest dressed in a distinctive uniform, and patrolling or upon the highway upon which the arrest was made, in plain sight of all persons traveling thereon. The Legislature, in the foregoing provision, clearly expressed its conviction that the presence of traffic officers actually patrolling the highways, dressed in distinctive uniforms,

and in plain sight of all travelers on the highways, would have a most salutary effect in securing the observance of each and all of the regulations imposed upon drivers of vehicles upon the public highways. * * * The Legislature knew that a very large percentage of accidents upon public highways occurred at street intersections, that such accidents were caused by failure to observe the right of way rule, by failure to give proper signals, by failure on the part of drivers to turn at intersections in the manner prescribed by law. The Legislature quite evidently believed that many of these accidents would be prevented in the event that officers patrolled the highway and enforced each and all the rules of the road heretofore mentioned.'"

From the foregoing it is clear that the legislature thought it better to prevent the commission of crime than to punish it after its commission, and that so far as speed law violations were concerned, it intended to make entirely ineffectual every method of apprehension which involved entrapment or similar procedures.

It is equally clear that the radar device used by the traffic officers in this case is adaptable to just such methods. Any construction of the speed trap statute which has the effect of reinstating the use of such methods, violates the spirit of the law and is contrary to the intention and purpose of the law makers.

Since the intention of the legislature is clear, and since the legislature has also defined the term "speed trap", Vehicle Code, § 751(b), it is clearly the duty of this court to reverse the conviction in this case if the language of the definition is sufficiently broad under any reasonable construction to encompass the method used by the traffic officers to obtain the evidence upon which the conviction is based. Glassell Development Co. v. Citizens' Nat. Bank, 1923, 191 Cal. 375, 216 P. 1012, 28 A.L.R. 1427; Fay v. District Court of Appeal, 1927, 200 Cal. 522, 254 P. 896; Pasqual v. DeVries, 1929, 101 Cal.App. 479, 281 P. 1057; Chilson v. Jerome, 1929, 102 Cal.App. 635, 283 P. 862; Southern Pac. R. Co. v. Stibbens, 1930, 103 Cal.App. 664, 285 P. 374; Carr v. Kingsbury, 1931, 111 Cal.App. 165, 295 P. 586; R.C.A. Photophone Inc., v. Huffman, 1935, 5 Cal.App.2d 401, 42 P.2d 1059; Maki, In re, 1943, 56 Cal.App.2d 635, 133 P.2d 64; King v. Mortimer, 1948, 83 Cal.App.2d 153, 188 P.2d 502; 23 Cal. Jur. 722, 725; Civ.Code, § 3541.

If the language is reasonably susceptible of two constructions, that construction which is more favorable to the defendant must be adopted, since "'the defendant is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact, or as to the true interpretation of words, or the construction of language used in a statute.'" People v. Ralph, 24 Cal.2d 575, 581, 150 P.2d 401, 404; Ex parte Rosenheim, 83 Cal. 388, 23 P. 372; People v. Sayre, 26 Cal.App.Supp.2d 757, 70 P.2d 546.

Section 751(b) defines a speed trap as follows: "A speed trap within the meaning of this chapter is (1) a particular section of a highway (2) measured as to distance and (3) with boundaries marked, designated or otherwise determined (4) in order that the speed of a vehicle may be calculated by securing the time it takes said vehicle to travel such known distance." Having in mind these elements, let us examine the radar device and its method of operation as disclosed by the record.

The device sends out successive electromagnetic waves or impulses toward the vehicle which is under surveillance. The maximum effective range is 175 feet. These waves, which travel at the speed of light strike the vehicle and are reflected back at the same rate of speed. "The continually going out waves and the continually returning waves create an interference in crossing and passing each other, which results in a phenomenon between the vehicle and device known as a standing wave." The distance between the crests on the standing wave is 2.1 inches. If the vehicle is stopped, the standing wave remains motionless. When the vehicle is going toward the device, the standing wave is at all times contiguous to the front of the vehicle. It is literally pushed ahead of the vehicle and into the recording device. When the vehicle is going away from the device the converse is true. The wave,

therefore, moves at the exact speed of the vehicle. "The machine is inherently a counting device." It counts the number of standing wave crests which pass through it per unit of time, and every time a wave crest is counted, it means that the vehicle has travelled 2.1 inches along the highway. The device computes the speed of the vehicle in miles per hour by dividing the measured distance travelled by the time required. This result, in turn, is shown on a visual meter and on a graph activated by the device.

The first element of a speed trap as defined by Section 751(b) "a particular section of a highway" is of course present, for as soon as the radar device is set up a particular section of highway comes under surveillance. The second element, "measured as to distance", is also present, because it is only by measuring a specific distance that the device can calculate speed. This measured distance is always some multiple of 2.1 inches and less than 175 feet. There is nothing in the statute which requires that the distance be measured at any particular time or in any particular manner, or that it be measured upon the surface of the highway. The third element consists of "boundaries marked, designated or otherwise determined". The boundaries of the particular section of highway which are measured by the device are not marked or designated, but they are "otherwise determined" each time the device measures distance, since it is impossible to measure distance without a point of beginning and a point of ending. The statute does not require that these boundaries be determined in any particular manner, or that they be marked at all, or that the measured distance be any given number of feet. The fourth requirement, that "the speed of a vehicle may be calculated by securing the time it takes said vehicle to travel such known distance", is simply a re-statement of the formula of physics that velocity equals distance divided by time. Although the computation is made by the device, this formula is used in the computation. The statute does not require that the computation be made by a person or by any particular method.

Since all of the elements necessary to constitute a speed trap are included in the device and method used by the traffic officers to obtain the evidence of speed in this case, it would appear that the evidence was admitted in violation of both sections 751 and 752 of the Vehicle Code.

The majority opinion implies that the device and method used by the traffic officers in this case is analogous to the method of detection followed when a speedometer is used. This is an erroneous conclusion. The radar device determines the acutal speed of the vehicle under surveillance, whereas the speedometer does not. The speedometer determines the speed of the vehicle operated by the traffic officer, who then by comparison attempts to estimate the speed of the vehicle being pursued. Of course, when a speedometer is used, the element of entrapment which is implicit in the speed trap law is totally lacking.

The majority opinion argues that the method used to calculate the speed of the defendant's vehicle does not constitute a speed trap, because the device measured the distance travelled by the defendant's vehicle through space rather than on the highway. In my opinion the statute cannot reasonably be given this narrow construction, and to do so does violence to the intention of the legislature. Does not the highway include the space immediately above the surface of the pavement? Furthermore, the argument proves too much. In the light of this reasoning, the enterprising village constable need not even acquire a radar device, but needs only to measure his distance in the space above the highway or on private property adjacent to the highway in order to circumvent the law; or better yet, he might install a system of electric eyes just off the highway. They in turn "through space" could make and record all of the observations necessary to the determination of the speed that a vehicle travelled "through space" above the highway.

Ironically the defendant was convicted of operating his vehicle at an excessive speed *upon the highway*, but if we carry the reasoning of the majority opinion to its

logical conclusion, we find the record barren of any evidence of the speed of defendant's vehicle *upon the highway,* because the radar device calculated its speed only through space "without reference to any highway at all."

It may well be that the speed trap law is no longer a wise law, and that it should be repealed. However, this is not the function of the courts but of the legislature, which can at the same time enact proper statutory safeguards to prevent the recurrence of the evils which prompted the passage of the law in the first instance. I would reverse the judgment.



130 Cal.App.2d Supp. 892

Walter HAERENS, Plaintiff and Appellant,

v.

COMMERCIAL CASUALTY INSURANCE COMPANY, etc., Defendant and Respondent.

C. A. 8532.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 26, 1955.

Action to recover on a property damage policy. Judgment for the defendant in the Municipal Court of Los Angeles Judicial District, Leo Freund, J., and the plaintiff appealed. The Appellate Department of the Superior Court, Bishop, J., held that where insured contracted to paint a house with many windows and its employees negligently injured a number of panes resulting in the total damage of $425, insurer was not relieved of liability on ground that each pane damaged gave rise to a separate claim and that no one pane was worth more than $50 within $50 deductible provision of the policy.

Judgment reversed.

1. Insurance ⇐434

An insurer was not relieved of liability under a property damage policy issued to a subcontractor painting a house with many windows which were damaged by its painters under the provision that the policy did not apply to injury to property in the care, custody or control of the insured since the window panes were never in the custody or control of the insured subcontractor.

2. Insurance ⇐146(3)

Where insurer was responsible for the drafting of the policy that it issued, any ambiguity therein must be constructed against it.

3. Insurance ⇐512

Where insured contracted to paint a house with many windows and its employees negligently injured a number of panes resulting in the total damage of $425, insurer under property damage policy was not relieved of liability on the ground that each pane damaged gave rise to a separate claim and that no one pane was worth more than $50 within $50 deductible provision of the policy, where the word "claim" as used in the policy was neither certain in itself nor made certain by other provisions.

Edmund R. Mietus, Los Angeles, for appellant.

Staples & Meifert, Los Angeles, for respondent.

BISHOP, Judge.

By their pleadings the parties have limited the issues with the result that the trial court was, and we are, confronted by the two questions that have been debated by counsel on this appeal. The answers we feel constrained to give to these questions require us to reverse the judgment that denied plaintiff any recovery.

Plaintiff, in the discharge of a subcontract to do the painting on a house with many windows, set one of his employees to sandpapering the metal strips that separated the panes of glass. The employee carelessly scratched a number of the window panes, and after the defendant had disclaimed re-

sponsibility for the resulting damage, the contractor had the window panes replaced, at an expense of $425, and withheld that sum when he settled with the plaintiff.

The plaintiff's demand upon the defendant was based on a policy of insurance that the defendant had issued. The only reason advanced by the defendant for its refusal to admit the validity of plaintiff's demand was that each pane damaged gave rise to a separate claim and no one pane was worth more than $50. It rested this reason upon the provision of the policy that "it is therefore understood and agreed that each claim covered by the policy whether or not more than one claim arising out of the one and same accident, shall be adjusted separately and any claim when determined which is not greater than Fifty and no/100 dollars ($50.00) shall be paid by the assured * *"

[1] Before considering the question suggested in the facts related, we note that the defendant, when it came to answer the complaint, offered a new reason for its position that it was not liable for the property damage caused by plaintiff's employee. It referred to subdivision (h) of the "Exclusions" of the policy, which provides that "This policy does not apply * * * to injury to * * * property * * * in the care, custody or control of the Insured." In our opinion, the window panes were never in the care, custody or control of the plaintiff, within the purview of subdivision (h).

[2, 3] Reverting to the $50 deductible provision, we find the word "claim" as there used neither certain in itself nor made certain by any provision of the policy. It is not unreasonable to say that the claim made upon the plaintiff by the contractor, to whom he was responsible, was for $425, the cost of replacing all the panes ruined by plaintiff's employee. Undoubtedly the defendant was responsible for the drafting of the policy that it issued. The ambiguity arising from the use of the word "claim" must therefore be construed against it. Coit v. Jefferson Standard Life Ins. Co., 1946, 28 Cal.2d 1, 3–4, 168 P.2d 163, 165, 168 A.L.R. 673. Had the defendant desired to shift to the assured the liability for each $50 item that goes to make up a claim, it should have chosen terms that made that meaning clear.

The judgment is reversed.

SHAW, P. J., concurs.



130 Cal.App.2d Supp. 894

Jay MILLICK, Plaintiff and Respondent,

v.

John Wallace PEER, Defendant and Appellant.

Civ. A. 21.

Appellate Department, Superior Court, San Bernardino County, California.

Jan. 26, 1955.

Action against buyer for deficiency judgment on automobile sales contract. Municipal Court of San Bernardino, Judicial District, C. E. Thompson, J., gave judgment for plaintiff. Defendant appealed. The Appellate Department of the Superior Court, Coughlin, P. J., held that statutory requirement of reasonable care and judgment in resale of repossessed automobile was complied with where vehicle was sold to highest of three bidders although price was much less than original sales figure, and evidence sustained finding that there was no misrepresentation by seller as to condition of automobile at time of sale.

Affirmed.

1. Appeal and Error ⇐931(1)

Upon appeal, any evidence and all inferences that legally may be drawn therefrom which would sustain finding in support of the judgment must be accepted by the appellate court in determining the sufficiency of the evidence as a matter of law.

2. Sales ⇐461

Statutory requirement of itemization, in automobile conditional sales contract, of charges was substantially met where charges were set out although not in stat-

utory order. West's Ann.Civ.Code, § 2982 and subd. (a).

3. Sales ⇐462

Where conditional sales contract signed by automobile buyer acknowledged receipt by buyer of exact copy of contract, that fact was substantial evidence that seller had delivered exact copy of contract to buyer as required by statute. West's Ann.Civ.Code, § 2982(a).

4. Sales ⇐462

Where charge for insurance policy was not included in sale contract for automobile, statutory requirement of delivery of policy within thirty days of sale was inapplicable. West's Ann.Civ.Code, § 2982(b).

5. Sales ⇐464

The penalty of unenforceability of contract for seller's failure to comply with provisions of statute relating to automobile conditional sales contract applied only to violations concerning time price differential and payment before maturity but not to matters of insurance and formalities and contents. West's Ann.Civ.Code, § 2982(e).

6. Sales ⇐52(7)

In conditional seller's action for deficiency judgment, evidence entitled trial court to infer that representations concerning condition of automobile were not representations of fact but were expressions of opinion and so regarded by buyer, where he continued making payments and did not complain until shortly before automobile was repossessed.

7. Sales ⇐479(14)

Where conditional seller after repossessing automobile from buyer solicited bids from seven or eight used car dealers and thereafter sold automobile to highest of three bidders, statutory requirement that seller "exercise reasonable care and judgment in making resale" was met, and price was not inadequate as a matter of law although the price was considerably less than sales price as automobile had deteriorated in value since sale. West's Ann.Civ.Code, §§ 1780(5), 2982.

8. Sales ⇐479(11)

In action by seller for deficiency judgment under automobile conditional sales contract, where there was no substantial evidence in the record upon which to base a finding of market value at time of resale, it could not be concluded on appeal that the price actually paid was inadequate. West's Ann.Civ.Code, §§ 1780(5), 2982.

Norman P. Courtney, Fontana, for appellant.

Charleville & Henry, San Bernardino, for respondent.

COUGHLIN, Presiding Judge.

The defendant appeals from a judgment in favor of the plaintiff in the sum of $310.72, under a contract of sale of an automobile. The agreed purchase price was $1,195. Among other things, the contract shows that a charge of $24 was made for "TR. Lic". It may be inferred that this item covered fees for transfer. The contract provided that, in the event of default, the seller might repossess the automobile; resell the same at a private sale; and hold the purchaser for the balance due. It was also stated in the contract that "the receipt of a copy of this contract is hereby acknowledged by Purchaser".

The defendant advances three grounds for reversal:

1. The first ground urged is that the contract is unenforceable because of a failure to comply with Section 2982 of the Civil Code. It is contended that the contract does not set forth

> "A description and itemization of amounts * * * which will actually be paid by the seller * * * to any public officer as fees in connection with the transaction * * *";

also that the evidence fails to establish that an exact copy of the contract was "delivered by the seller to the buyer at the time of its execution"; and further, that the original or an exact copy of a policy of insurance required by the seller was not delivered to the purchaser within thirty days after execution of the contract.

[1–5] It is the opinion of the Court that none of these contentions is sustainable under the general rule that, upon ap-

peal, any evidence and all inferences that legally may be drawn therefrom which would sustain a finding in support of the judgment must be accepted by the Appellate Court in determining the sufficiency of such evidence as a matter of law. The record establishes a substantial compliance with the provisions of Section 2982 of the Civil Code for, although the contract under consideration did not itemize the charges made in the order prescribed by Subdivision (a) of said Section, nevertheless, in substance, the requirements were met. The contract introduced in evidence, which was signed by the defendant, acknowledged receipt of a copy thereof by him. This was substantial evidence that an exact copy thereof was delivered to him at the time of its execution. The insurance policy for which the defendant was charged was issued after the expiration of an existing policy and the charge therefor was not included in the amounts to be paid under the contract and consequently was not subject to the provisions of Subdivision (b) of said Section 2982. Moreover, the penalty of unenforceability for failure to comply with the provisions of said Section 2982 applies only to the requirements set forth in Subdivisions (c) and (d), and not to those set forth in Subdivisions (a) and (b) of that Section, Civil Code Section 2982 (e).

[6] 2. As a second ground for reversal the defendant contends that his consent to the contract was obtained by false representations. These representations concern the condition of the automobile at the time of sale. The defendant testified that he discovered the falsity of these representations within a few days after the sale. However, he continued to make payments under the contract, and made no complaint to the seller about the condition of the car, or the alleged misrepresentations, until shortly before the automobile was repossessed. A review of the evidence indicates that the trial court was entitled to infer that the representations with respect to the condition of the car were not representations of fact, nor false representations, but were expressions of opinion and were so considered by the defendant at the time of his purchase.

[7,8] Lastly, the defendant contends that the plaintiff did not comply with the provisions of Subdivision (5) of Section 1780 of the Civil Code which requires a seller "to exercise reasonable care and judgment in making a resale". After repossessing the automobile in question the plaintiff solicited bids from seven or eight used car dealers and thereafter received three bids and sold the car to the highest bidder for the sum of $350. The defendant contends that the resale of the automobile for $350 is sufficient evidence of inadequacy of price to require the Court, as a matter of law, to conclude that the seller did not exercise reasonable care and judgment in making a resale. Even though this legal premise be accepted, the fallacy of the defendant's contention is in assuming that the evidence establishes, as a matter of law, that the sum of $350 was an inadequate price. Although the original sales price of the car was $1,195, the automobile had been used by the defendant for eight months and, prior to its repossession, had been stripped of a number of items including a radio, heater and other accessories. Assuming that the plaintiff had the burden of proving that he exercised reasonable care and judgment in making a resale, he met that burden with a prima facie case by showing that he solicited bids from seven or eight prospective purchasers and accepted the highest of three bids actually made. The defendant's contention that the resale price was inadequate has no evidentiary support. To prove such inadequacy the evidence would have to establish that the market value was greatly in excess of the price paid. There is no substantial evidence in the record upon which to base a finding of the market value at the time of resale. Under the circumstances, it cannot be concluded on appeal that the price actually paid was inadequate.

The judgment is affirmed.

MITCHELL, J., concurs.

HILLIARD, J., not participating.

130 Cal.App.2d Supp. 883

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, California, etc., Plaintiff and Respondent,

v.

Jim C. CORDOVA et al., Defendants and Appellants.

C. A. 8550.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 19, 1955.

Actions by municipal housing authority for unlawful detainer. The housing authority's motion for summary judgment in each case was granted by the Municipal Court of the Los Angeles Judicial District, Lucius P. Green, J., and the tenants appealed. The Superior Court, Appellate Department, Patrosso, J., held that the housing authority was without authority to exact the signing of a certificate of non-membership in certain organizations designated by the Attorney General of the United States in an executive order, as a condition to the right to occupy its premises.

Reversed and remanded for trial upon the issues.

1. Judgment ⇐186

In unlawful detainer actions by municipal housing authority, allegation of tenants' answer in each case that sole reason for eviction was refusal to sign certificate of non-membership in certain organizations, designated by Attorney General of United States, would have to be taken as true on housing authority's motion for summary judgment. Executive Order No. 10450, 5 U.S.C.A. § 631 note.

2. Landlord and Tenant ⇐22(1)

Private landlord may select tenants as he pleases and in absence of letting for prescribed term, may terminate tenancy without reason or for any reason and may refuse to rent to persons of particular race, religion or political affiliation, or to permit their continued occupancy.

3. Municipal Corporations ⇐717

Public housing authority may not discriminate arbitrarily between persons and classes in leasing its premises or in permitting continued occupancy to those who are already tenants.

4. Insurrection and Sedition ⇐1

Neither the Hatch Act nor the Executive Order by which United States Attorney General has designated certain organizations proscribes membership in all organizations so designated. Executive Order No. 10450, 5 U.S.C.A. § 631 note; 5 U.S.C.A. § 118j(1).

5. Insurrection and Sedition ⇐1

Listing of an organization by United States Attorney General does not operate as a final determination of loyalty of a member thereof. Executive Order No. 10450, 5 U.S.C.A. § 631 note.

6. Constitutional Law ⇐38

A government is without power to impose an unconstitutional requirement as condition for granting a privilege, even if the privilege is the use of government property. West's Ann.Cal.Const. art. 1, § 21.

7. Municipal Corporations ⇐717

Municipal housing authority is without authority to exact signing of certificate of non-membership in certain organizations designated by United States Attorney General in executive order, as condition to right to occupy its premises. Executive Order No. 10450, 5 U.S.C.A. § 631 note; S.H.A. Ill. ch. 67½, §§ 25 to 25.02, 27; Health and Safety Code, §§ 34322, 34323, 34327.

Wirin, Rissman & Okrand, Los Angeles, for appellants.

James J. Arditto, Los Angeles, for respondent.

PATROSSO, Judge.

This case and three companion cases [Civ. A. 8551, 8552 and 8553] present the same questions, and this opinion is equally applicable to each.

The complaint is in the usual form of an action in unlawful detainer, alleging that defendants are the tenants of a unit in a housing development operated by the plaintiff under a month to month tenancy evidenced by a written agreement providing that it may be terminated by either party upon ten days' written notice to the other; and that plaintiff elected to so terminate defendants' tenancy by giving the requisite notice, but that defendants have refused to surrender possession thereof and unlawfully continue to occupy the same. Defend-

ants answered, admitting generally the allegations of the complaint except that they denied that their tenancy had been lawfully terminated, and alleging that such purported termination was unlawful and unauthorized in that the only reason therefor was defendants' refusal to sign a certificate that they were not members of any one of a list of numerous organizations described as those "designated by the Attorney General of the United States as within Executive Order No. 10450 (18 F.R. 2489)," and that eviction from the premises for the reason stated was in violation of their constitutional rights. Plaintiff thereupon moved the court for summary judgment upon the ground that the facts alleged did not constitute a defense. The motion was granted, and defendants appeal from the resulting judgment.

In support of the judgment plaintiff contends that the reason for its action in terminating defendants' tenancy is immaterial, the argument being that it, like a private proprietor, may terminate a monthly tenancy by giving the requisite notice with or without cause, and that the reason underlying its action in so doing may not be inquired into in a proceeding seeking to recover possession of the premises following such termination. Defendants reply that plaintiff, as a public body, does not occupy the same status as a private proprietor, and that it may not terminate their tenancy if its action in so doing is arbitrary or in violation of their constitutional rights, as they allege to be the situation here. Plaintiff replies that, assuming its action in terminating defendants' tenancy was for the reason stated, it is not arbitrary nor is it violative of any of defendants' constitutional rights.

[1] In the present posture of the case, it must be taken as true that the sole and only reason for the termination of defendants' tenancy is the fact that they refused to execute the certificate previously referred to; and hence the question presented is whether, if this fact be established upon the trial, such proof would have constituted a good defense to the action.

[2, 3] Plaintiff's argument that it may terminate the tenancy of those occupying its public housing projects with or without reason may readily be disposed of. We believe it fairly obvious that a public body, a housing authority as here, does not possess the same freedom of action as a private landlord, who is at liberty to select his tenants as he pleases, and in the absence of a letting for a prescribed term, may terminate their tenancy either without any reason or for any reason regardless how arbitrary or unreasonable it may be. Thus he may refuse either to rent to or permit the continued occupancy of his premises by persons of a particular race or religion or political affiliation. A housing authority, however, has no such freedom of action. See Banks v. Housing Authority, 1953, 120 Cal.App.2d 1, 8, et seq., 260 P.2d 668. And if it may not discriminate arbitrarily between persons and classes in leasing its premises, we see no reason why like considerations do not preclude arbitrary discrimination as between existing tenants in their right to continue such occupancy. See Chicago Housing Auth. v. Blackman, 1954, 4 Ill.2d 319, 122 N.E.2d 522.

We pass, therefore, to the vital question as to whether plaintiff's action in undertaking to terminate defendants' right to continue the occupancy of the premises for the sole reason that they refused to execute the certificate previously referred to, may legally be sustained.

While the arguments of counsel upon this question take a wide range, we find it unnecessary to notice all of them in detail, although each has received careful consideration. In essence, plaintiff's argument is this: The right to occupy low-rent housing units is in the nature of a bounty which the state is not required to extend to those of its citizens who are disloyal or are engaged in activities designed to destroy our form of government by force or violence or other unconstitutional means. It is to be noted, however, that, if the facts alleged in defendants' answer be taken as true (as they must for present purposes), the defendants are not being evicted because they are in fact disloyal or engaged directly or indirectly in advocating the overthrow of our government by unconstitutional means, but only because they refuse to sign a cer-

tificate that they are not members of certain organizations. Implicit in plaintiff's argument, therefore, is the assertion that failure or refusal of defendants to disavow membership in any of said organizations is in itself proof that they are disloyal or subversive. Upon this premise plaintiff argues that the case here is comparable to those in which it has been held that a public employee may be required, as a condition to his right to retain public employment, to take an oath that he had not advised, advocated, or taught, and is not a member in any organization which teaches or advocates the overthrow of our form of government by force or violence or other unlawful means. Garner v. Board of Public Works of L. A., 1952, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317. Without undertaking to so decide, we may concede, for the purposes of this discussion, that if defendants were being evicted because of their refusal to take an oath similar to that involved in the Garner case they could not successfully challenge the action of the plaintiff. In such circumstances, it might reasonably be inferred that a refusal to take such oath constituted an admission that they in fact advocated the overthrow of our form of government by unlawful means. As indicated, however, this is not the situation here—rather the question is whether they may be evicted from public housing premises for their failure or refusal to sign a statement that they are not members of any one of a large number of organizations designated by the Attorney General "as within Executive Order 10450" (18 F.R. 2489, 5 U.S.C.A. § 631 note), namely: "Totalitarian, Fascist, Communist, or subversive" or which advocates or approves "the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means."[1]

Fully mindful of the grave threats which the activities of subversives present to our form of government, and while reluctant to strike down any governmental action designed to frustrate their purpose and the accomplishment of their objectives, we are not at liberty to disregard settled rules of law and the limitations inherent in our constitutional form of government, observance of which in our view compels a reversal of the judgment for the following reasons:

[4–6] 1. If it be assumed, as plaintiff's argument suggests, that subversives may constitutionally be denied the right to enjoy public housing facilities, neither the Executive Order nor the Hatch Act, 5 U.S.C.A. § 118j(1)[2] undertakes to proscribe membership in *all* of the organizations designated by the Attorney General. Nor does the Executive Order declare that proof of membership in any of the organizations designated by the Attorney General shall in and of itself operate to establish that one is a subversive. See Kutcher v. Gray, 1952, 91 U.S.App.D.C. 266, 199 F.2d 783, 787–788. In speaking of the effect of the Executive Order as related to a government employee's membership in an organization included in the Attorney General's list, Mr. Justice Reed, upon behalf of the minority in Joint Anti-Fascist Refugee Committee v. McGrath, 1951, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817, points out that the "listing" of an organization has no "finality in determining the loyalty of members" thereof, 341 U.S. 123, 71 S.Ct. 666, 95 L.Ed. 871, and further that "The em-

1. Originally the Attorney General in compiling his list had broken it down into six categories, only one of which was entitled "subversive" and only about thirteen organizations had been so designated up to April 29, 1953, after which the current list was promulgated, in which the organizations named therein are not separately classified but they are described only as being organizations "within Executive Order No. 10450." See Peters v. New York City Housing Auth., 1954, 307 N.Y. 519, 121 N.E.2d 529, 532–533.

2. "It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States."

ployee's association with a listed organization does not, under the Order, establish, even *prima facie,* reasonable grounds for belief in the employee's disloyalty." 341 U.S. 123, 71 S.Ct. 659, 95 L.Ed. 864. See also discussion in Peters v. N. Y. City Housing Authority, Sup. 1953, 128 N.Y.S.2d 224, 240–241, reversed upon other grounds, 307 N.Y. 519, 121 N.E.2d 529. If this be true in the delicate field of public employment, it is doubly so where a state agency undertakes to discriminate against members of any such organization solely upon the basis of membership therein. As said in Peters v. N. Y. Housing Authority, supra 128 N.Y.S.2d at page 236: "Obviously, the government is under no duty to provide bounties in the form of low rent housing accommodations for its citizens. If it elects to do so, however, it cannot arbitrarily prevent any of its citizens from enjoying these statutorily created privileges. Nor can it make the privilege of their continuance dependent upon conditions that would deprive any of its citizens of their constitutional rights. A government is without power to impose an unconstitutional requirement as a condition for granting a privilege, even though the privilege may have been the use of government property. Frost v. Railroad Commission of California, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101." "(N)or shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Cal.Const., Art. I, sec. 21.

[7] 2. We are also in agreement with the conclusion expressed by the Supreme Court of Illinois in Chicago Housing Authority v. Blackman, supra, 122 N.E.2d 522, that the plaintiff Housing Authority is without authority to exact the signing of the nonmembership certificate as a condition to the right to occupy its premises. The court there says 122 N.E.2d at page 526: "The purpose of the Illinois Housing Authorities Act [S.H.A.Ill. ch. 67½, § 1 et seq.] is to eradicate slums and provide housing for persons of low-income class. See Krause v. Peoria Housing Authority, 370 Ill. 356, 373, 19 N.E.2d 193. It is evident that the exclusion of otherwise qualified persons solely because of membership in organizations designated as subversive by the Attorney General has no tendency whatever to further such purpose. In Krause v. Peoria Housing Authority, we held that arbitrary discretion in the choice of tenants was not conferred on the local housing authority, since reasonable standards to guide the exercise of discretion are provided by section 25 of the act. A construction of section 27 which would enable the housing authority to prescribe conditions of eligibility having no rational connection with the purpose of the act would raise serious constitutional questions. It is a well-established rule that statutes will be construed, if possible, so as to avoid invalidity. We conclude that appellee exceeded its statutory authority in requiring appellant Clark to execute the certificate of nonmembership in subversive organizations."

It may be noted that section 25 of the Illinois Act, except for the requirement of the statutory oath (there held invalid) is substantially identical with our Health and Safety Code sections 34322 and 34323, and section 27 is substantially the same as Health and Safety Code section 34327.

In addition to what was said by the Supreme Court of Illinois, we fail to find in the act, pursuant to which the plaintiff Housing Authority was created, anything to suggest that it is authorized to use the powers conferred upon it to punish subversives or discourage persons from entertaining subversive ideas by denying to such the right of occupying its facilities. Nor is it apparent that the laudable purpose of combating the efforts of subversives is advanced by compelling them to live in slums or substandard housing accommodations.

As indicated at the inception of this discussion, we have necessarily been compelled to assume the truth of the facts alleged in the defendants' answer for the purpose of determining whether it stated a defense to the action. This because the facts set forth in the affidavits filed upon behalf of the defendants in opposition to plaintiff's motion for summary judgment are in accordance with and support the allegations in the answer. It may, of course, well be that upon the trial the evidence will disclose that

the failure of defendants to sign the non-membership certificate was not the sole reason for their eviction, in which event the defendants will have failed to establish their pleaded defense.

The judgment is reversed and the cause remanded for trial upon the issues tendered by the pleadings.

SHAW, P. J., and BISHOP, J., concur.



130 Cal.App.2d Supp. 890

Ella R. BARBOZA, Plaintiff, Cross-Defendant and Respondent,

v.

Charlotte DELLOTA, Defendant, Cross-Complainant and Appellant.

C. A. 8557.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 25, 1955.

Action by vendor against purchaser for damages for purchaser's failure to carry out contract to purchase. The purchaser filed a cross-complaint asserting title to the amount deposited by purchaser in escrow. The Municipal Court of Long Beach Judicial District, Martin DeVries, J., rendered judgment awarding vendor damages and ordered that deposits in escrow be paid over to vendor and purchaser appealed. The Appellate Department of the Superior Court, County of Los Angeles, Bishop, J., held that under the circumstances the vendor was properly awarded $1,000 damages upon purchaser's refusal to carry out contract to purchase furnished apartment hotel but that money deposited in escrow never became money of vendor but remained money of purchaser who was entitled to a return of it.

Judgment affirmed as modified and order reversed.

1. Escrows ⇐1

Where there was no uncertainty as to what parties to escrow agreement meant to say or what they understood that they had said with respect to furnished apartment hotel that was subject of sale and agreement was not one to agree on terms but only to take steps to carry out terms agreed upon, the fact that evidence outside the contract might be required to establish whether a particular piece of personal property fell within agreement did not render agreement uncertain.

2. Escrows ⇐9

Furnished apartment hotel vendor was excused from performance of escrow agreement by purchaser's failure to cooperate, followed by unequivocal and definite repudiation of contract of sale.

3. Vendor and Purchaser ⇐330

Where vendor sold furnished apartment hotel for $9,000, upon purchaser's refusal to carry out contract to purchase hotel so that vendor lost $1,000 by purchaser's failure to pay any part of $10,000 agreed upon, vendor was entitled to $1,000 damages.

4. Escrows ⇐15

Where furnished apartment hotel purchaser paid into escrow money which was to be paid at close of escrow to vendor who was to place in escrow a deed or bill of sale and vendor was excused from executing deed or bill of sale by purchaser's failure to cooperate followed by unequivocal and definite repudiation of contract of sale, the money deposited in escrow never became money of vendor but remained money of purchaser who was entitled to a return of it.

Alfred L. Armstrong, Hollywood, for appellant.

Morrison, Simon & McKinsey, Long Beach, for respondent.

BISHOP, Judge.

This action became dual in nature: first, an action by the plaintiff for $1,000 damages because the defendant failed to carry out her contract to purchase plaintiff's 17 room, completely furnished, apartment

hotel; second, an action in interpleader to determine to whom the $950, first paid into escrow and then paid into court, belonged. The trial court correctly determined that the plaintiff was entitled to damages in the amount of $1,000, but at the same time incorrectly decreed that the defendant was not entitled to the $950, but, subsequent to the judgment, ordered that sum paid over to the plaintiff. As a consequence, we are modifying the judgment and reversing the order.

Action for Damages.

[1] We do not have the exact terms of the escrow agreement before us, but that which we have raises no belief that there was any uncertainty as to what the parties meant to say, or understood that they had said, with respect to the property that was the subject of sale. The fact that evidence outside the contract may be required to establish whether a particular piece of personal property falls within the agreement does not render it uncertain. McIllmoil v. Frawley Motor Co., 1923, 190 Cal. 546, 549, 213 P. 971, 972. The agreement was not one to agree on terms, but only to take steps to carry out terms agreed upon.

[2] Plaintiff was fully excused from performance, by defendant's failure to cooperate, followed by an unequivocal and definite repudiation of the contract of sale.

[3] No point is made that the evidence does not support the amount of damages awarded. If we disregard the $1,000 deposited by the defendant in escrow, we can quickly conclude that the award is supported by the evidence. The plaintiff, fairly, sold the property for $9,000, upon defendant's refusal to go ahead with the deal, so that she lost $1,000 by defendant's failure to pay to her any part of the $10,000 agreed upon. If, however, the plaintiff receives any part of the $1,000 paid into escrow by the defendant, her $1,000 loss is reduced by that much. What becomes of the $950 ($1,000 less escrow charges) paid by the escrowholder into court, becomes of interest, therefore.

Interpleader Action.

[4] The judgment decreed that the defendant take nothing by the cross-complaint, in which she asserted title to the $950, but failed to say what does become of this money. Both in its silence and in what it said, the judgment was in error.

After the judgment, the plaintiff made a motion that the $950, that the defendant escrowholder had been allowed to pay into court, be applied in partial satisfaction of the judgment. Instead of granting the motion as made, the trial court adjudicated that the defendant had no interest in the $950, and awarded it to the plaintiff. This action was erroneous. The money paid into escrow by the defendant was to be paid to the plaintiff at the close of the escrow, into which she was to place a deed and a bill of sale. She was excused from executing either a deed or a bill of sale, but her excuse did not serve to fulfill the terms of the escrow; the $1,000 deposited in escrow never became the money of the plaintiff, but remained that of the defendant. Kellogg v. Curry, 1951, 101 Cal.App.2d 856, 859–860, 226 P.2d 381, 383–384. Again we point out that if the $950 had become plaintiff's money, then she had received $950 from the defendant, so that, having received $9,000 from the sale of the property, she had not been damaged in the sum of $950, but of $50.

The judgment is modified by rewording the sentence beginning with the words "It is further adjudged" to read: "It is further adjudged that cross-complainant Charlotte Dellota is entitled to the $950 which has been paid into court, and the same shall be paid to her upon demand." As so modified, the judgment is affirmed, appellant to have her costs of appeal. The order of May 18 is reversed.

SHAW, P. J., and PATROSSO, J., concur.

44 Cal.2d 52

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, Petitioner,

v.

Harry D. ROSS, as Controller of the City and County of San Francisco, Respondent.

S. F. 18982.

Supreme Court of California, In Bank.

Feb. 3, 1955.

As Modified Feb. 16, 1955.

Proceeding in mandamus to compel controller of City and County of San Francisco to certify the availability of funds to be used by city and county for acquisition by eminent domain of land for use as parking facilities. The Supreme Court, Shenk, J., held that acquisition of land by city to be leased to private individuals to construct parking garage, without retaining power to control charges or otherwise regulate operations in the public interest, was for a private and not a public use and not a proper exercise of constitutional power of eminent domain as implemented by general law.

Alternative writ discharged and application for peremptory writ denied.

Prior opinion, 270 P.2d 488.

1. Eminent Domain ⇐7

A municipal corporation has no inherent power of eminent domain and can exercise such power only when expressly authorized by law. West's Ann.Code Civ. Proc. § 1238.1; West's Ann.Const. art. 1, § 14.

2. Eminent Domain ⇐1

Exercise of power of eminent domain by municipal corporation is a matter of statewide concern and is not to be classed as a municipal affair. West's Ann.Code Civ.Proc. § 1238.1; West's Ann.Const. art. 1, § 14.

3. Eminent Domain ⇐167(4)

Where city purporting to act under general law of the state in acquiring private property by eminent domain for purpose of providing public parking facilities, city must conform to the general law in acquiring such property. West's Ann.Code Civ.Proc. § 1238.1; West's Ann.Const. art. 1, § 14.

4. Eminent Domain ⇐19

The exercise of power of eminent domain is restricted by Constitution to specific purposes which do not include acquisition of private property by city for the purpose of providing parking facilities, unless such purpose qualifies as a public use. West's Ann.Const. art. 1, § 14.

5. Eminent Domain ⇐19

City has authority under general law of the state to condemn private property for off-street parking facilities for public use. West's Ann.Code Civ.Proc. § 1238.1; West's Ann.Const. art. 1, § 14.

6. Eminent Domain ⇐19

Statutes providing for acquisition of land by municipalities for use as parking facilities disclose a clear legislative policy requiring governmental control of rates and charges to assure that such facilities fulfill a public need. Streets and Highways Code, §§ 31500–31907, 31788, 32500–33552, 33116, 33800–34859, 34400, 35100–35705, 35569; Government Code, §§ 54300–54672.

7. Constitutional Law ⇐212

The police power cannot be used as a means of regulating the activities of particular individuals while excluding from such regulation others of the same general class. U.S.C.A.Const. Amend. 14, § 1.

8. Eminent Domain ⇐13

The power of eminent domain may not be exercised to secure to private activities the means to carry on a private business whose primary objective and purpose are private gain and not public need, even though such activities also serve a public need. West's Ann.Code Civ.Proc. § 1238.1; West's Ann.Const. art. 1, § 14.

9. Eminent Domain ⇐19

Acquisition of land by city to be leased to private individuals to construct parking garage, a portion of ground floor frontage of which might be leased to and occupied by retail stores, without the city retaining power to control charges for parking or otherwise regulate operation of parking

facilities in the public interest, was for a private and not a "public use" and not a proper exercise by city of its constitutional power of eminent domain as implemented by general law. West's Ann.Code Civ. Proc. § 1238.1; Streets and Highways Code, §§ 32500–33552.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Use".

Dion R. Holm, City Atty., and John Elmer Barricklo, Deputy City Atty., San Francisco, for petitioner.

Jesse H. Steinhart, B. J. Feigenbaum, John H. Steinhart, San Francisco, and Joseph J. Carter, Albany, for respondent.

SHENK, Justice.

This is a proceeding in mandamus. The alternative writ issued. The respondent Harry D. Ross is the Controller of the petitioning city and county and upon request refused to certify to the availibility of funds in the city's Off-Street Parking Bond Fund for the acquisition by eminent domain of a proposed off-street parking garage site between Ellis and O'Farrell Streets in downtown San Francisco. By this proceeding the city seeks to compel such certification.

The electorate of the city approved a parking bond issue in the sum of $5,000,000 in 1947. The purpose of providing this fund was to pay for "the cost of public parking lots, storage space, garages, single or multi-level structures, and other off-street parking facilities on, under or above the surface of any property, including public parks, squares, lands, easements or rights of way to be acquired by purchase or condemnation, together with buildings, structures, equipment, approach roads, entrances, exits, fencing, off-street parking meters, and other works, property or structures for the accommodation of automotive vehicles, and necessary or convenient for adequate parking facilities, to relieve the congestion and to facilitate traffic in the metropolitan district of the City and County of San Francisco, provided that all lands and sites so acquired be subject to the approval of the Planning Commission of the City and County of San Francisco." Approximately $4,000,000 remains unallocated in this fund.

On October 3, 1949, purporting to act under the Parking Law of 1949, Sts. & Hy. Code, §§ 32500–33552, the city duly took the necessary steps to create a Parking Authority. The Authority, with the sanction of the City Planning Commission, approved the site here involved. The Board of Supervisors determined the site to be convenient and necessary and requested the Authority to submit a proposed working agreement between it and the city. Such an agreement was submitted and executed. Under the agreed plan the city was to acquire by eminent domain the desired site and to lease it to private individuals who would build a structure thereon in accordance with the city's specifications and operate parking and other facilities therein. Acting on the Authority's recommendation the Board of Supervisors passed an ordinance requesting the respondent controller to certify the availability of funds for the acquisition of the site under the authority of the San Francisco city charter and eminent domain provisions of the general law.

The controller's refusal to act favorably in response to the request is based on his contention that the money in the fund cannot lawfully be used for the expenditure as it is proposed to be applied. The Charter of the City of San Francisco requires the approval of the respondent before money may be disbursed. Charter of San Francisco, § 86, par. 1.

There are several special statutory procedures under which the city could proceed and by eminent domain acquire property to be leased to and operated by private individuals. Vehicle Parking District Law of 1943, Sts. & Hy.Code, §§ 31500–31907; Parking District Law of 1951, Sts. & Hy. Code, §§ 35100–35705; Sanitation, Sewer and Water Revenue Bond Law of 1941, Gov.Code, §§ 54300–54672. The city created its existing Parking Authority under the Parking Law of 1949. Sts. & Hy. Code, §§ 32500–33552; see also Municipal Parking Revenue Bond Law of 1949, Sts. &

Hy.Code, §§ 33800–34859. But other than the establishment of the Authority, the city has not availed itself of any of the various special legislative acts and does not purport to proceed in any manner provided for in those statutory provisions. It is assuming to proceed under its general power of eminent domain to accomplish the acquisition of the property, Code of Civ. Proc. § 1238.1, and thereafter to proceed under its claimed power to effect the lease of its properties to private interests.

[1–3] The city's right to proceed under any one of several alternative methods for acquiring the property by the exercise of eminent domain is not challenged. See City of Oakland v. Parker, 70 Cal.App. 295, 233 P. 68; County of Los Angeles v. Rindge Co., 53 Cal.App. 166, 200 P. 27. But it must justify its actions under whatever procedure it undertakes to accomplish its purpose. There are no express provisions in its charter conferring upon the city the right to condemn property for the purpose stated herein. A municipal corporation has no inherent power of eminent domain and can exercise it, if at all, only when expressly authorized by law. Alexander v. Mitchell, 119 Cal.App.2d 816, 821, 260 P.2d 261; Mackay v. City of Los Angeles, 136 Cal.App. 180, 183, 28 P.2d 706; City of Los Angeles v. Koyer, 48 Cal.App. 720, 725, 192 P. 301; 10 Ruling Case Law 196, and cases there cited. In such event its exercise is not to be classed as a municipal affair but instead is a matter of statewide concern. Alexander v. Mitchell, supra, 119 Cal.App.2d 816, 820, 260 P.2d 261; City of Tacoma v. State, 4 Wash. 64, 29 P. 847. This conclusion is inescapable in the present case as the city itself purports to find its power of condemnation in the general law of the state. Code Civ. Proc. § 1238.1. The city, then, must conform to the general law in acquiring the proposed property.

[4, 5] The controller's refusal to certify the availability of funds is based on his contention that under the general law the city cannot condemn private property to be immediately leased to private parties for use as a private venture. Article 1, section 14 of the Constitution restricts the exercise of eminent domain to specific purposes not including the contemplated use in the present case unless it may qualify as a "public use." Section 1238.1 of the Code of Civil Procedure authorizes the city to condemn property for off-street parking facilities "for public use." The controller insists that the city's admitted intention to refrain from directly controlling rates to be charged to customers and from otherwise regulating the operation of the proposed facility constitutes the operation of the garage as one in the nature of a private business and not as one for "public use" for which eminent domain could be used. This is the basic issue involved.

The question appears to be a novel one in this state. It has been decided adversely to the city's contention in a recent decision by the Supreme Court of the State of Rhode Island. In Opinion to the Governor, 1950, 76 R.I. 365, 70 A.2d 817, 820, the court held unconstitutional a statute authorizing a development authority to acquire land by eminent domain for a marina and auditorium to be operated by a private individual under a lease from the authority. After holding that the operation of a marina might be for the public benefit the court stated that the statute "would permit the spending of public money and the exercise of the right of eminent domain to acquire private property ostensibly for a public purpose but actually for profit in the operation of the marina as a private enterprise. * * * To permit such authority to lease the entire project to some private person, who thereafter would operate it for his own profit by fixing the fees and charges for its use and for services rendered without regulation in the public interest as a public utility, would at once make it a private enterprise and would remove the element of primary public use or purpose which is essential if the act by which the project is authorized is to be considered valid."

In Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, the District of Columbia Redevelopment Law of 1945, 60 Stat. 790,

D.C.Code 1951, §§ 5–701 to 5–719, was held valid. That law provided for the redevelopment of substandard housing areas through the acquisition of all private property within the area by a governmental agency in condemnation proceedings. Under the provisions of the act the agency might then sell or lease the property to private parties for its redevelopment. However the decision in that case affords no aid to the city in the present case. The act there involved provided for a systematic plan to assure redevelopment in a manner to protect the public health, safety, morals and welfare. It directed the National Capital Planning Commission to develop a comprehensive general plan of the district including "a land-use plan" which designated land for use in such categories as "housing, business, industry, recreation, education, public buildings" and public reservations. In making its plans the commission was required to consider "standards of population density and building intensity", the amount or character or class of any low-rent housing and maximum rentals chargeable. The agency which acquired the land could lease or sell portions not devoted to such purposes as streets, utilities, schools and recreational facilities, but only under agreements which provided that the lessees or purchasers would carry out the redevelopment plan and that "no use shall be made of any land or real property included in the lease or sale nor any building or structure erected thereon" which did not conform to the plan.

It is the stringent controls maintained over the properties sold or leased to private parties which distinguishes the Berman case from the present case. Such controls are designed to assure that use of the property condemned will be in the public interest. In the present case these controls are lacking.

The same reasoning is apparent in decisions in this state wherein the courts have attached significance to the control retained by governing bodies as indicative that public lands leased to private individuals were still serving a public purpose. In City of Oakland v. Williams, 206 Cal. 315, 274 P. 328, it appeared that tide lands were granted by the state to the City of Oakland for public purposes. In upholding a lease of some of that land to a private operator to conduct a warehouse thereon, the court set forth at length the terms of the lease which would insure performance by the lessee of the uses and purposes specified for which the city had been granted the lands. In Redevelopment Agency of City and County of San Francisco v. Hayes, 122 Cal.App.2d 777, 266 P.2d 105, 122, the court held that the taking of land by eminent domain for public use was proper and that the intention that the land would be returned to private ownership but "subject to restrictions protecting the public use" did not make it any the less a public use.

[6] A résumé of the statutory procedures under which the city might have acted had it chosen to do so, indicates a clear legislative policy requiring governmental control of rates and charges to assure the fulfilling of a public need. In Vehicle Parking District Law of 1943, Sts. & Hy. Code, §§ 31500–31907, a vehicle parking district is authorized to acquire land by condemnation and to construct garages thereon for parking purposes. The managing board of the district may lease the property to a private operator, but in such a case section 31788 of the code provides: "The maximum rentals, fees, and charges to be collected by the operator shall be fixed by the board after public hearing following such notice as the board prescribes, and shall be recited in the lease or franchise. No higher rentals, fees, or charges shall be collected by the operator without amendment of the lease or franchise agreed to by the board after like public hearing." The Parking District Law of 1951, Sts. & Hy. Code, §§ 35100–35705, authorizes the creation of parking projects in similar manner and in language almost identical with that set out above and requires that rates to be charged be controlled, regulated and fixed by the governing body. Sts. & Hy.Code, § 35569.

Under the Parking Law of 1949, Sts. & Hy.Code, §§ 32500–33552, the Parking Au-

thority is given the power to provide for the control of rates to be charged by a private party operating under a lease where the revenue from such operation is to be used to retire a bond issue. Sts. & Hy.Code, § 33116. The Municipal Parking Revenue Bond Law of 1949, Sts. & Hy.Code, §§ 33800–34859, provides a method of financing public parking projects by means of revenue bonds, which projects may be leased. Section 34400 provides: "The legislative body shall fix the rates, fees, and other charges for all projects, services, or facilities furnished, acquired, constructed, or completed pursuant to this part * *." To a similar effect see the Sanitation, Sewer and Water Revenue Bond Law of 1941. Gov.Code, §§ 54300–54672.

The controller further contends and it so appears that the city intends to allow a portion of the ground floor frontage of the proposed building to be leased and occupied by retail stores. While the area of total floor space to be occupied by such commercial activity is estimated by the city to be no more than 4% thereof, it is contended that to this extent there is a clear taking of private property for private purposes and so interwoven with an otherwise questionable exercise of eminent domain as to characterize the whole taking as one without authority. In Shizas v. City of Detroit, 1952, 333 Mich. 44, 52 N.W.2d 589, the Supreme Court of Michigan held invalid a statute authorizing the taking of private lands for automobile parking facilities which allowed not to exceed 25% of the floor area of the structures to be built thereon to be leased for other commercial activities. While it might be argued in the present case that the percentage area to be used for other commercial activity is small enough to be merely an incident to the parking activity and not in itself enough to invalidate the whole plan, nevertheless it aids in characterizing the whole operation as a private one for private gain. See also Public Parking Authority of Pittsburgh v. Board of Property Assessment, etc., 377 Pa. 274, 105 A.2d 165

[7] The city argues at length that it will retain control of rates to be charged the motoring public through its police power. If it be assumed that the city would have the power thus to fix the rates and otherwise prescribe regulations for parking, see Serve Yourself Gasoline, etc., Ass'n v. Brock, 39 Cal.2d 813, 249 P.2d 545, it is the rule that the police power cannot be used as a means of regulating the activities of particular individuals and exclude from such regulations others of the general class of which the individual is a member. § 1, 14th Amend. U.S.Const.

[8] The argument is made that parking at any reasonable rate is serving a public need in metropolitan San Francisco. If "public use" is to be given such a broad meaning, it would appear that all off-street parking facilities in San Francisco, regardless of ownership and primary purpose of operation, would be serving a public use. The Constitution does not contemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need. The parking facility contemplated in the present case appears to be narrowed to such an enterprise.

[9] It is concluded that the city may not proceed as it is proposing in the present case to acquire possession of the land under its constitutional power of eminent domain as implemented to that end by general law.

The validity of other steps taken or anticipated by the city has been questioned. As the city's plan has failed in its initial step we do not deem it necessary to consider or discuss the propriety of subsequent action if contemplated.

The alternative writ is discharged, and the application for the peremptory writ is denied.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

44 Cal.2d 43

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Anthony ZILBAUER, Defendant and Appellant.

Cr. 5593.

Supreme Court of California, In Bank.

Feb. 1, 1955.

Rehearing Denied March 3, 1955.

Defendant was convicted of kidnapping with intent to commit robbery and of murder in the first degree. The Superior Court, Los Angeles County, Clement D. Nye, J., rendered judgments of conviction, and from such judgments and order denying motion for new trial, defendant appealed. The Supreme Court, Shenk, J., held that defendant's conduct, according to his own version of what occurred prior to fatal shooting, constituted as a matter of law false imprisonment effected by violence or menace and that hence instruction on manslaughter was properly refused because the homicide could not, on any permissible theory, be deemed involuntary in the commission of an unlawful act, not amounting to felony, within statutory definition of manslaughter.

Judgments and order affirmed.

1. Criminal Law ⇐554

In prosecution for murder, jury was not required to believe the version of killing given by defendant at trial, in view of conflicts in his own testimony and impeachment thereof by his prior sworn statements and admissions when interviewed under oath in district attorney's office.

2. Homicide ⇐253(3, 6)

Evidence sustained conviction for murder in the first degree either as a wilful, deliberate and premeditated killing or as one committed in the perpetration of or attempt to perpetrate a robbery. Pen.Code, § 189.

3. Homicide ⇐309(4), 341

Where the evidence in prosecution on charge of murder would warrant a conviction of manslaughter, refusal to give instruction on manslaughter is reversible error. Pen.Code, §§ 189, 192.

4. Homicide ⇐309(6)

In prosecution on charge of murder, defendant is not entitled to instruction on manslaughter, if it must be said as a matter of law, that, accepting the defendant's own version of what occurred, the crime could not have been manslaughter. Pen.Code, §§ 189, 192.

5. False Imprisonment ⇐43

Forcing victims at gunpoint to change positions in automobile and remain in automobile while parked on a dark road in uninhabited area during which time defendant held victims at gunpoint and threatened to kill one of them constituted felony of "false imprisonment" as a matter of law. Pen.Code, §§ 236, 237.

See publication Words and Phrases, for other judicial constructions and definitions of "False Imprisonment".

6. False Imprisonment ⇐43

False imprisonment effected by violence or menace is a felony. Pen.Code, §§ 236, 237.

7. False Imprisonment ⇐43

Some restraint of the person is essential to "false imprisonment", but depriving another of his liberty by any exercise of force or express or implied threat of force, or thereby compelling him to remain where he does not wish to remain or to go where he does not wish to go constitutes false imprisonment. Pen.Code, §§ 236, 237.

8. Homicide ⇐309(6)

Where defendant's conduct, according to his own version of what occurred prior to fatal shooting, constituted as a matter of law false imprisonment effected by violence or menace, the homicide could not, on any permissible theory, be deemed involuntary in the commission of an unlawful act, not amounting to felony, within statutory definition of manslaughter, and hence instruction on manslaughter was properly refused. Pen.Code, §§ 189, 192, 236, 237.

Thomas Higgins, Jr., Los Angeles, under appointment by the Supreme Court for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHENK, Justice.

The defendant was charged by information in Count I with the kidnaping of Belle Brooks on November 20, 1953, with intent and for the purpose of committing robbery, and in Count II with the murder of Andrew Kmiec on November 21, 1953. The information also alleged that the defendant was armed with a deadly weapon at the time of each offense and that he had previously been convicted of the felonies of Uttering and Publishing Forged Instrument to Defraud in Ohio in 1922, Robbery in Ohio in 1935, Auto Stealing and Uttering Check with Intent to Defraud in Ohio in 1946, and with having served a term of imprisonment for each offense. On arraignment he denied the prior convictions and pleaded not guilty and not guilty by reason of insanity. At the trial, by leave of court, he withdrew his insanity plea and admitted the prior convictions. The jury returned a verdict of guilty as charged in Count I. It also found that he was armed and that he inflicted bodily harm upon the victim. By its verdict on this count the jury recommended that he be imprisoned for life without possibility of parole.

The jury also found that the defendant was guilty of murder as charged in Count II of the information and that he was armed at the time of the homicide. The offense was found to be murder of the first degree and no recommendation was made as to punishment. The death penalty was imposed. A motion for a new trial was denied. This is an appeal from the judgments of conviction and from the order denying the motion for a new trial.

The defendant is about 53 years of age. He is a machinist and machine tool worker. He married his second wife, Geraldine, in the state of Ohio a short time before they came to California, which was about 1951. In February, 1953, under the name of Anthony A. Barr he purchased a revolver in Huntington Park. For some reason best known to themselves he and Geraldine were remarried in Las Vegas, Nevada, on October 7, 1953. The defendant was there married under the name of James A. Bauer. At that time their home was in Norwalk in Orange County. Not long after they returned to their home the defendant gave up his job and was short of funds. He began to examine newspaper advertisements offering for sale automobiles and other personal property. These advertisements were usually anonymous but gave the telephone numbers of the proposed sellers. By telephone the defendant made appointments to see the property offered for sale. By this means he gained access to the homes or apartments of the proposed sellers. This he did on several occasions, giving his name as Bauer, Bower, Barr, Barger and perhaps others. One of the places he thus gained access to was the apartment of Mrs. Belle Brooks whose advertisement offered for sale "My lovely ranch mink coat. Will sac. $950. Also 6-skin Russian Sable Stole," giving her telephone number. This advertisement appeared in local papers on the morning of November 20, 1953. The defendant called Mrs. Brooks on the telephone, gave his name as "Barger" and made an appointment to meet her at her apartment a little later on with reference to her advertised furs.

About 1:30 that afternoon he appeared at her apartment and after a few minutes of conversation he flourished a gun at her and ordered her to go to another room in the apartment where he compelled her to lie on a bed face down. He taped her wrists and ankles and tied a kitchen towel around her mouth. He then committed upon her body the infamous crime against nature, a felony denounced by section 286 of the Penal Code. The victim begged the defendant to take the furs and leave. He replied, "I ain't going until you tell me where the diamonds are, or your jewels." After committing the act the defendant cut the telephone wires leading to the apartment, put the stole and other personal property of Mrs. Brooks in a suitcase, threw the mink coat over his arm and departed, saying to Mrs. Brooks: "If you get off that bed for the next fifteen minutes, I have someone standing outside that has been watching you." Mrs. Brooks later found missing, in

addition to the furs and the suitcase, a wrist watch, two cigarette cases, a compact and a bracelet. The mink coat was later sold by the defendant for $300. Mrs. Brooks' watch, two cigarette cases, the bracelet and the compact were found in the defendant's home by a deputy sheriff on November 30, 1953. Her stole and suitcase and the revolver which the defendant had purchased in Huntington Park were recovered by the Police Department in St. Louis, Missouri, after the defendant was taken into custody in that city. The foregoing, in brief, constitutes the factual basis upon which the jury found the defendant guilty on the first count. Although the defendant denied participation in the activities attributed to him by various witnesses who testified concerning interviews and conversations with him in response to newspaper advertisements, including Mrs. Brooks, he does not attack the judgment on the first count on any ground whatsoever.

The defendant's conviction of the charges contained in Count II finds abundant support in evidence from which the jury reasonably might have believed that the following events took place: The defendant had been informed by his wife that a man driving a Mercury automobile with Indiana license plates had forcibly raped her. The defendant did not know the name of the man nor where to locate him but had considered taking some action. He discovered in his wife's purse a slip of paper containing a telephone number. This same telephone number came to his attention while he was engaged in the above mentioned practice of examining newspaper advertisements for the sale of personal property. Singularly enough it appeared in an advertisement offering for sale a Mercury automobile with Indiana license plates. The defendant had been unable to obtain California license plates for his own car, having lost the "papers" thereon. He particularly desired to obtain "out of state" plates and the advertised automobile would enable him to accomplish that purpose. He called the telephone number named in the advertisement several times seeking to ascertain the identity of the owner of the Mercury car but the man who answered would not divulge the information. Finally, on November 20, 1953, when the defendant again called that number, a person who answered the telephone identified himself as Andrew Kmiec. The defendant stated that he wanted to see Kmiec personally about the affair he had had with the defendant's wife. A meeting was arranged, to be at the Biltmore Hotel in the late afternoon of the following day.

About four o'clock in the afternoon of that day he left home in his automobile and drove to Los Angeles where he parked his car in a Pershing Square garage. About 5:15 he met Kmiec and they talked a few minutes. The defendant told Kmiec that he wanted to get this family affair straightened out. They went to Kmiec's car which was parked nearby, and Kmiec introduced the defendant to a Miss McCormick who was in the car. Kmiec had asked her to accompany him and had told her that he was going to see a person interested in the purchase of the car. The defendant asked why he had brought Miss McCormick along, apparently suspicious that Kmiec had brought her along as a witness. Kmiec replied that she knew nothing about the wife's affair and requested the defendant not to say anything about it in her presence, and that he would drop her off later on. The defendant directed Kmiec to drive the car to Whittier so that his wife could see it, and to drive out Sixth Street. Kmiec proceeded as directed. All three sat in the front seat with Miss McCormick in the center. On the way there was some conversation about the sale of the car and caravan charges but nothing about the wife's affair. On the way a stop was made for gasoline, and they then proceeded toward Whittier. Suddenly the defendant ordered Kmiec to stop the car. He flourished a gun and pointed it at Kmiec and ordered him to get into the back seat. Kmiec pleaded for his life, offering the defendant his watch or the car. He also offered to drive home to obtain money and give it to him if the defendant would let him go. The defendant asked Miss McCormick if she could drive and when she said she could, he ordered her to do so. She drove until he ordered her to stop at a lonely spot with oil wells nearby but no houses. Defendant continued to hold the gun on

Kmiec and stated that he was trying to make up his mind whether to let him go. At that Kmiec gagged, put his hands up to his mouth, and then, just as Kmiec dropped his hands, defendant shot him in the chest. As Kmiec fell toward the front seat of the convertible a second shot was fired and Miss McCormick jumped out of the car. She heard a third shot as she ran. When she returned with deputy sheriffs a short time later Kmiec's car was gone and his lifeless body was found lying beside the road.

The car was found the next morning at Carl's drive-in at Soto and Olympic Streets in Los Angeles, where it had been abandoned by the defendant after he had taken off the Indiana license plates and had placed California plates upon it. Miss McCormick's purse and coat were still in the car. There was blood on the back seat and on the front seat, particularly on the floor near the door on the driver's side. It was ascertained that Kmiec's death was caused by hemorrhage from a bullet wound in the chest. There was also a bullet wound in his back and one in his cheek.

The defendant admitted that after the killing he had driven the Mercury to his home; that he changed his clothes and took the Indiana license plates from the Mercury car; that he had taken the car to the drive-in and abandoned it, and that he then had gone by bus to downtown Los Angeles where he obtained his own car at the Pershing Square garage. On November 23rd the defendant and his wife went by automobile to Las Vegas, Nevada. When they returned to California the defendant destroyed the clothes he had worn on the day of the killing and left the state. About two weeks later he was arrested in St. Louis, Missouri.

[1, 2] The defendant was interviewed under oath in the District Attorney's office in Los Angeles on December 11, 1953, and the interview was recorded on a tape recorder and was also taken down by a reporter. Relevant portions were introduced at the trial. His testimony on the stand was self-contradictory and evasive and was impeached by his prior sworn statements and admissions. He repudiated the story he had theretofore given and presented a different version at the trial, contending that his later version was the true story and that he had given the previous version merely to protect his wife's reputation. In view of the conflict in the evidence the jury was not required to believe the defendant's final version of the killing. People v. Borrego, 211 Cal. 759, 765, 297 P. 17; People v. Shafer, 101 Cal.App.2d 54, 59, 224 P.2d 778. There is abundant evidence to sustain the verdict of murder in the first degree either as a "willful, deliberate, and premeditated killing"; or as one "committed in the perpetration or attempt to perpetrate * * * robbery" of Kmiec's automobile. Penal Code § 189. The prosecution presented its case on both theories and the jury was fully instructed thereon.

[3, 4] The defendant's sole contention on appeal is that the trial court committed prejudicial error in refusing to submit to the jury an instruction on manslaughter. "It has been repeatedly held that it is reversible error to refuse a manslaughter instruction in a case where murder is charged, and the evidence would warrant a conviction of manslaughter." People v. Carmen, 36 Cal.2d 768, 773–774, 228 P.2d 281, 285, and cases cited there. On the other hand if it must be said as a matter of law that, accepting the defendant's version of what took place, the crime could not have been manslaughter, the defendant was not entitled to such an instruction. People v. Wolfe, 42 Cal.2d 663, 671, 268 P.2d 475; People v. Alcalde, 24 Cal.2d 177, 188, 148 P.2d 627; People v. Mitchell, 14 Cal.2d 237, 241–242, 93 P.2d 121; People v. Turley, 50 Cal. 469.

Manslaughter is defined as the "unlawful killing of a human being, without malice. It is of three kinds:

"1. Voluntary—upon a sudden quarrel or heat of passion.

"2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; provided

that this subdivision shall not apply to acts committed in the driving of a vehicle.

"3. In the driving of a vehicle * * *." Penal Code, § 192.

The killing did not occur in the driving of a vehicle. Defendant denied that he shot Kmiec voluntarily. He does not contend that the killing occurred upon a sudden quarrel or heat of passion. He argues that the facts testified to by him would support a verdict that the killing occurred involuntarily, in the commission of an unlawful act not amounting to a felony. Such unlawful act, he asserts, was the drawing of a loaded gun "in a rude, angry or threatening manner". This is a misdemeanor, Penal Code, § 417.

[5–7] Although the defendant's different versions of what took place just prior to the killing are conflicting and inconsistent, he contends that his testimony on direct examination in regard to what took place in the automobile after it had come to a stop showed no more than the commission of a misdemeanor and required an instruction on manslaughter. That testimony is set forth in the footnote.* That testimony itself

* "Q. * * * After you stopped on Painter, what you later learned to be Painter, tell us what happened. * * * A. He seen the gun before I said anything. I said, 'You know what this is, Kmiec?' He said, 'Yes, I know what it is.' I said, 'Get in the back seat.' He got in the back seat and I told Miss McCormick to move over, that she would not be bothered; it was just an unfortunate thing that she was along, that she had him to thank for it; that he knew what he was getting into, and that he had no business bringing her along, so Mr. Kmiec kept saying, 'You got the wrong guy, Tony. You got the wrong guy.

"Q. Then what happened? A. No one has called me Tony but my wife. No one knew that nickname.

"Q. What happened then? A. He kept telling me that I had the wrong man. I said, 'I don't think I have.' He said, 'Look, I will give you my money, I will give you my watch, I will give you my jewelry, I will give you my car and take you home and get you some more money, but don't hurt me.' I seen he was really scared. I said, 'Well, I am trying to decide whether it is worth letting you go or not. You have hurt me more than any man has ever hurt me.'

"Q. What did you mean when you said that? A. The advantage he took of my wife.

"Q. While you were trying to make up your mind whether to let him go or not, had you some time prior to that decided that you were going to do something to him? A. I did intend to, but the girl being along changed my mind.

"Q. What did you intend to do? A. I was going to pistol-whip him.

"Q. Did you intend to kill him? A. No, I did not.

"Q. At any time on that day, November 21st, did you intend to kill Andrew Kmiec? A. No, I did not.

"Q. After you said, 'I am trying to make up my mind whether to let you go or not,' what happened? A. I decided—as soon as I spoke those words, I decided to get out of that car and tell Dolly McCormick what kind of a heel she was with.

"Q. What did you do next? A. I turned to loosen the door handle on the car, and I couldn't find it. I instinctively turned my head slightly to find the door handle and when I did he landed right on top of me in the front. He had my head doubled down on my chest and his body came over. He brought the gun right over up against both of us. It was unfortunate that the gun was pointed toward him instead of me.

"Q. What happened then? A. Well, he had one hand on my throat and one on my nose. My nose started to bleed and he let go of my nose and with the hand he released my nose with he grabbed the hand that I had the gun in. In the tussle a short was fired, shortly after that another one was fired.

"Q. Were there more than two shots? A. There were three shots fired in close succession.

"Q. All right, What happened next? A. He was still trying to get the gun out of my hands, and I knew if he got the gun out of my hands he would kill me. I did my utmost to keep the gun from him. We finally landed out in the street on the driver's side of the car.

"Q. Who landed out there? A. Kmiec and myself.

"Q. Then what happened? A. He landed on top of me; he got up and he ran. I turned around and got into the car and drove the car away. The last I seen of Kmiec, he was running toward the back end of the car; in fact, he was out of the shadow of the car in the darkness when I picked myself up and got into the car and drove away."

shows more than the mere drawing of a gun "in a rude, angry, or threatening manner." By his own admission the defendant used the gun in such a manner as to terrorize the occupants, and to forcibly deprive them of their personal liberty. They were forced at gunpoint to change positions in the car. They were forced to remain in the car while it was parked on a dark road in an uninhabited area during which time the defendant held them at the point of the gun and threatened to kill one of them. These acts as a matter of law constituted at least one felony, that of false imprisonment. Penal Code section 236 provides that "False imprisonment is the unlawful violation of the personal liberty of another." Where it is effected by violence or menace it is punishable by imprisonment in the state prison for not less than one nor more than ten years and is a felony. Penal Code § 237. In People v. Agnew, 16 Cal.2d 655, at page 659, 107 P.2d 601, at page 603, the court stated: "In defining false imprisonment, it is said in 22 Amer.Juris. at page 359, 'In order to constitute a case of false imprisonment, it is essential that there be some restraint of the person; but it is not necessary that there be confinement in a jail or prison. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty or is compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment. The wrong may be committed by acts or by words, or both, and by merely operating upon the will of the individual or by personal violence, or both. * * *'" See also People v. Wheeler, 73 Cal. 252, 14 P. 796; Ex parte Keil, 85 Cal. 309, 24 P. 742.

[8] The defendant's last account at the trial of what took place in the automobile immediately before the homicide should be considered in connection with his admitted conduct prior thereto beginning with the commencement of the journey in the Mercury car and continuing throughout its course, and culminating in the claimed final struggle. That admitted conduct of the defendant constituted false imprisonment as a matter of law. Under the circumstances the killing could not, on any permissible theory, be deemed involuntary "in the commission of an unlawful act, not amounting to felony", and therefore did not come within the statutory definition of manslaughter.

The defendant had a full and fair trial. The court gave adequate instructions responsive to the evidence on first and second degree murder. As there was no evidence which would warrant a conviction of manslaughter the court properly refused to instruct the jury thereon.

The judgments and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



43 Cal.2d 864

The PEOPLE of the State of California, Plaintiff-Respondent,

v.

Johnson William CALDWELL, Defendant-Appellant.

Cr. 5621.

Supreme Court of California.
In Bank.
Jan. 28, 1955.

Defendant was convicted of first degree murder. The Superior Court, Riverside County, Russell S. Waite, J., entered judgment of conviction and defendant appealed. The Supreme Court, Traynor, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Homicide ⇐9

Physical suffering, which accompanies almost all violent deaths, is not, in itself, enough to show murder by torture, and there must also be intent that victim shall suffer. Pen.Code, § 189.

2. Homicide ⇐230

Murder by strangulation indicates malice, but does not, in itself, indicate intent to make victim suffer. Pen.Code, § 189.

3. Homicide ⇐230

In prosecution for murder, evidence was insufficient to establish intent on part of defendant to make victim suffer.

4. Homicide ⇐22(2)

Verdict of murder in first degree for slaying not committed in perpetration of crimes enumerated by statute or by means enumerated in penal code, is proper only if slayer killed as result of careful thought and weighing of considerations, as deliberate judgment or plan, carried on coolly and steadily, and according to preconceived design. Pen.Code, § 189.

5. Homicide ⇐22(3)

Use by Legislature of words "wilful, deliberate, and premeditated" in conjunction in penal code section relating to first degree murder, indicated that Legislature meant to emphasize its intent to require, as element of first degree murder, considerably more reflection than mere amount of thought necessary to form intention. Pen.Code, § 189.

6. Homicide ⇐253(3)

In prosecution for murder, if evidence shows no more than infliction of multiple acts of violence on victim, it will not be sufficient to show that killing was result of careful thought and weighing of considerations. Pen.Code, § 189.

7. Homicide ⇐253(1)

In homicide prosecution, evidence was sufficient to sustain conviction of first degree murder. Pen.Code, § 189.

Rubin Tepper, San Francisco, under appointment by the Supreme Court, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant was charged by information with the murder of his wife, Lily Pearl Storts Caldwell, and with four previous convictions of felony. He pleaded not guilty to the charge of murder, admitted the convictions, and waived trial by jury. The court found him guilty of murder in the first degree and sentenced him to death. This appeal is automatic. Pen.Code, § 1239b.

In early February 1954, defendant informed the Arkansas State Police that he had killed his wife in Riverside, California. An investigation followed and her body was found in the bathtub in her Riverside cabin. She had been dead for about five days. The autopsy surgeon testified that the body disclosed a single long laceration of the scalp, extending to but not through the bones of the skull. Round the neck were two belts. A torn piece of cloth belt, broken at the buckle and large enough only to encircle the neck, was next to the skin and over that was a tightly drawn plastic belt. It was the opinion of the surgeon that the cause of death was asphyxiation by strangulation, and that the laceration, though inflicted immediately before strangulation, was not a contributing cause of death. In the main bedroom were a two-foot length of iron pipe, two pieces from the cloth belt that encircled the decedent's throat, and mopped-up blood stains. A small black purse was on the bed. It was identified as one the decedent usually kept on her person and in which she usually kept her money. Bedclothing, drapes, wearing apparel, extra bed springs, boxes, a large can, and miscellaneous articles were piled about the two bedrooms.

In early January 1954 defendant rented a cabin from Lily. Within three days, defendant, who was thirty-two years old, married Lily, who was forty to fifty years old and weighed two hundred and thirty-five pounds. Defendant testified that the marriage occurred after a drinking party, that everyone at the time was intoxicated, that he did not know why he married Lily, and that she seemed to be willing to spend her money on him in an effort to have a good time. Prosecution witnesses testified that defendant had told them that he had married Lily for her money and property. During his extradition to California, he

stated that Lily had her eye on a young man, and that he had his eye on her money.

The marriage was marked by quarrels, attempted separations, and defendant's steady drinking. He testified that he was annoyed and embarrassed by her penuriousness, pronounced sexual desires, and her insistence that he remain with her constantly rather than work or visit others. Prosecution witnesses related several conversations in which defendant uttered threatening words against Lily. Two or three weeks after the marriage, Lily had called to defendant, "Come on, Daddy, let's go." Defendant said to a neighbor, "I'm a little fed up with it," and continued that he would, "take her in and do her up." On another occasion, he complained that Lily did not give him money, and said, "As soon as she gets me some more money, I am going to do her in." At a party in celebration of the marriage, defendant was heard to tell others that he was, "getting tired of it," and that he was going to, "knock the old bag in the head and take off." On the morning of the murder, the witnesses agreed that defendant and Lily had argued, but they disagreed as to whether he again expressed an intention to "do her up." On the occasion of each of these threats, defendant was described as drinking, drunk, smelling of alcohol, "tight," "a little off," "pretty well tight," "a little high," "just there and drinking," and "pretty much drunk." On cross-examination, one witness stated that he did not regard these remarks as serious; no one ever bothered to mention them to Lily.

Defendant testified that one week before the killing he had attempted to leave Lily and that she spent the afternoon following him, first to his sister's home, then to that of a neighbor, pleading with him to return. That evening they took an auto trip with a neighboring couple, but continued to argue. Lily accused defendant of incest with his sister; he struck her in the eye and began to strangle her, but was stopped by the other man in the car.

On the day before the killing, defendant asked Lily to supply bail for his friend Cecil, who was in jail. He became angry when she refused, stating that he was "pretty well fed up," and that he would "knock her in the head." Accompanied by Cecil's wife, Wilma, defendant left to raise bail money, but failing in that objective or forgetting it, he and Wilma spent the night together drinking at various public places and later lodging at a motel. They spoke of going to Texas together, but never reached an agreement. On the morning of the killing, defendant and Wilma went to his sister's home, to a cafe, and then to Lily's cabin. Defendant testified that he and Wilma commenced drinking immediately upon awakening. According to both defendant and Wilma, upon arriving at his sister's home, defendant learned that Lily had left most of his clothes there and had told his sister that the marriage was over. Defendant said that he "was glad of it" but that he wanted to get a pair of pants and a shirt that Lily had kept. He and Wilma went to Lily's cabin after stopping for a short time at a cafe. The waitress there testified that defendant bought no drinks, and although he appeared to have been drinking, he was not boisterous but was laughing and having a good time. Arriving at Lily's cabin, defendant and Wilma found that Lily had just awakened, and that she was angry. She said, "I am glad you got what you wanted." At that point, Cecil and two other persons drove up to the cabin. Defendant asked, "Can we come in and make some coffee?" Lily said, "No." Wilma and Ray, one of those who had just arrived, both testified that Lily and defendant began to argue, but they disagreed as to what was said. Ray asserted, "He said he was going to take her in and do her up." Wilma testified that defendant asked, "Do you want me to stay?" that Lily replied, "Yes," and that he said "All right, all right, I guess so." Defendant testified that he and Lily argued, but asserted that she pleaded with him to remain with her, but that he insisted on leaving. Ray testified that defendant was "pretty much" drunk and "tight" at the time. Shortly thereafter, Wilma, Cecil, Ray, and the other visitor drove away leaving defendant and Lily arguing.

Defendant testified that the argument continued, that he tried to get his clothes and leave, that Lily grabbed them from him,

that he hit her with his fist and then, grabbing a piece of pipe from the bedroom floor, hit her on the head. In one of his admissions during the trip from Arkansas to California he said that he then helped Lily to her feet, guided, punched, and pushed her to the bathroom, pushed her into the tub, locked the bathroom door, and left the premises. At the trial he testified, "I know I just went crazy. I hit her on the jaw and knocked her down, and she got up and turned around and came at me with her hand raised. Well, I hit her again; and this little old pipe was there * * * I grabbed that, and I remember hitting her one time." He testified that he did not remember much after that, except that he shut the bathroom door when Lily was in the tub, took twenty-four dollars from Lily's small purse, looked under the front room couch for more money, and departed in Lily's car. He asserted in his deposition given in Arkansas, in his admissions during the trip from Arkansas to California, and in his testimony at the trial that he did not remember putting the belts on his wife's neck. He did admit, however, that he could have strangled her, but that he did not remember it.

In the afternoon of the day of the killing, defendant met Cecil and Wilma at a cafe. He was asked about blood on his clothes, and replied that he had punched his wife in the nose. The waitress testified that he appeared to have been drinking, was in a good mood, bought three beers, and offered to sell her a piano and lawnmower. When asked about his wife, he declared, "She is passed out; she is all sprawled out." Defendant testified that he did not return to Lily's cabin, but a neighbor testified that he saw defendant on the front porch between 9:30 and 10:00 that night, and that shortly thereafter Lily's auto was driven away. Defendant admitted selling a lawnmower that belonged to Lily and driving through Arizona, where he changed license plates, and into Arkansas, where he confessed when stopped for an auto registration inspection. He declared that he financed the trip by picking up hitchhikers and selling accessories from the automobile.

[1–3] The basic issue on this appeal is whether the killing was murder in the first degree. It was murder in the first degree if it was committed in the perpetration of robbery, committed by torture, or if it was wilful, deliberate, and premeditated. Pen. Code, § 189. The question of whether it was committed in the perpetration of robbery is not before us, since the trial court expressly withheld a decision on that question, stating that it was "unnecessary to decide, as a question of fact, at this time whether or not this killing was perpetrated in an attempt to commit robbery, or in the commission of robbery or burglary, or any other offense." Physical suffering, a concomitant of almost all violent deaths, is not enough by itself to show murder by torture. There must also be intent that the victim shall suffer. People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911. Murder by strangulation indicates malice, but it does not by itself indicate an intent to make the victim suffer. People v. Bender, 27 Cal.2d 164, 177, 163 P.2d 8. There is no evidence in this case that defendant had such intent.

[4, 5] The judgment can be sustained, therefore, only if the evidence supports the conclusion that the killing was deliberate and premeditated. A verdict of murder in the first degree for a slaying not committed in the perpetration of certain enumerated crimes, or by means enumerated in Penal Code section 189, is proper only if the slayer killed " 'as a result of careful thought and weighing of considerations; as a *deliberate* judgment or plan; carried on coolly and steadily, esp. according to a preconceived design' ". People v. Bender, 27 Cal. 2d 164, 183, 163 P.2d 8, 19. " 'Further, the use of "wilful, deliberate, and premeditated" in conjunction would seem to indicate that the legislature meant, by reiteration, to emphasize its intent to require, as an element of first degree murder, considerably more reflection than the mere amount of thought necessary to form the intention.' " People v. Holt, 25 Cal.2d 59, 87, 153 P.2d 21, 36.

[6, 7] If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be suffi-

cient to show that the killing was the result of careful thought and weighing of considerations. People v. Tubby, 34 Cal.2d 72, 78–79, 207 P.2d 51; People v. Bender, 27 Cal.2d 164, 170, 186, 163 P.2d 8. In the present case, however, the circumstances attending the killing itself cannot be divorced from defendant's threats to "knock the old bag in the head and take off," and to "do her up." Whether or not these threats were the result of serious contemplation before they were made, they at least justify the inference that defendant considered killing his wife when he felt "fed up" and wished to leave her. Defendant's last threat before he entered the house with his wife on the day of the homicide was followed by approximately an hour of argument over whether or not he should leave her, and this argument terminated in the killing. The trial court could reasonably conclude that during this period, when defendant's thoughts were directed to the question of whether he should leave, he also weighed and considered the question of whether he should kill. These questions had been associated in defendant's mind in the past, and there is no reason to believe that they were not so associated and reflected upon for the period of approximately an hour that he and his wife argued before her death.

Our conclusion that the evidence supports the judgment is not inconsistent with People v. Holt, 25 Cal.2d 59, 153 P.2d 21. It is true that in the Holt case, as in this case, defendant threatened to kill the deceased approximately an hour before he did so. In the Holt case the court recognized that such a threat followed by a killing, standing alone, would justify a finding of first degree murder. There was other evidence in that case; however, that did more than create a conflict with the inference that might be drawn from the threat followed by the killing, it was sufficient to establish as a matter of law that the threat was of no significance. In particular the court relied upon the fact that defendant with eight loaded cartridges remaining in his rifle stopped firing when the deceased stopped advancing toward him and that he then permitted the deceased to turn and walk away. In the present case, on the contrary, defendant did not terminate his attack on his wife after he had sufficiently disabled her so that he would be free to leave as he testified he wanted to do, but continued the attack until it culminated in her strangulation. Under these circumstances we cannot say as a matter of law that the threats were of no significance.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER and SPENCE, JJ., concur.

EDMONDS, Justice (concurring).

I concur in the affirmance of the judgment of conviction. Certainly, Caldwell's threats to take Lily's life, followed by his killing of her, give rise to an inference that the murder was premeditated. In my opinion, however, that conclusion is inconsistent with People v. Holt, 25 Cal.2d 59, 153 P.2d 21, where the defendant made similar threats before taking the life of his victim. The Holt case is distinguished upon the ground that, after firing the lethal bullet, Holt "with eight loaded cartridges remaining in his rifle stopped firing * * * and * * * permitted the deceased to turn and walk away." But evidence of the activities of the accused *after* he shot the victim or inflicted a lethal blow, to the extent that it bears at all upon the question of premeditation, could create only a conflict.

In view of the present decision, the Holt case should be overruled.

Robert G. WEIL, Plaintiff and Appellant,

v.

Harvey O. BARTHEL and Erma Barthel, his wife, and Bank of Davis, a corporation, Defendants and Respondents.

Sac. 6398.

Supreme Court of California, In Bank.

Feb. 4, 1955.

Rehearing Granted March 3, 1955.*

Action by assignee of judgment debtors, who were purchasers under land contract, to compel redemption, following foreclosure sale to enforce vendors' lien, and to quiet title to the realty which was sold by judicial sale. The Superior Court, Yolo County, C. C. McDonald, J., sustained general demurrer to complaint without leave to amend, and assignee appealed. The Supreme Court, Edmonds, J., held that complaint, which failed to allege tender of purchase price and production of certain documents to officer or person from whom redemption was sought to be made, was not sufficient.

Judgment reversed with directions.

Prior opinion, 263 P.2d 130.

1. Pleading ⇐189

A demurrer reaches only the contents of a pleading and such matters as may be comprehended by the doctrine of judicial notice.

2. Pleading ⇐6

Where matter is judicially noticed, it must be read as part of pleading even if pleading contains an allegation to the contrary.

3. Evidence ⇐43(3, 4)

Provision of Code of Civil Procedure that courts take judicial notice of public and private official acts of legislative, executive, and judicial departments of state is sufficiently broad to allow judicial notice to be taken of record in another action, either in the same court, or a different court of the state. West's Ann.Code Civ.Proc. § 1875.

4. Evidence ⇐43(2, 3)

Court is bound to take notice of record in action before it but, generally, will not take judicial notice of other actions, even those pending or concluded in the same court, but such general rule will not be followed whenever justice of case requires a departure therefrom. West's Ann.Code Civ.Proc. § 1875.

5. Evidence ⇐3

Basis for allowing judicial notice to be taken is not alone to avoid hardship but to facilitate administration of justice by dispensing with necessity of formal proof in cases where there is not any real need for evidence. West's Ann.Code Civ.Proc. § 1875.

6. Evidence ⇐43(3)

There should not be any objection to allowing court to notice contents of record in another action if it may do so without impairing procedural rights of parties, but no fixed rule may be made concerning circumstances in which such notice would be proper.

7. Judgment ⇐570(3, 4)

Judgments of dismissal, whether voluntary or involuntary, are not on merits and do not operate as bar or estoppel in subsequent proceedings involving same matters, unless it appears that the judgment necessarily involves those matters.

8. Judgment ⇐948(1), 950

Res judicata and similar defenses in bar generally are waived by failure to plead or prove them, but, even when properly pleaded and proved, prior judgment may not be conclusive, since there may be questions concerning its legal effect, identity of parties and issues, and other matters which require proof.

9. Evidence ⇐43(3)

In action by assignee of judgment debtors to compel redemption and to quiet title to realty sold by judicial sale, trial court's taking of judicial notice of judgment upon which the sale was based for purpose of determining nature of rights of assignee and his assignors under the judgment was not error. West's Ann.Code Civ.Proc. § 1875.

10. Vendor and Purchaser ⇐289

In framing a decree effecting a strict foreclosure of purchaser's right to redeem

* Opinion vacated 291 P.2d 30.

realty sold upon execution following purchaser's default, court ordinarily fixes time within which defaulting purchaser should pay amounts due upon contract or be foreclosed from asserting any rights under it, but period to be allowed purchaser to exercise his equity of redeeming lies within trial court's equitable discretion. West's Ann.Code Civ.Proc. § 700a.

11. Mortgages ⇐591(1)

Term "equity of redemption" is generally applied to mortgages and similar transactions and has reference to mortgagor's right to avoid being divested of his property after a default, by payment of the mortgage debt, but such right is terminated by a judicial foreclosure or foreclosure sale.

12. Vendor and Purchaser ⇐289

If right to redeem the property following foreclosure sale brought to enforce vendor's right in executory land sales contract exists in purchaser by force of statute, such right could not be concluded by a decree purporting to extinguish it. West's Ann.Code Civ.Proc. § 700a.

13. Judicial Sales ⇐59

Generally, there is not any redemption of property from a judicial sale to enforce rights in it in absence of statute specifically creating such a right to redeem. West's Ann.Code Civ.Proc. § 700a.

14. Liens ⇐23

Redemption statutes are to be liberally construed in favor of the right. West's Ann.Code Civ.Proc. § 700a.

15. Vendor and Purchaser ⇐289

Enforcement, by foreclosure sale, of vendor's rights in executory land sales contract allows defaulting vendee a statutory period in which to redeem the property. West's Ann.Code Civ.Proc. §§ 346, 681 et seq., 700a, 725a.

16. Vendor and Purchaser ⇐289

In action by assignee of judgment debtors, who were purchasers under land contract, to compel redemption, following foreclosure sale to enforce vendors' lien, and to quiet title to the realty which was sold by judgment sale, complaint, which failed to allege tender of purchase price and production of certain documents to officer or person from whom redemption was sought to be made, was not sufficient. West's Ann.Code Civ.Proc. §§ 346, 681 et seq., 700a, 702, 705, 725a.

James S. Eddy, Sacramento, for appellant.

Robert M. Cole, Davis, for respondents.

Driver & Driver, amici curiæ, on behalf of respondents.

EDMONDS, Justice.

Lou B. Rowland[1], the assignee of the interests of C. E. Burton and his wife in a parcel of real property, brought a suit in the superior court of Yolo County entitled "Complaint to Compel Redemption and to Quiet Title". Named as defendants are Harvey O. Barthel and his wife and the Bank of Davis. The appeal is from a judgment entered upon an order which sustained a general demurrer to the complaint without leave to amend.

Rowland alleged that in an action "involving title" to the same property here concerned, by a prior judgment against the Burtons in the same court, the land was ordered to be sold "as the property of the plaintiff's said assignors in the manner provided by law for sales pursuant to execution upon real property." The effect of that judgment, it is charged, was to create in the Burtons, as an equitable interest, "a right to redeem said real property according to law." The complaint includes the official record of the judgment, but its terms are pleaded only by a statement of their legal effect.

Pursuant to the judgment, it is alleged, the property was sold by the sheriff to the Barthels, who were purchasers at the "execution sale". The complaint asserts that, prior to the expiration of the period pro-

1. After the argument of this case, Robert G. Weil, by order of the superior court, was substituted as party-plaintiff for Rowland. Similarly, Weil has been substituted for Rowland as party-appellant.

vided by law for the redemption of real property sold upon execution, the sheriff wrongfully delivered a deed to the property to the Barthels, who have recorded it. Also of record, the complaint continues, is a deed of trust to secure a note payable to the Bank of Davis, which claims an interest in the parcel. The terms of an instrument executed by the Burtons purporting to assign to Rowland their "right to redeem" the property, are pleaded in *haec verba*.

The prayer is for a declaration of Rowland's right to redeem the property and for an accounting by the Barthels. Other relief sought by Rowland is an order directing the Barthels to reconvey the property. The court is also asked to retain jurisdiction of the matter pending a redemption, and to quiet Rowland's title against each of the defendants.

The defendants demurred to the complaint, asserting, among other grounds, that it does not state facts sufficient to constitute a cause of action. In their memorandum of points and authorities accompanying the demurrer, the defendants relied, in part, upon the terms of the judgment in the prior action. When the demurrer was sustained without leave to amend, by a memorandum stating the grounds of decision, the trial judge declared that he took judicial notice of the prior judgment. That judgment, he concluded, "terminated and foreclosed the interest of the plaintiff's assignors in said real property and enjoined and restrained them forever from asserting any right, title and interest therein." In that circumstance, the court continued, "it is impossible for him [Rowland] to state a cause of action which will enable him to redeem the real property in controversy."

Two contentions are made by Rowland as bases for reversing the judgment in the present action. He asserts that it was prejudicial error to take judicial notice of the prior judgment. Another argument is that, even if such notice were proper, the record in the former action may not be construed so as to deprive him of the right to redeem the property.

[1, 2] The fundamental rule is that a demurrer "reaches only the contents of a pleading and such matters as may be comprehended by the doctrine of judicial notice." County of Los Angeles v. Security First Nat. Bank, 84 Cal.App.2d 575, 579, 191 P.2d 78, 81. But where matter is judicially noticed, it must be read as a part of the pleading even when the pleading contains an allegation to the contrary. Bell v. Southern Pacific Co., 189 Cal. 421, 425, 208 P. 970; Chavez v. Times-Mirror Co., 185 Cal. 20, 23, 195 P. 666. If the prior judgment and record may be considered and they establish that Rowland's assignors have no right to redeem the property, the contrary allegation of the complaint must be disregarded.

[3] Section 1875 of the Code of Civil Procedure provides: "Courts take judicial notice of * * * [p]ublic and private official acts of the legislative, executive and judicial departments of this state * * *." By its terms, the section is sufficiently broad to allow judicial notice to be taken of the record in another action, either in the same court, or in a different court of the state. (See 2 Stanf.L.Rev. 664, 666.)

[4] It has been stated as a general rule, however, that although it is bound to take notice of the record in the action before it, "the court will not take judicial notice of other actions, not even those pending or concluded in the same court." Johnston v. Ota, 43 Cal.App.2d 94, 96, 110 P.2d 507, 509. On the other hand, it is firmly established that the rule will not be followed whenever the justice of the case requires a departure from it. City of Los Angeles v. Abbott, 217 Cal. 184, 193, 17 P.2d 993; see Willson v. Security-First Nat. Bank, 21 Cal.2d 705, 711, 134 P.2d 800. An argument is made that the facts of the present case do not bring it within any recognized exception to the general rule, and that judicial notice of the record in the action which resulted in the sale of the property to the Barthels should not be allowed. For the latter proposition reliance is placed upon a statement in Bank of America Nat. Trust & Savings Ass'n v. Button, 23 Cal.App.2d 651, 74 P.2d 81, and

cases following that decision, which limits its judicial notice of the record in other actions to "unusual cases where unreasonable hardship would otherwise result." 23 Cal.App.2d at page 653, 74 P.2d at page 82; see also Johnston v. Ota, supra, 43 Cal. App.2d 97, 110 P.2d 507; Popcorn Equipment Co. v. Page, 92 Cal.App.2d 448, 453, 207 P.2d 647. That statement unduly restricts the circumstances in which the doctrine of judicial notice may apply, and does not accurately reflect the reason either for the doctrine or for the general rule precluding its application to the records of actions other than the one before the court.

[5] The basis for allowing judicial notice to be taken is not alone to avoid hardship but to facilitate the administration of justice by dispensing with the necessity of formal proof in cases where there is no real need for evidence. It is characterized as a "judicial short cut". Varcoe v. Lee, 180 Cal. 338, 344, 181 P. 223, 226; Communist Party of United States of America v. Peek, 20 Cal.2d 536, 546, 127 P.2d 889. The same considerations which underlie the rule of judicial notice generally, make it applicable to records in other actions. Normally such records are assumed to be correct and a controversy concerning their existence would be extremely unlikely. See IX Wigmore on Evidence (3rd Ed.1940) 570, § 2579; McCormick, Judicial Notice, 5 Vand.L.Rev. 296, 311–312. But if the court were required, of its own motion, to notice the records of all other actions which might bear upon the one before it, their great numbers would place an intolerable administrative burden upon it. Also if the court were allowed to resort to the record of another action under circumstances denying to the parties an opportunity to argue its legal effect or, if used to establish a fact, to present contrary or explanatory evidence, injustice might result. Accordingly, the rule of preclusion is aptly described as being not of power but of expediency. See City of Los Angeles v. Abbott, supra, 217 Cal. 192–193, 17 P.2d 993.

[6] There should be no objection, however, to allowing the court to notice the contents of the record in another action if it may do so without impairing the procedural rights of the parties. Necessarily, no fixed rule may be made concerning the circumstances in which such notice would be proper. To some degree it is a matter which must rest within the sound discretion of the trial or appellate court. In determining whether such rights are properly safeguarded, the purpose for which such notice is sought to be used and the manner in which the question of its use is presented are important considerations.

[7] In the Bank of America, Johnston, and Popcorn Equipment Co. cases, supra, the purpose of the contemplated use was in abatement or in bar of the action then before the court. To defeat the claims of the Bank of America the appellate court was asked to take judicial notice of a prior pending action. Although the pendency of that action was pleaded, "the matter was not urged upon the trial court in any way." 23 Cal.App.2d at page 653, 74 P.2d at page 82. In the Popcorn Equipment Co. case, the record on appeal did not show that the judgment relied upon was before the trial court or that the same issues were involved in both actions. 92 Cal.App.2d at page 452, 207 P.2d 647. The answer in Johnston v. Ota, supra, included a copy of a judgment of dismissal in a prior action. But as stated by the appellate court, "[t]here were no means by which the court could have determined whether the demurrer in the former case was sustained for want of jurisdiction or upon one or more of the special demurrers or whether it was for lack of substance in the complaint to constitute a cause or causes of action. 'Generally, judgments merely of dismissal, whether voluntary or involuntary, are not on the merits, and do not operate as a bar or estoppel in subsequent proceedings involving the same matters, unless it appears that the judgment necessarily involves those matters.'" 43 Cal.App.2d at pages 98–99, 110 P.2d at page 510.

[8] Res judicata and similar defenses in bar generally are waived by a failure to plead or prove them. Domestic and Foreign Petroleum Co. v. Long, 4 Cal.2d 547, 562, 51 P.2d 73. But even when properly pleaded and proved, a prior judgment may not be

conclusive. There still may be questions concerning its legal effect, the identity of the parties and issues, and other matters which require proof. To conclude material issues under the doctrine of res judicata by judicial notice of the record in a former action may deny the parties an opportunity to present such proof. See Rideaux v. Torgrimson, 12 Cal.2d 633, 638, 86 P.2d 826. In most cases courts have declined to take judicial notice of a prior record, urged in bar of an action. Cf. Lake Merced Water Co. v. Cowles, 31 Cal. 214, 215; Stanley v. McElrath, 86 Cal. 449, 25 P. 16, 26 P. 800, 10 L.R.A. 545; Reed v. Cross, 116 Cal. 473, 48 P. 491; Estudillo v. Security Loan, etc., Co., 149 Cal. 556, 87 P. 19; People v. Newell, 192 Cal. 659, 221 P. 622; Rideaux v. Torgrimson, supra; Willson v. Security-First Nat. Bank, supra, 21 Cal.2d 705, 134 P.2d 800; Wolfsen v. Hathaway, 32 Cal.2d 632, 198 P.2d 1; Dillard v. McKnight, 34 Cal.2d 209, 209 P.2d 387, 11 A.L.R.2d 835; Brown v. Brown, 83 Cal.App. 74, 256 P. 595; Olds v. Peebler, 66 Cal.App.2d 76, 151 P.2d 901; but cf. Mason v. Drug, Inc., 31 Cal.App.2d 697, 88 P.2d 929; Roberts v. Roberts, 81 Cal.App. 499, 253 P. 1112.

In other situations, however, the rule as to judicial notice of records has been liberally applied. Cf. Southern Pacific R. Co. v. Painter, 113 Cal. 247, 253, 45 P. 320; Sewell v. Johnson, 165 Cal. 762, 774, 134 P. 704; Hammell v. Britton, 19 Cal.2d 72, 75, 119 P.2d 333; Thomas v. Lavery, 125 Cal. App. 666, 669, 14 P.2d 158; Gackstetter v. Market Street Railway Co., 10 Cal.App.2d 713, 716, 52 P.2d 998; Mann v. Mann, 76 Cal.App.2d 32, 41, 172 P.2d 369; Christiana v. Rose, 100 Cal.App.2d 46, 52–53, 222 P.2d 891.

[9] No decision has been found which concerns a situation similar to the one in the present case. However, many of the factors involved here have been considered to be persuasive in a determination of whether judicial notice of the record of another action, has prejudiced the rights of the parties. Here, the judgment in the action to which reference was made is pleaded and identified in Rowland's complaint. It is the basis of his cause of action against the Barthels, cf. Roberts v. Roberts, supra, 81 Cal.App. at page 501, 253 P. 1112; Nordin v. Bank of America, 11 Cal.App.2d 98, 100, 52 P.2d 1018; Mann v. Mann, supra, 76 Cal.App.2d at page 41, 172 P.2d 369; the only question before the trial court was the legal effect of that judgment. Cf. Nordin v. Bank of America, supra, 11 Cal.App.2d at page 100, 52 P.2d 1018. The prior action involved the same parties or those in privity with them, cf. Sewell v. Johnson, supra, 165 Cal. at pages 770–771, 134 P. 704; Mason v. Drug, Inc., supra, 31 Cal.App.2d at pages 700–701, 88 P.2d 929; and the record of it was made available to the trial judge. The legal effect of the judgment was fully considered and argued, see City of Los Angeles v. Abbott, supra, 217 Cal. at page 193, 17 P.2d 993, and the material portions of the record are before the court on this appeal. Cf. People ex rel. Carrillo v. De La Guerra, 24 Cal. 73, 78. In these circumstances, it was not error for the trial judge to consider the record in the prior action to determine the nature of Rowland's rights, and those of his assignors, under the judgment.

That record shows these facts:

The Barthels formerly were owners of a tract of unimproved land. In 1948, they entered into an oral contract, which was superseded by a later oral agreement, to sell the land and an abandoned streetcar on the premises to the Burtons. If the consideration was not paid in cash, the Barthels were to receive a note secured by a purchase money trust deed. The Burtons took possession of the property and began constructing improvements but, although demands were made upon them, they refused to pay the purchase price or to execute a note. In October of that year, a third oral agreement was made, the Burtons agreeing to pay immediately $5,000 for the land and to perform certain other obligations which were incident to the original agreements.

The Burtons continued in possession of the property for more than a year and one-half without paying the agreed purchase price. During that time, they continued to make improvements on the property for which they incurred mechanics' liens and

claims of material men in the sum of about $5,700. Despite repeated demands and a tender of a deed to the property by the Barthels, the purchase price remained unpaid. The Burtons resided in one of the buildings on the property without paying rent, and the Barthels were deprived of the crops from several walnut trees during the period of occupancy.

Finally, the Barthels brought suit against the Burtons. Their complaint was in two counts. In the first one, they alleged the execution of the oral agreements, the defendants' breach, their unlawful holding of possession of the premises, and losses assertedly resulting therefrom. The second count asserted that the Barthels were owners of the property in question and that the Burtons claimed a right in the property adverse to them. The prayer was for a cancellation of the oral agreement and a decree adjudging the defendants to be without interest in the property and enjoining them from asserting any claim to it. It was also prayed that the sheriff be commanded to put them into possession of the realty and to evict the Burtons from it. Finally, they sought damages for loss of use of the premises and the crops of the walnut trees.

The trial court found that the Burtons had breached their oral agreement; that "Plaintiffs are the owners of said property, and Defendants, and anyone acting through them, have no right, title, or interest therein. The Plaintiffs have owned said real property at all times herein mentioned, subject only to said oral agreements." The Burtons had erected substantial improvements on the property of an uncertain value, the court also found, and liens had accrued against the realty for mechanics' services and material men's claims. The Burtons were in unlawful possession of the premises, the court concluded, and the Barthels had been damaged by loss of use of the property and loss of the walnut crops.

The decree was in several parts. It was adjudged that the interest of the Burtons and of any person claiming through them in the real property or the oral contract "is hereby terminated and foreclosed". The Burtons and such other persons were enjoined from asserting "any right, title or interest in and to said contract or said real property, which arose before the date of this Decree." It was further decreed that the Barthels were owners of the real property in fee simple subject to its sale by order of the court "in the manner provided by law for sale pursuant to execution upon real property". By other provisions of the decree, the proceeds of such a sale were to be distributed to certain persons until exhausted.

Upon execution of a deed after the sale, the decree continued, title was to be quieted in the purchaser from all claims by either the Barthels or the Burtons, or persons acting through them. The court also enjoined them from asserting any claim or demand arising prior to the date of the decree. The decree declared that "all equity of redemption of any of the aforesaid persons is hereby foreclosed."

No appeal was taken from the decree and, at the time of the trial of this action, it had become final. Pursuant to the decree, the property was sold at public auction to the Barthels and the proceeds from the sale distributed as ordered by the court. No claim is made by the Barthels that they have any interest in the property other than that derived from their purchase at the sale, and it is undisputed that Rowland's interest is limited to the rights, if any, remaining with his assignors after the prior judgment.

Briefly stated, the legal relationship of the Barthels and the Burtons before the earlier action was that of vendors and vendees under an executory contract for the sale of real property with title in the vendors, possession in the vendees, and the vendees in default under the contract. Ordinarily, in that situation several remedies are available to a vendor. See Comment, 27 Calif.L.Rev. 583. Apparently the Barthels sought a combination of remedies, including rescission, quiet title, unlawful detainer, and damages.

Rowland's position is that the Barthels obtained a decree of foreclosure by sale. In such a proceeding, Rowland argues, the

defaulting vendee is entitled to a statutory right of redemption pursuant to section 700a of the Code of Civil Procedure.[2] The Barthels contend that decree quieted the vendors' title or, in the alternative, granted relief in the nature of a "strict foreclosure" according to Keller v. Lewis, 53 Cal. 113, and similar cases. But even if the decree be one directing a foreclosure by sale, the argument continues, there is no statutory right of redemption in such a proceeding, and the trial court was not required to allow the vendees a period in which to redeem the land.

The decree may not reasonably be construed as quieting title in the vendors. Instead, it purports to quiet title in the purchaser at the subsequent public sale. It is unnecessary to decide whether, as an abstract proposition, the court may quiet title in one not a party to the action and whose identity is unknown. Here the person challenging the purchasers' title claims through a party to the action and asserts no right other than that remaining in such party after the decree. The decree expressly enjoins both vendors and vendees from claiming rights in the property arising prior to its effective date; and although the vendors are declared to be "owners in fee simple", such ownership is made expressly subject to the "execution sale" which was to follow.

[10] In framing a decree effecting a strict foreclosure, the court ordinarily fixes a time within which the defaulting vendee should pay the amounts due upon the contract or be foreclosed from asserting any rights under it. See Cross v. Mayo, 167 Cal. 594, 605, 140 P. 283; Kornblum v. Arthurs, 154 Cal. 246, 249, 97 P. 420; Vanneman, Strict Foreclosure on Land Contracts, 14 Minn.L.Rev. 342, 353 et seq. Although the period to be allowed the vendee in exercising his equity of redeeming the rights under the contract lies largely within the equitable discretion of the trial court, Cross v. Mayo, supra, 167 Cal. at page 606, 140 P. 283; Los Angeles Auto Tractor Co. v. Superior Court, 94 Cal.App. 433, 440, 271 P. 363; Veterans' Welfare Board of California v. Burt, 4 Cal.App.2d 659, 662, 41 P.2d 587, such a period is a characteristic of that type of proceeding. Here, however, it does not appear that a strict foreclosure was contemplated. There was no period of grace to allow the vendees to correct their default under the contract, and it does not appear that a foreclosure of the vendees' rights was intended to inure to the benefit of the vendors. Instead, as stated by the trial judge in his memorandum opinion, the equities of all parties were to be preserved, including those of the lien claimants and that of the vendees in the improvements made upon the property. Obviously the trial court determined that the only feasible method of accomplishing that result was by a sale of the property. The only reasonable conclusion is that the remedy provided was a foreclosure by sale.

[11, 12] The decisive question is whether the enforcement of the vendor's rights in an executory land sales contract by a foreclosure sale allows a defaulting vendee a statutory period in which to redeem the property. In this connection, Rowland bases his rights upon what he asserts to be the proper construction of the term "equity of redemption", as used in the decree, and the effect of the purported foreclosure of it. That term, which is generally applied to mortgages and similar transactions, has reference to the mortgagor's right to avoid being divested of his property after a default, by payment of the mortgage debt; the right is terminated by a judicial foreclosure or foreclosure sale. See II Glenn on Mortgages (1943) 1092–1093, § 227. But as Rowland correctly maintains, if a right to redeem the property after a foreclosure sale exists by force of statute, it could not be concluded by a decree purporting to extinguish it, cf. Anthony v. Janssen, 183 Cal. 329, 334, 191 P. 538, or by a premature delivery of a deed by a sheriff or commissioner. Cf. Bessinger v. Grotz, 66 Cal.App.2d 947, 949, 153 P.2d 369. The purpose of the decree was to terminate all

2. "Sales of personal property, and of real property, when the estate therein is less than a leasehold of two years' unexpired term, are absolute. In all other cases the property is subject to redemption, as provided in this chapter."

rights existing prior to the sale; there was no necessity to mention any redemption rights which might arise as a result of the sale. Anthony v. Janssen, supra, 183 Cal. at pages 334–335, 191 P. 538.

[13] It is generally held that there may be no redemption of property from a judicial sale to enforce rights in it in the absence of a statute specifically creating a right to redeem. See 31 Am.Jur., Judicial Sales, § 222, p. 521. In jurisdictions which have no redemption statute applicable to a sale upon foreclosure of the rights in land sales contracts, it is held that the vendee may not redeem the property in the absence of a specific provision in the decree allowing him to do so. United States Plywood Corp. v. Alexander, 180 Or. 174, 175 P.2d 460, 462; see 66 C.J., Vendor and Purchaser, § 1309, p. 1337.

No California decision squarely determines whether a foreclosure sale to enforce the vendor's rights allows a defaulting vendee a statutory period of redemption. In other jurisdictions, there is a conflict of authority. The statutes of some states which grant a period of redemption after an execution sale and upon the foreclosure of a mortgage, have been construed as inapplicable to the foreclosure of a vendor's lien. Standley v. Mason, 148 Ark. 141, 229 S.W. 3, 4; Priddy & Chambers v. Smith, 106 Ark. 79, 152 S.W. 1028, 1029, 44 L.R.A.,N.S., 285; Drysdale v. P. J. Christy Land Co., 248 Mich. 184, 226 N.W. 882; Security Savings & Trust Co. v. Mackenzie, 33 Or. 209, 52 P. 1046, 1047; cf. Beason v. Porterfield, 40 Tenn. 363. Other cases emphasize the similarity which exists between a transaction in which the vendor retains legal title as security and the ordinary mortgage. See Brannan v. Adams, 202 Ala. 442, 80 So. 826, 828; Crabtree v. Davis, 237 Ala. 264, 186 So. 734, 736; Hill v. Preston, 119 Tex. 522, 34 S.W.2d 780, 784; see also Sparks v. Hess, 15 Cal. 186, 194. Upon that reasoning, a defaulting vendee has been granted a statutory right of redemption under a statute authorizing such a right upon foreclosure of a mortgage. Brannan v. Adams, supra, 80 So. at page 828.

Arguing that section 700a of the Code of Civil Procedure should be construed to include sales upon foreclosure of rights in real property, Rowland points to the broad language of the statute, which provides that "[i]n all other cases [than sales of personal property and sales of real property in which the estate is less than a leasehold of two years' unexpired term] the property is subject to redemption." To construe it as not applicable to the foreclosure of a vendor's lien, he contends, would be to disregard its plain terms and also to authorize a sale in such a proceeding with no safeguard that the property should bring a fair price. In all other kinds of judicial sales, the argument continues, the debtor is entitled to redeem the property or a confirmation of the sale by the court is required.

As the Barthels read the statute, it applies only to an execution sale to enforce a judgment for damages and does not include one made under any other authority. To require the purchaser at such a sale to take the property subject to redemption, they argue, tends to lower the amount bid. They reason that with the knowledge that the property might be redeemed, a purchaser would not pay a fair price for it. In such circumstances, it is said, only the creditor who can bid the amount owed to him will be likely to purchase the property at such a sale. A further contention is that the rights of the parties to the property being purely equitable should be enforced according to the equitable discretion of the trial court, including the power to have the property sold without redemption.

Section 700a is a part of a title of the Code of Civil Procedure designated "Execution of Judgment in Civil Actions", and is included in a chapter entitled "Execution". Pt. 2, Tit. 9, Ch. 1, Code Civ.Proc. Its wording is very similar to that of former section 229 of the Practice Act, Stats. 1851, p. 51 et seq., which also was included in a chapter dealing with "The Execution" and in a title relating to "Execution of the Judgment in Civil Actions." Tit. VII, Ch. I. In Kent & Cahoon v. Laffan, 2 Cal. 595, the problem was whether section 229 allowed a right of redemption after the fore-

closure of a mortgage. The court accepted the argument that the section applied to "all other cases" and was part of an act which included provisions both for execution sales and the foreclosure of mortgages.

In a subsequent case, which also concerned the right to redeem after a foreclosure of a mortgage, the Kent decision was criticized by the court in an opinion by Chief Justice Field: "It is very generally conceded by the profession that the decision was based upon an erroneous construction of the statute; but, admitting this to be true, it is too late to interfere with it; rights of property of vast value have grown up under the decision which no Court is at liberty at this day to disturb." Gross v. Fowler, 21 Cal. 392, 395. Specific statutory provision now is made for the redemption of real property after the foreclosure of a mortgage or a deed of trust. Code Civ. Proc. §§ 725a, 346.

[14] In few cases have sections 729 and 700a been considered in connection with proceedings other than those arising out of an execution to enforce a civil judgment or an action to foreclose a mortgage or trust deed. Although not a direct holding, it was strongly suggested in Anthony v. Janssen, supra, that a right to redeem real property arises after a sale to foreclose a mechanic's lien. See 183 Cal. 334, 191 P. 538. Two cases involving the foreclosure of a vendor's lien, without directly deciding the question, assumed a statutory right in the vendee to redeem the property from the foreclosure sale. See Tilley v. Bonney, 123 Cal. 118, 120, 55 P. 798; Brown v. Kahn, 176 Cal. 159, 164, 167 P. 869. Although section 700a is susceptible of a construction limiting it to executions and mortgage or trust deed foreclosures, the practice has been to construe it more broadly. Such a construction is in keeping with the requirement that redemption statutes be liberally construed in favor of the right. Lobingier v. Skinner, 93 Cal.App. 695, 700, 270 P. 394; Bender v. King, C.C., 111 F. 60, 65. That conclusion does not mean that there is a right of redemption of property from every judicial sale. The present action concerns solely the rights arising out of the foreclosure sale to enforce a vendor's lien; the rights of the parties in other situations will be determined when they are presented for decision.

[15] This result does not hamper a court of equity in disposing of the parties' interests under a contract for the sale of land. Sufficient remedies are available to allow a final determination of the various interests in the real property, if that course is deemed desirable. Also, from a practical standpoint the debtor's opportunity to obtain a fair bid for the property will be improved. As has been pointed out, generally the creditor is the purchaser at the foreclosure sale, and with the knowledge that the property may be redeemed for the price paid at that sale, he more likely will bid a fair price in order to avoid being divested of it at a later time. See Durfee and Doddridge, Redemption from Foreclosure Sale—The Uniform Mortgage Act, 23 Mich.L. Rev. 825, 838–841.

[16] It does not follow, however, that the general demurrer should not have been sustained. The complaint is deficient in failing to allege a compliance with sections 702 [tender of amount of purchase price], and 705 [production of certain enumerated documents to the officer or person from whom the redemption seeks to redeem] of the Code of Civil Procedure. These defects might be cured by amendment, cf. Photochart v. Del Riccio, 94 Cal.App.2d 315, 319, 210 P.2d 547; Pulvermacher v. Los Angeles Co-Ordinating Committee, 61 Cal.App.2d 704, 711, 143 P.2d 974, and the ruling by which the demurrer was sustained without leave to amend amounted to an abuse of discretion.

The judgment is reversed with directions to permit Weil to amend his complaint if he be so advised.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the judgment of reversal. But I disagree with the holding in the majority opinion that it was not prejudi-

cial error for the trial court to take judicial notice of the record in the former action.

In the case at bar, plaintiff's complaint was entitled "Complaint to Compel Redemption and to Quiet Title." It was there alleged that "* * * upon the 18th day of March 1950 a *judgement* [sic] and decree of the Superior Court of the State of California in and for the County of Yolo was entered against certain persons being C. E. Burton and Helen Burton, his wife, the same being plaintiff's assignors; that said *judgement* [sic] and decree was pursuant to an action involving title to the following described real property, and was entered in the Official Records of the said Superior Court in *Judgement* [sic] Book 'R' at page 92; * * *." The property was then specifically described and it was alleged "That said *judgement* [sic] and decree provided that said real property be sold as the property of plaintiff's said assignors in the manner provided by law for sales pursuant to execution upon real property; that said *judgement* [sic] and decree created in plaintiff's said assignors an equitable interest in said real property, to wit: a right to redeem said real property according to law; * * *." It was further alleged that the property was sold by the sheriff of Yolo County in the manner provided for by law; that Harvey O. and Erma Barthel were the purchasers at said execution sale; and that "prior to the expiration of the period of time provided by law for redemption of sales or real property upon execution, the said Sheriff of Yolo County upon said execution sale did wrongfully make and deliver a deed of said real property to the defendants Harvey O. Barthel and Erma Barthel, his wife; * * *"; that said deed had been recorded and constituted a cloud upon plaintiff's equitable title. It was alleged that "the plaintiff's said assignors, desiring to redeem, the said real property from the said sale upon execution, did within one year of the said 14th day of April 1950, demand in writing of the defendants * * * a written and verified statement of the amounts of said rents, and profits; that said defendants have for a period of more than one month from and after said demand, failed and refused to give plaintiff's said assignors such a statement or any statement whatever, and do so continue to fail and refuse; * * *.

"That the plaintiff is informed and believes * * * that the defendants hereto deny the right of the plaintiff to redeem said real property from said sale upon execution; * * *."

Plaintiff's assignment from C. E. and Helen Burton of their "right to redeem" is set forth in full. The prayer is for an order declaring plaintiff's right to redeem; for an accounting by the defendants of the rents and profits received and for the amounts expended by them for taxes, insurance, repairs and the like; and for a "further hearing wherein plaintiff may redeem said real property from the defendants. * * *"; and for an order directing the defendants to convey legal title to plaintiff upon redemption.

Defendants demurred on the grounds that the complaint did not state a cause of action; that it was ambiguous in that it was not possible to "ascertain what the provisions are of the degree which is referred to in Paragraph 2 of Plaintiff's Complaint"; that the complaint was unintelligible and uncertain; and that there was another action pending by the same parties for the same cause. The trial court sustained the demurrer without leave to amend upon the ground, set forth in its order, that it took judicial notice of the prior action and that the judgment in the prior case (11,463) had cut off any right of redemption existing in plaintiff's assignors and that it was "impossible for [plaintiff] to state a cause of action which will enable him to redeem the real property in controversy."

We said in Wolfsen v. Hathaway, 32 Cal.2d 632, 638, 198 P.2d 1, 5, that "It has been uniformly held that in the absence of either pleading or proof of a former judgment upon litigated issues, the defense of res judicata is thereby waived in the subsequent action. 15 Cal.Jur., sec. 233, p. 214; 50 C.J.S., Judgments, § 822, p. 389; Domestic and Foreign Petroleum Co., Ltd., v. Long, 4 Cal.2d 547, 562, 51 P.2d 73;

Rideaux v. Torgrimson, 12 Cal.2d 633, 638, 86 P.2d 826; Spitzer v. Superior Court, 74 Cal.App. 494, 498, 241 P. 270. Nor can respondents avail themselves of the principle of judicial notice in support of their present plea of the former adjudication. It is the general rule that 'the court will not take judicial notice of other actions, not even those pending or concluded in the same court.' [Citations.] The authority of a court to take judicial notice of its own records 'is limited to proceedings in the same case.'" In Willson v. Security-First Nat. Bk., 21 Cal.2d 705, 711, 134 P.2d 800, 804, it was said: "To hold that a court may generally take judicial notice of another proceeding with a view to determining whether it is a bar to the pending suit, would do away with the rule that the defense of res judicata may not be raised by demurrer unless the facts appear in the complaint, in those cases where the judgment relied on as a bar was rendered by the same court." The general rule is apparently subject to an exception. In Christiana v. Rose, 100 Cal.App.2d 46, 52–53, 222 P.2d 891, 895, the court said: "It has been held that, in the interests of justice, the court may take judicial notice of proceedings in other cases in the same court. Willson v. Security-First Nat. Bk., 21 Cal.2d 705, 711, 134 P.2d 800; Calhoun v. Calhoun, 81 Cal.App.2d 297, 302, 183 P.2d 922. In the instant case the appellant in his complaint referred to the wrongful death action and specifically alleged the date of the case, its file number in the clerk's office, and the *date the appellate court affirmed.* Under such circumstances, there can be no doubt but that this court may look at and consider the records in the wrongful death action. See Popcorn Equipment Co. v. Page, 92 Cal.App.2d 448, 453, 207 P.2d 647." (Emphasis added.) The Calhoun case involved taking judicial notice of a former appeal in the same court between the same parties; the Christiana case involved another case which had been appealed; the Popcorn Equipment Co. case pointed out that "Only in exceptional cases will the court depart from the general rule, for example in order to avoid a resulting unreasonable hardship. Under certain circumstances the Supreme Court will take judicial notice of the records of that court, although not pleaded in the trial court, when brought to the court's attention in some appropriate manner." Popcorn Equipment Co. v. Page, 92 Cal.App.2d 448, 453, 207 P.2d 647, 651. In Bank of America, Nat. Trust & Savings Ass'n v. Button, 23 Cal.App.2d 651, at page 653, 74 P.2d 81, it was said: "It is the general rule that courts will not take judicial notice of other actions even though pending in the same court. In re Estate of Fulton, 8 Cal.App. 2d 423, 48 P.2d 120; Brown v. Brown, 83 Cal.App. 74, 256 P. 595; Ralphs v. Hensler, 97 Cal. 296, 32 P. 243. This rule has been made subject to exception, in the discretion of the court. Sewell v. Johnson, 165 Cal. 762, 134 P. 704, Ann.Cas.1915B, 645; City of Los Angeles v. Abbott, 217 Cal. 184, 17 P.2d 993. The exception is only invoked in unusual cases where unreasonable hardship would otherwise result. This does not appear to us to be such a case." See, also, 10 Cal.Jur., § 52; 5 Cal.Jur.Supp., § 52. In Johnston v. Ota, 43 Cal.App.2d 94, 97, 110 P.2d 507, 509, the court stated the general rule and said:

"The only exception to the rule is where unreasonable hardship would result. Bank of America [Nat. Trust & Savings Ass'n] v. Button, supra. Although the judgment pleaded was an adjudication of the matter at bar and may have been rendered by the same court upon the same cause of action, and although such judgment and its supporting papers may be on file in the same court still the party pleading such prior adjudication carried the burden of establishing his plea which can be done only by *actual proof of its records.* Glaze v. Bogle, supra [105 Ga. 295, 31 S.E. 169].

"It must appear either upon the face of the record or be shown by extrinsic evidence that the precise issue raised in the second action was determined in the former suit. * * *

"There was no circumstance in the instant case that would have justified the court's taking judicial notice of the judgment pleaded or of the pleadings which preceded it. * * *" (Emphasis added.)

It seems clear in the case at bar that it was error for the trial court to take judicial notice of the prior action in ruling upon defendants' demurrer inasmuch as there is nothing to show that any exceptional circumstances existed.

I have set forth the manner in which plaintiff referred to the judgment in the prior action; defendants demurred on the ground that "another action [was] pending by the same parties for the same cause" and noted in their Memorandum of Points and Authorities that "The Plaintiff should have pled in his Complaint the decree in case No. 11463 in haec verba, rather than using bald legal conclusions. For that reason, the Complaint does not state facts sufficient to constitute a cause of action, and is ambiguous, unintelligible and uncertain." Neither of the parties introduced in any way the record of the prior action (11463) other than as above pointed out. In the majority opinion it is said "and the record of it [the former action] was made available to the trial judge." How was it made available? The record does not disclose. It is also said "The legal effect of the judgment was fully considered and argued * * *." When and where? And by whom? Again I say the record does not disclose. This appeal is from a judgment *entered upon an order which sustained a general demurrer to the complaint without leave to amend.* And the Order sustaining the demurrer to the complaint shows clearly and without equivocation that the trial court's reason for so acting was because it took *"judicial notice"* of the former action although no portion of the record in said action was before the court in this action. This statement is also found in the majority opinion: "* * * and the material portions of the record are before the court on this appeal." The Clerk's Transcript in this action contains a list of the "requested documents" *from the file in the former action,* but none of these documents was properly before the trial court in this action. We here have no way of knowing what other documents in the former action might not have been requested which would be relevant in this action since they were not before the trial court. In Olwell v. Hopkins, 28 Cal.2d 147, 150, 168 P.2d 972, 974, we said: "At the hearing upon their motion to dismiss the present action, *defendants introduced in evidence the record of the first action.*" (Emphasis added.) We also said, 28 Cal.2d at page 153, 168 P.2d at page 976, "Plaintiffs contend that under section 597 of the Code of Civil Procedure they were entitled to a trial of the issue of res judicata. That section provides: 'When the answer pleads that the action is barred * * * by a prior judgment, * * * or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof, the court may, upon the motion of either party, proceed to the trial of such special defense * * * before the trial of any other issue in the case, and if the decision * * * upon any special defense so tried * * * is in favor of the defendant pleading the same, judgment for such defendant shall thereupon be entered and no trial of other issues in the action shall be had * * *.' Although the defense of res judicata in the present action was raised by demurrer and motion to dismiss and not by answer, it was tried at the hearing upon that motion as it would have been tried under the provisions of section 597. The evidence at a trial under that section would be the record of the former action, which *was introduced at the hearing upon defendants' motion to dismiss,* and since that trial would take place 'before the trial of any other issue,' plaintiffs would find themselves in exactly the same position as they are now." This is a different situation from the one at bar where the trial court, without benefit of pleading, or proof on a motion to dismiss, took judicial notice of its records in a prior action. The correct rule is the one stated in Johnston v. Ota, supra, 43 Cal. App.2d 94, 97, 110 P.2d 507, 509, that "Although the judgment pleaded was an adjudication of the matter at bar and may have been rendered by the same court upon the same cause of action, and although such judgment and its supporting papers may be on file in the same court, still the party pleading such prior adjudication *carried*

the burden of establishing his plea which can be done only by actual proof of its records." (Emphasis added.)

A majority of this court here approves the action of the trial court in taking judicial notice of the record in the former action while at the same time admitting that the court should not be permitted to notice judicially its own records if, to do so, would impair the procedural rights of the parties, but the majority here fails to recognize that in condoning the judicial notice taken by the trial court and construing the holding there as the majority has done, the defendants' "absolute defense" is non-existent and, contrary to the majority opinion, prejudice to a party results thereby. It should also be noted that although the majority opinion asserts that neither party attacks the validity of the former judgment, this court itself does so in its construction of that judgment. The facts as set forth in the majority opinion are all garnered from the former record. The judgment there is scrutinized and, as pointed out by the majority opinion, "The decree declared that 'all equity of redemption of any of the aforesaid persons is hereby foreclosed.'" It is admitted that the judgment has long since become final, but despite that admission the majority finds that the right of redemption could not be so cut off and plaintiff is given permission to amend his complaint if he be so advised. We said in the Olwell case, supra, that the defense of res judicata could be raised by demurrer, rather than by answer, since "the record of the former action makes it clear that plaintiffs cannot overcome that defense." Emphasis added; Olwell v. Hopkins, supra, 28 Cal.2d 147, 153, 168 P.2d 972, 976. The situation is exactly reversed here.

I agree with the holding that plaintiff should be granted leave to amend his complaint so as to state a cause of action if that be possible. The complaint was fatally deficient so far as the allegations concerning compliance with the provisions of sections 702, 705 and 707 of the Code of Civil Procedure are concerned and plaintiff should be permitted to allege his compliance therewith if he be so advised.

I would reverse the judgment because of the prejudicial error committed by the trial court in taking judicial notice of the record in the prior case, and because of the abuse of discretion in sustaining defendants' demurrer to plaintiff's complaint without leave to amend.



130 Cal.App.2d 609

Kenneth DOUGLASS, Plaintiff and Respondent,

v.

Ansel R. DOUGLASS, Defendant and Appellant.

Civ. 16040.

District Court of Appeal, First District, Division 2, California.

Feb. 7, 1955.

Action against plaintiff's uncle for injuries received while plaintiff, who was gratuitously installing electrical wiring in uncle's home workshop, was, to facilitate such work, operating uncle's jointer, which uncle had authorized plaintiff to use, but which had been left by uncle with blade guard out of proper place and in deep cut setting which caused board to move and plaintiff's hand to slip into blades. The Superior Court, San Mateo County, W. T. Belieu, J., entered judgment upon $5,000 verdict for plaintiff, and uncle appealed. The District Court of Appeal, Dooling, J., held that questions of uncle's negligence and of plaintiff's contributory negligence and assumption of risk were for jury.

Judgment affirmed.

1. Appeal and Error ⇐930(1)

Evidence on appeal must be construed more strongly in respondent's favor, and every reasonable inference that can be drawn therefrom in support of judgment must be indulged in.

2. Negligence ⇐32(1), 52

Business invitor's responsibility is not absolute, but invitor is required to use dr-

dinary care for safety of persons he invites to come upon the premises, and, if there is danger attending upon such entry or upon work which invitee is to do thereon, and such danger arises from causes or conditions not readily apparent to eye, invitor has duty to give invitee reasonable notice or warning of such danger.

3. Negligence ⇐68

Business invitee has right to expect that apparatus furnished him is in reasonably safe condition.

4. Negligence ⇐16

Supplier of chattel for another for use in supplier's business is under duty to exercise reasonable care to make the chattel safe for use for which it is supplied.

5. Negligence ⇐136(18)

In action against plaintiff's uncle for injuries received while plaintiff, who was gratuitously installing electrical wiring in uncle's home workshop, was, to facilitate such work, operating uncle's jointer, which uncle had authorized plaintiff to use, but which had been left by uncle with blade guard out of proper place and in deep cut setting which caused board to move and plaintiff's hand to slip into blades, question whether uncle had exercised reasonable care to make the jointer safe for use for which it was supplied was for jury.

6. Negligence ⇐136(18)

In action against plaintiff's uncle for injuries received while plaintiff, who was gratuitously installing electrical wiring in uncle's home workshop, was, to facilitate such work, operating uncle's jointer, which uncle had authorized plaintiff to use, but which had been left by uncle with blade guard out of proper place and deep cut setting which caused board to move and plaintiff's hand to slip into blade, question whether defects in machine were so obvious that uncle was entitled to assume that plaintiff would perceive that which would be obvious to him upon ordinary use of his senses was for jury.

7. Appeal and Error ⇐996

A reviewing court can only say that plaintiff is guilty of contributory negligence as matter of law where there is no room for reasonable minds to differ and the conclusion that he was guilty of negligence is only one that can be rationally drawn from the evidence.

8. Negligence ⇐136(26)

In action against plaintiff's uncle for injuries received while plaintiff, who was gratuitously installing electrical wiring in uncle's home workshop, was, to facilitate such work, operating uncle's jointer, which uncle had authorized plaintiff to use, but which had been left by uncle with blade guard out of proper place and in deep cut setting which caused board to move and plaintiff's hand to slip into blades, question of plaintiff's contributory negligence was for jury.

9. Negligence ⇐136(26)

In action against plaintiff's uncle for injuries received while plaintiff, who was gratuitously installing electrical wiring in uncle's home workshop, was to facilitate such work, operating uncle's jointer, which uncle had authorized plaintiff to use, but which had been left by uncle with blade guard out of proper place and deep cut setting which caused board to move and plaintiff's hand to slip into blades, question whether plaintiff had assumed risk of his injury was for jury.

10. Appeal and Error ⇐1050(1)
Evidence ⇐359(3)

In action against plaintiff's uncle for injuries received while plaintiff, who was gratuitously installing electrical wiring in uncle's home workshop, was, to facilitate such work, operating uncle's jointer, which uncle had authorized plaintiff to use, but which had been left by uncle with blade guard out of proper place and in deep cut setting which caused board to move and plaintiff's hand to slip into blades, pictures of the workshop were relevant and were not prejudicial, even though they showed part of a swimming pool, since verdict was not excessive.

Partridge, O'Connell & Whitney, Wallace O'Connell, San Francisco, for appellant.

Arthur T. Bridgett, Bridgett & Marcus, San Francisco, for respondent.

DOOLING, Justice.

Defendant appeals from a judgment entered on a jury verdict awarding plaintiff $5,000 for personal injuries. Respondent was an electrician by occupation and in his spare time he had been gratuitously installing the electrical wiring in a home workshop which was being constructed by his uncle, the appellant.

On Sunday, January 13, 1952 respondent worked with appellant and installed conduits for the wiring. At the conclusion of that day there remained some little electrical work to be done, including the installation of electrical outlet boxes in the walls of the workshop. It was necessary to mount these outlet boxes on strips of wood and these wooden strips must be thin enough so that the outlet boxes would fit between the outer wall and the inner wall yet to be installed. Respondent told appellant that he would return on Tuesday to finish the electrical work and appellant promised respondent that he would cut the wooden strips for the outlet boxes, "he said he would cut them and have them ready for me to put in." Appellant told respondent that he had arranged for the electrical inspector to come on Wednesday and the electrical work should be finished by that time.

On Tuesday afternoon it was raining and the respondent, who was doing outside work in his regular employment, took the afternoon off to finish the electrical installation for his uncle. He arrived about 2 p. m. and let himself into the workshop with a key which his uncle had given him. The latter had not cut the wooden strips for mounting the outlet boxes, and after respondent had done some other work he looked for some wood suitable for the purpose. He found some pieces of redwood which being soft he thought could be easily cut. These were 30 inches long, 4 inches wide and ¾ inches thick. They were a fraction of an inch too thick for the desired purpose so respondent looked about for a tool to cut them down.

About in the center of the workshop there was an electrically operated jointer. The jointer was resting on a frame and was approximately 2½ feet high. Basically the jointer consists of two platforms or tables, with blades rotating on a cylinder between the two platforms. One platform is stationary and the other may be raised or lowered. The board to be planed is set on the adjustable table and its end forced against the rotating blades. By lowering this table more of the board to be planed is brought in contact with the rotating blades and hence more of the wood is removed from its lower surface.

Respondent's only experience with the use of this jointer was that about a year before he had used it on one occasion. At that time it was set for a very shallow cut and he experienced no difficulty in operating it. His only other experience with any other jointer was in high school where he had taken a wood-working course. They had jointers for the use of the class but respondent did not remember whether he had used one of them or whether his only experience was in some group instruction given by the teacher. He had no very clear recollection about this course in which he had not been particularly interested. The only instruction which appellant had given respondent about the operation of the jointer when he had used it before was to be sure that the wood was clear and had no nails in it.

On the Sunday before appellant had used the jointer and had set it for the deepest possible cut, about ⅜ of an inch. The jointer was fitted with a guard which operated with a spring. The guard fitted over the blades and was pushed aside by the width of the board which was being cut and would spring back over the blades on the board being removed. The guard was supported by a hexagonal stem which fitted into a hexagonal hole. Appellant had removed the guard because he was planing some very wide boards and when he replaced it he set the guard away from the blades so that the spring could not bring it over them. He also left the table set for the deep cut as he had been using it.

Appellant had told respondent to use any of the tools in the workshop and he testified that he knew that respondent might use the jointer in the course of his work. There is a gauge on the side of the jointer which indicates the depth of the cut for which the jointer is set.

On the Tuesday afternoon in question respondent decided to use the jointer to cut down the thickness of the redwood boards. The day was dark and it was raining. The only provision for artificial light in the workshop was by attaching a light to the same cord which furnished the power to operate the jointer. Respondent had observed that the current was not strong enough to operate a light and the jointer at the same time, when the motor was started the light became very dim and almost went out. So he did not put on a light. He saw that the guard was not over the blades and attempted to force it over but could not do so. He did not know that the guard was set in a hexagonal hole and could be adjusted over the blades by taking it out and replacing it at the proper angle. He therefore decided that the guard was broken. As he looked down on the jointer from a standing position he did not observe that the jointer was set for a very deep cut. It appeared to him to be set for a very shallow cut, just about the same as when he had used it the year before. He did not know of the gauge on the side of the jointer. Appellant had not shown it to him and he did not see it.

He decided that he could use the machine safely without the guard by taking the rear end of the board in his right hand and using a piece of wood about 14 inches long to press on the front end of the board with his left hand, thus keeping the left hand away from any danger of contact with the blades. He did this and when he brought the front end of the board against the rotating blades, the blades kicked the board back, this flipped the piece of wood out of his left hand and the left hand dropped onto the rotating blades. His third and fourth finger tips were cut off and his thumb and index finger injured.

After the accident appellant made the following statement to respondent: "He said that he left the machine in a bad position for me to operate, and he said the cut was too deep, which made the board kick out * * *. He felt like he was guilty of cutting the fingers off himself, his fault * * * he said he left the guard open, said he had it off and he just put it back in place but he didn't put it in over the cutter."

[1] We have stated the facts so fully because the principal contentions of appellant relate to the sufficiency of the evidence. In doing so we have stated that evidence most favorable to respondent as we are required to do in support of the judgment. We need hardly refer to the accepted rule that the evidence on appeal must be construed most strongly in respondent's favor and every reasonable inference that can be drawn therefrom in support of the judgment must be indulged.

[2–4] It is agreed by the parties that respondent was a business invitee of appellant. "The invitor's responsibility is not absolute but he is 'required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger.'" Hinds v. Wheadon, 19 Cal.2d 458, 460–461, 121 P.2d 724, 726. Similarly when one supplies machinery for the use of such invitee the invitee has "a right to expect that the apparatus furnished him for that purpose was in reasonably safe condition. One who supplies a chattel for another to use for the supplier's business purposes is under a duty 'to exercise reasonable care to make the chattel safe for the use for which it is supplied' * *." Mondine v. Sarlin, 11 Cal.2d 593, 597, 81 P.2d 903, 904.

[5] Here we have the admission of the appellant that knowing that the jointer might be used by the respondent he left it "in a bad position for (him) to operate

* * * the cut was too deep which made the board kick out * * *." With such an admission and on the other facts of the case the jury could reasonably find that appellant did not "exercise reasonable care to make the chattel safe for the use for which it is supplied."

[6] Appellant argues however that the defects in the machine were obvious and hence no duty was violated by him since the "owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses." Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P. 793, 794. The fact that the guard was not over the blades was obvious, but appellant himself had used the machine without the guard and that was the very reason that it was not in its normal position. Having used it himself without the guard the jury could reasonably conclude that appellant might expect respondent to do the same when he found the guard in a position where he could not force it to cover the blades. The real danger lay in the fact that the machine was set for a deep cut which, in appellant's own words, "made the board kick out." Whether this constituted a danger which would be obvious to respondent upon the ordinary use of his own senses presented a fact question for the jury. The machine was in court and was seen and inspected by the jury. They could test the respondent's testimony that the machine appeared to him to be set for a shallow cut by standing over it themselves and looking down from a position similar to that occupied by respondent. With the machine before them they were in the best position to determine whether the depth of the cut for which it was set would or would not be obvious to one in respondent's situation upon the ordinary use of his own senses. They must have answered this question in respondent's favor and we cannot say that the evidence does not support their conclusion.

Appellant argues that respondent was guilty of contributory negligence as a matter of law 1. in using the machine without the guard and 2. in not observing that the machine was set for a deep cut.

[7, 8] An appellate court can only say that a plaintiff is guilty of contributory negligence as a matter of law "where there is no room for reasonable minds to differ and the conclusion that he was guilty of negligence is the only one that can rationally be drawn from the evidence." Terrell v. Key System, 69 Cal.App.2d 682, 689–690, 159 P.2d 704, 708; Dwelly v. McReynolds, 6 Cal.2d 128, 133, 56 P.2d 1232. Whether a person of ordinary prudence, believing the guard was broken as respondent did, would have undertaken to use the machine, was a question for the jury's determination.

We have already discussed to some extent the failure of respondent to observe that the machine was set for a deep cut. The gauge was not seen by him nor did he know of its existence. Except for a very casual experience with jointers when he was 13 or 14 years old in a high school course of which he had no very clear recollection respondent's only experience was in previously operating this machine with no untoward incident. He did not even know that when the machine was set for a deep cut it would have a tendency to kick out a board. In high school he had once seen a board kicked out of a jointer but he did not know what caused it. Whether he should have examined the machine more closely, or whether under the circumstances he should have attached and lighted an electric light were also questions for the jury. We cannot say that the facts compelled the conclusion as a matter of law that respondent was guilty of contributory negligence.

[9] Appellant also claims that in using the machine without the guard respondent assumed the risk of his injury. Prescott v. Ralph's Grocery Company, 42 Cal.2d 158, 265 P.2d 904. That case furnishes its own reply to this argument. The court said in that case, 42 Cal.2d at page 162, 265 P.2d at page 906, that "the elements of the defense of assumption of risk are a person's knowledge and appreciation of the danger involved and his voluntary acceptance of the risk." Here respondent knew that the guard was not working but the jury could find that he had no knowledge and appreciation of the danger in proceeding without its

protection as he did. He testified that he held the board down with another stick "so I wouldn't get my left hand into the cutter." It is true that in high school respondent had been told never to use a jointer without the guard, but whether he had knowledge and appreciation of the danger involved and voluntarily assumed the risk was properly a jury question.

[10] Finally appellant objects to the introduction in evidence of two photographs of the workshop. They were offered to show the windows in this building, as an aid to the jury in determining the amount of visibility inside on the afternoon in question. Appellant claims because they showed a portion of a swimming pool as well they had a tendency to prejudice the jury. The pictures of the workshop were relevant and the fact that they showed part of the swimming pool cannot be said to have prejudiced appellant since the verdict was in no sense excessive for the damages suffered.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.



130 Cal.App.2d 606

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Earl BRADFORD, Defendant and Appellant.

Cr. 3065.

District Court of Appeal, First District, Division 1, California.

Feb. 7, 1955.

Defendant was convicted in the Superior Court, City and County of San Francisco, Twain Michelsen, J., of the sale of heroin and he appeals. The District Court of Appeal, Fred B. Wood, J., held that defendant was not entitled to a dismissal for failure to bring the cause to trial within 60 days or of the lapse of several months after the commission of the offense until his arrest and that the evidence established a sale of heroin within the prohibition of the statute.

Judgment affirmed.

1. Criminal Law ⇐576(5)

A defendant's consent to postponement of his trial is equivalent to a postponement on his application and is a sufficient cause for delay so as to preclude a dismissal because not brought to trial within 60 days after filing of the information. Pen.Code, § 1382.

2. Attorney and Client ⇐92

Consent of counsel to postponement of a criminal trial is the consent of the accused.

3. Criminal Law ⇐576(5)

Where information was filed March 4 and continuances from March 8 to March 10 to April 7 were made with the consent of counsel of accused and from April 7 to May 7 to May 26 and to June 7 with consent of respective counsel when trial was had, accused was not entitled to a dismissal for failure to bring the cause to trial within 60 days after filing of the information. Pen.Code, § 1382.

4. Criminal Law ⇐575

Where defendant's plea was entered March 10 and the cause with consent of counsel was continued for trial to April 7, such was a setting "for trial for date not later than 30 days" after date of entry of the plea of the defendant as required by the Penal Code. Pen.Code, § 1050.

5. Criminal Law ⇐617

Where continuances from a specified date to and including the holding of the trial were made with the defendant's consent, he was not entitled to complain thereof. Pen.Code, § 1050.

6. Criminal Law ⇐147

In prosecution for the sale of heroin, a lapse of several months after the commission of the offense until the arrest of the defendant was immaterial where it was well within the three year period of statute

of limitations. Health and Safety Code, §§ 11500, 11713; Pen.Code, §§ 17, 800.

7. Poisons ⇐9

Evidence sustained conviction for the sale of heroin. Health and Safety Code, § 11500.

8. Poisons ⇐4

In prosecution for sale of heroin, where on each sale officer contacted defendant through an informer, through whom officer paid the money to defendant and to whom defendant delivered the heroin, evidence established a "sale" of heroin within the meaning of the statutes. Health and Safety Code, § 11500; West's Ann.Civ. Code, § 1558.

9. Poisons ⇐4

Where each sale of heroin occurred in the presence of an officer who furnished the informer with the purchase price money, and inference was authorized that the officer was the buyer and that informer acted as a go-between so as to establish a "sale" of heroin within the prohibition of the statute. Health and Safety Code, § 11500.

See publication Words and Phrases, for other judicial constructions and definitions of "Sale".

10. Criminal Law ⇐698(1)

Defendant could not complain of testimony as hearsay where no objection was interposed to it on that ground.

Earl Bradford, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., San Francisco, for respondent.

FRED B. WOOD, Justice.

Convicted on two counts of violating section 11500 of the Health and Safety Code (sale of heroin) on the 5th and 12th, respectively, of June, 1953, defendant has appealed.

[1–3] Defendant claims that the action should have been dismissed by the trial court for failure to bring to trial within 60 days of the filing of the information, as provided in subdivision 2 of section 1382 of the Penal Code.[1] A motion to that effect was made and denied on June 7, 1954. Sixty days had elapsed, the information having been filed March 4 of that year. But, as the record shows, continuances from March 8 to March 10 and to April 7 were made "with consent of counsel"; thereafter, from April 7 to May 7, to May 26, to June 7, "with consent of respective counsel." The continuances from March 8 through March 10 to April 7 were presumably with consent of counsel for each party, because the minutes show that both counsel were present upon each of those occasions. Even if it be not so presumed, the period from March 4 to April 7 was well within the 60 days, and the remainder of the period was definitely covered by defendant's consent. "The defendant's consent to the postponement of his trial is equivalent to a postponement on his application and is sufficient cause for the delay. Ray v. Superior Court, 208 Cal. 357, 281 P. 391; People v. Santos, 134 Cal.App. 736, 744, 26 P.2d 522." In re Lopez, 39 Cal.2d 118, 120, 245 P.2d 1, 2. Consent of counsel is, of course, consent of the party. See People v. Santos, supra, 134 Cal.App. at page 744, 26 P.2d 522. It necessarily follows that the dismissal statute here invoked did not come into play. There was no further postponement. The trial commenced and was completed on June 7.

[4, 5] Defendant also cites section 1050 of the Penal Code which reads in part as follows: "The court shall set all criminal cases for trial for a date not later than thirty (30) days after the date of entry of the plea of the defendant. No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. * * * Whenever any continuance is granted, the court shall

1. That section declares that, "unless good cause * * * is shown," the court must order dismissal if a defendant, "*whose trial has not been postponed upon his application*, is not brought to trial * * * within 60 days after * * * the filing of the information." (Emphasis added.)

enter in its minutes the facts proved which require the continuance. * * *." Here, the defendant's plea was entered March 10 and the cause, "with consent of counsel" was "continued for trial to April 7." That was a setting "for trial for a date not later than thirty (30) days." All continuances from April 7 to and including the holding of the trial were made with defendant's consent. He, therefore, is in no position to complain. "Not having objected to a continuance, an accused person is presumed to have consented, Ray v. Superior Court, 208 Cal. 357, 358, 281 P. 391, but where he himself has requested it, he will not be heard to complain. People v. George, 91 Cal.App.2d 537, 540, 205 P.2d 464." People v. Fude, 117 Cal.App.2d 186, 189, 255 P.2d 23, 24.

[6] Defendant complains of the lapse of several months after the commission of the offense (June, 1953) until his arrest (February, 1954). This is of no legal significance because well within the three year period of the statute of limitations. See Health and Saf.Code, § 11713 and Pen. Code, §§ 17 and 800. Incidentally, the prosecution witness, a state narcotic investigator, testified that an immediate arrest was not made lest other potential offenders he was investigating be alerted.

[7] Defendant challenges the sufficiency of the evidence to support the verdict but cites no specific lack in that regard. We have read the entire record and find that the evidence amply supports the verdict.

[8, 9] He refers to each sale as nudum pactum, asserting that for a "contract" to be valid the parties must exist and be identifiable, citing Civil Code, section 1558. He apparently refers to the evidence that upon the occasion of each sale the officer contacted the defendant through an unnamed informer, through whom the officer paid the money to defendant and to whom defendant delivered the heroin. The answer is that we are here dealing with an executed contract whereas section 1558 deals primarily with executory contracts. Also, there is no doubt as to the existence of the parties to this executed contract (defendant as seller and the informer as buyer) and that each of those parties is identifiable even though the name of one of them was not given in evidence herein. Moreover, each sale occurred in the presence of the officer, who furnished the informer with the purchase price money, circumstances which would allow an inference that the officer was the buyer and that the informer acted as a go-between. See People v. Grijalva, 48 Cal.App.2d 690, 691–693, 121 P.2d 32. Whether the informer or the officer be deemed the buyer, a sale took place within the meaning of section 11500 of the Health and Safety Code.

[10] Defendant further claims that the oral statements of the informer, narrated in the officer's testimony, constituted hearsay and that the admission thereof into evidence violated defendant's right to be confronted by the witness. Much, if not all of it, consisted of acts done and statements made by the informer in defendant's presence, hence not hearsay. In addition, no objection was interposed to this testimony. So, if any of it was hearsay, it became competent evidence for lack of an objection.

The judgement is affirmed.

PETERS, P. J., and BRAY, J., concur.



130 Cal.App.2d 536

Leo A. YATES and Marjorie R. Yates, Plaintiffs and Respondents,

v.

Orville J. KUHL and Vivian W. Kuhl, Defendants and Appellants.

Civ. 8359.

District Court of Appeal, Third District, California.

Feb. 1, 1955.

Rehearing Denied Feb. 23, 1955.

Action by operators of duck hunting resort for damages resulting from wrongful interference by adjoining landowners with flow of water onto plaintiffs' land. The Superior Court, Colusa County, Arthur Coats, J., gave judgment for resort oper-

ators. Adjoining landowners appealed. The District Court of Appeal, Peek, J., held that where adjoining landowners had been restrained in a previous action from interfering with resort owners' rights to water, but allegedly again acted to deprive resort owners of water, judgment in first action was only res judicata to issues before court on that trial, and resort owners' cause of action in second action was based on damages arising from alleged acts of adjoining landowners subsequent to that action, and such issues had not been determined by court in first action.

Judgment affirmed.

1. Judgment ⇐605, 713(2)

Resort owners' judgment against adjoining landowners in action for damages resulting from adjoining landowners' interference with resort owners' water rights, was res judicata on all issues presented or which could have been presented at trial, but such judgment did not apply to damages arising from acts of adjoining landowners subsequent to judgment. West's Ann.Code Civ.Proc. § 1911.

2. Election of Remedies ⇐7(1), 10

The doctrine of inconsistent remedies only attaches when a litigant, having full knowledge of all of the facts, has elected one of two inconsistent remedies and pursues it to judgment.

3. Judgment ⇐600

A judgment for damages accruing prior to the commencement of an action is not a bar to an action for damages accruing subsequently. West's Ann.Code Civ.Proc. § 1047.

4. Election of Remedies ⇐2

Action by resort owners to recover damages for interference with their rights to water by adjoining landowners was not an election of remedies that barred subsequent action by resort owners based upon adjoining landowners' acts of interference subsequent to judgment in first action, as they were separate breaches of resort owners' rights, and not a continuing breach. West's Ann.Code Civ.Proc. § 1047.

5. Waters and Water Courses ⇐247(1)

That contempt proceeding based on injunction previously obtained against adjoining landowners' interference with resort owners' water rights was available to resort owners did not preclude action for damages based upon new injury caused by subsequent interference.

6. Waters and Water Courses ⇐247(1)

In action by resort owners for damages arising from adjoining landowners' interference with water in irrigation system, where there was conflicting testimony as to amount of water available to users of irrigation system, question as to amount of water resort owners could have received was for jury.

7. Waters and Water Courses ⇐247(1)

In action by resort owners for damages arising from adjoining landowners' interference with resort owners' rights to water in irrigation system, where it was necessary for resort owners to show source and availability of water, admitting testimony as to acts of adjoining landowners in destroying dam which caused resort owners' land to drain was not error, although such testimony related to acts of adjoining landowners that were basis for previous action by resort owners against adjoining landowners.

8. Damages ⇐40(3)

Where an established business has been injured, the loss of profits resulting therefrom can be recovered.

9. Waters and Water Courses ⇐247(1)

Where adjoining landowners had interfered with water flowing onto resort owners' land from irrigation ditch, so that some of resort owners' duck blinds could not be operated, there was a satisfactory basis for computing damages, and damages awarded resort owners were not speculative.

Arthur C. Huston, Jr., Woodland, Duggan, Smith & Lawlor, Oakland, for appellants.

Desmond, Miller & Artz, Sacramento, for respondents.

PEEK, Justice.

This is an appeal by defendants from a judgment awarding plaintiffs damages for the alleged wrongful interference by defendants with the flow of water necessary for irrigation and flooding of plaintiffs' land.

On February 7, 1949, the defendants granted to plaintiffs certain land in Colusa County. The land so conveyed was bounded on the north, south and west by land owned by defendants. The deed additionally granted to plaintiffs the use of water for agricultural and hunting purposes without charge so long as defendants were not obligated to pay for the water so used. The water was obtained from two sources: (1) by gravity flow from an artificial drain owned by Reclamation District 2047, and (2) from an artificial ditch known as Sublateral (F) belonging to the Maxwell Irrigation District. Both the ditch and the drain adjoin plaintiffs' and defendants' land at a point where there was constructed a concrete flashboard controlled weir in the 2047 drain which is partly on plaintiffs' property and partly on that of defendants. Plaintiffs constructed duck blinds on their property and sold hunting privileges to persons desiring to hunt thereon. In order to so use the area it was absolutely necessary that it be flooded with water during the shooting season.

This is the second of two cases. The primary charge in the first action, which was filed on November 9, 1949, was that defendants had unlawfully cut off plaintiffs' supply of water. The action was tried on December 15 and 16 and a formal judgment entered on January 12, 1950. It was substantially the same as that which the court gave orally on December 16 at the conclusion of the trial. The findings in that proceeding, among other things, were that for many years water from the weir had been running into the sublateral from which it was diverted to plaintiffs' land; that it was therefore necessary for defendants to maintain the stop box on their property; that plaintiffs were entitled to the maintenance thereof and to the use of the weir and their pro rata share of the water for irrigation and hunting purposes; that defendants should continue to so regulate said weir in such a manner that all users of the water receive their pro rata share; that plaintiffs were entitled to have maintained an earthen dam which was used to divert water to and drain water from plaintiffs' land; that defendants had caused the dam to be destroyed; that as a result plaintiffs were deprived of all water; that plaintiffs should remove a certain blind at the corner of their property; that damages were balanced and that plaintiffs were entitled to compensation for replacing the earthen dam. The judgment which was accordingly entered restrained and enjoined defendants from depriving plaintiffs of their share of available water or in any way wrongfully interfering with plaintiffs' rights as set forth in the findings.

The second action, the one from which this appeal is taken, alleged among other things that on December 17 (the day following the conclusion of the first trial) defendant Orville Kuhl removed certain boards from the weir and stop box, and that as a result of this act plaintiffs, for the second half of the duck season, were deprived of the use of sufficient water to flood the property for hunting purposes. Damages were asked for the loss occasioned thereby to plaintiffs. Defendants denied that the water was the only necessary and available source of supply to plaintiffs; denied that an adequate supply of water was available during the season; admitted removing the boards from the cement weir and from the stop box, but denied that this act had resulted in any damage to plaintiffs. Affirmatively defendants alleged that the decree in the prior action established certain rights to the use of the water. At the conclusion of the trial on the issues so formed, the jury gave its verdict in favor of plaintiffs in the amount of damages requested.

It is now the contention of appellants that the judgment in the first action was res judicata as to this action; that the respondents by their election of remedies in the first action are barred from seeking further relief in the present action; that the evidence is insufficient to sustain the judg-

ment; that the court committed prejudicial error in admitting certain evidence, and that the damages were improper.

[1] As to appellants' first contention, there can be no question but that the judgment in that case was res judicata on all issues that were presented or could have been presented at the trial, Sutphin v. Speik, 15 Cal.2d 195, 99 P.2d 652, 101 P.2d 497; however, it is equally well established that the doctrine is limited by the rule that it does not apply to new rights. Kettelle v. Kettelle, 110 Cal.App. 310, 294 P. 453; Segarini v. Bargagliotti, 79 Cal.App. 347, 249 P. 545; Code of Civil Procedure, § 1911.

The first proceeding established the rights of plaintiffs to the water and the damages resulting from the acts of defendants as therein alleged. The cause of action in the instant case was for the alleged wrongful acts of defendants occurring on December 17 and subsequent to the trial of the first action. The defendants' breach of their obligation to plaintiffs which was the subject matter of the first action was entirely separate and apart from their breach to plaintiffs which was the subject matter of the second case. In the first action the findings and judgment show without question that the issue of damages was limited to the breach committed during the first half of that season. The question of any damage which might have occurred during the second half was not in issue. Furthermore, it should here be noted that defendants, at the trial of the second action, made no claim that the damages recovered in the first action also covered the damages resulting from the act of December 17. Rather, they endeavored to justify their act and introduced evidence as to the availability of water which was the major issue at the second trial.

[2, 3] The cases relied upon by defendants in support of their second contention, that plaintiffs made an election of remedies in their original proceeding and hence are barred from further relief, are not applicable to the present situation. The doctrine of inconsistent remedies only attaches when a litigant having full knowledge of all of the facts has elected one of two inconsistent remedies and pursues it to judgment. In the case primarily relied upon by appellants, Abbott v. 76 Land & Water Co., 161 Cal. 42, 118 P. 425, plaintiff had brought a suit for specific performance which was granted and damages awarded. His subsequent action for damages for delay in performance was held to be barred by the first. The breach there alleged was a single, entire and complete breach of the contract. Nothing further occurred. However, the court also reiterated the rule herein applicable that, "* * * in such a case, a judgment for damages accruing prior to the commencement of the action is not a bar to an action for damages accruing subsequently, for the claim for such damages is a new cause of action." 161 Cal. at page 48, 118 P. at page 428.

[4] The instant case is not one wherein there has been a continuing breach. It concerns successive causes of action arising out of the same general subject matter—the right to the water. Successive causes of action based on the same contract or transaction are specifically recognized by section 1047 of the Code of Civil Procedure. The first action was a single cause based upon events occurring on November 5, 1949, and determined the plaintiffs' right to the water. There is nothing in that action, nor did the court or the litigants assume so, to indicate that the acts of that date caused permanent injury or that plaintiffs' land was thereafter valueless. The second action was solely for the damage caused by the acts occurring on December 17 which kept the available water from flooding plaintiffs' land, and was not one for additional damages for the particular breach involved in the former action.

[5] In their reply brief defendants contend for the first time that plaintiffs could only recover for the second breach before the court of equity which granted the injunction in the first proceeding. Their argument appears to be that plaintiffs elected the wrong course of action, and that their proper remedy was by contempt proceedings. Even if such contention were not subject to the rule precluding considera-

tion of questions raised for the first time on appeal, it is quite apparent that plaintiffs were not limited to seeking an order to show cause by defendants; that was merely an additional remedy for the tortious acts of defendants committed on December 17.

[6] It is next contended by defendants that the evidence was insufficient to sustain the judgment in that it does not show that the acts of Orville Kuhl were such as to cause plaintiffs any damage, as it was not shown that plaintiffs could have retained the water on their land. The evidence relied upon to sustain such contention is taken out of context. When read as a whole, the record discloses ample evidence that when Yates, on December 17, went to remove the obstruction and to act in accordance with the court's order of the previous day, he found that defendant had removed some boards from the weir as well as some boards from the stop box on his property so that water could not flow onto plaintiffs' property; that is, the water was flowing from the weir to and through the stop box onto defendants' land and draining off at the east end thereof. Furthermore, plaintiffs testified, in response to questions by the court, that there was an equal or greater amount of water discharging at the southeast corner of defendants' property than was entering through the stop box at the northwest corner, and that it was in a sufficient amount to have flooded his land. This testimony by plaintiffs was corroborated by a neighbor who testified to the same effect. The most that can be said for the testimony relied upon by defendants is simply that it created a conflict in the evidence as to whether or not there was available water so that plaintiffs could receive their proportionate share. This question was solely within the province of the jury, and under such circumstances cannot be interfered with by this court.

[7] Defendants' next contention, that the court committed prejudicial error in admitting testimony of the acts of November 5, is likewise without merit. The acts and damages caused by defendants' conduct on November 5 were not in issue in the present case, nor did plaintiffs attempt to relitigate the issues of the prior action; however, it was incumbent upon plaintiffs to prove the source and availability of the water. To do this it was necessary to show the method used prior to December 17 and the actual condition of their land during the second half of the duck season. Thus it was proper for them to show the existence of conditions of the land prior to December 17 as this would relate to the sufficiency of the water to maintain flooded conditions on their land. They could show why the land was not flooded; that it was because of the acts of November 5, the destruction of the dam on defendants' property which caused the plaintiffs' land to drain, and the placing of an earthen obstruction before the inlet box at the corner of plaintiffs' property so that the water would not flow upon their land. It was this obstruction which should have been removed in accordance with the court's order in the first case, and hence was a continuing breach.

[8, 9] It is defendants' further contention that the damages as awarded were speculative and based on gross income, and hence as a matter of law were improper. It is well settled that where an established business has been injured, the loss of profits resulting therefrom can be recovered. Here there was a satisfactory basis for the damages awarded since it was shown by ample evidence and precise mathematical computations that had it not been for defendants' conduct, plaintiffs could have rented all of the duck blinds on their property for the entire second half of the season.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

130 Cal.App.2d 602

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Artis MARTIZ, Defendant and Appellant.

Cr. 3051.

District Court of Appeal, First District, Division 1, California.

Feb. 7, 1955.

Defendant was convicted of unlawfully selling and furnishing narcotics. The Superior Court, County of Alameda, Donald K. Quayle, J., entered judgment, and defendant appealed. The District Court of Appeal, Peters, P. J., held that late filing of notice on appeal from judgment of conviction was not excused because prior timely notice, which was allegedly deposited in place designated for deposit of mail in county jail, was never received by clerk of Superior Court, since risk of nondelivery was required to be borne by defendant, in absence of proof of negligence on part of clerk or jail officials.

Appeal dismissed.

1. Criminal Law ⇐1081

The filing of notice of appeal from judgment of conviction with clerk of Superior Court within ten days specified by Rule on Appeal, is jurisdictional and not subject to qualification because of hardship. Rules on Appeal, rule 31.

2. Criminal Law ⇐1081

Late filing of notice on appeal from judgment of conviction was not excused because prior timely notice, which was allegedly deposited in place designated for deposit of mail in county jail, was never received by clerk of Superior Court, since risk of nondelivery was required to be borne by defendant, in absence of proof of negligence on part of clerk or jail officials. Rules on Appeal, rule 31.

Artis Martiz, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., San Francisco, for respondent.

PETERS, Presiding Justice.

[1] By information Artis Martiz was charged in two counts with having violated section 11500 of the Health and Safety Code, that is, that on January 4, 1954, and again on January 5, 1954, he had unlawfully sold and furnished narcotics. One Willie Scott was jointly charged as to the count relating to January 4, 1954, and each accused was charged with a prior conviction. Scott pleaded guilty, but Martiz, although admitting the prior, pleaded not guilty to the two main charges. The jury found Martiz guilty on both counts. Judgment and sentence were entered April 8, 1954. On June 18, 1954, Martiz filed a notice of appeal from the judgment. Rule 31 of the Rules on Appeal requires that in criminal cases a written notice of appeal must be filed "with the clerk of the superior court within 10 days after the rendition of the judgment". The filing of such notice within the time specified is jurisdictional and not subject to qualification because of hardship. People v. Dawson, 98 Cal.App.2d 517, 220 P.2d 587; People v. Lewis, 219 Cal. 410, 27 P.2d 73.

Appellant recognizes that the notice of appeal was filed too late, but contends that such late filing should be excused for the following reasons: On May 10, 1954, appellant placed in the hands of the mail clerk at San Quentin an affidavit directed to the District Court of Appeal, First Appellate District. It is there averred that "on Monday, April 12th, 1954, as a prisoner in the Alameda County Jail, he prepared a Notice of Appeal, and deposited it at the designated place prescribed for picking-up mail." It is then averred that he assumes "that the Court had neglected, or overlooked, or did not receive the Notice of Appeal" and for those reasons "he is asking the Court to notify him of any action taken, as the result of his Notice of April 12th, 1954. If no action was taken, he requests the Court to grant him relief from the loss of ten (10) days appeal." A copy of this affidavit was mailed to the Alameda County Clerk.

The original affidavit was not received by the clerk of this court, but the copy was received by the trial court clerk on May 18,

1954. On June 4, 1954, the appellant wrote the clerk of the trial court telling him that he had directed the affidavit to the appellate court by mistake, and requesting advice. This letter was apparently given to Judge Quayle, who had tried and sentenced appellant, because on June 11, 1954, the judge notified appellant by letter that the records of the trial court in his case indicated that no notice of appeal had been received at any time. The judge suggested that the appellant file such a notice, and then leave it up to the appellate court to determine whether such notice was timely. Appellant thereupon filed the notice of appeal on June 18, 1954.

[2] Obviously, the notice of appeal was filed too late, not having been filed until 71 days after the rendition of the judgment. The late filing cannot be condoned on the showing made by appellant. All that the affidavit avers is that within the required 10 days, a notice of appeal was deposited in the place designated for picking up mail. It is not averred that the notice was handed to any official of the county jail or that such official was negligent in its handling. This is not a case of a letter being delayed and then being delivered late. In this case the letter containing the purported notice of appeal was never received. We do not know to whom or how the letter was addressed. In the absence of proof of negligence on the part of the court or jail officials, the risk of non-delivery must be borne by the appellant. This would be so even though it had been averred, which it was not, that the notice was deposited in the mail, properly stamped and addressed. As was said in People v. Slobodion, 30 Cal.2d 362, 367, 181 P.2d 868, 871: "* * * depositing the notice in the mail is not a filing, and it has been expressly held that section 1013 of the Code of Civil Procedure, providing that in case of service by mail the service is complete at the time of deposit, has no application to a notice of appeal. McDonald v. Lee, 132 Cal. 252, 64 P. 250; Estes v. Chimes, 40 Cal.App.2d 41, 104 P.2d 74."

It is true that in some cases it has been held that late filings of notices of appeal may be excused where it could be held that there had been a constructive filing of the notice within the 10-day period. Thus, in People v. Slobodion, supra, the appellant within the 10-day period handed his letter containing the notice of appeal, properly addressed, to an employee of the prison in charge of the mail. This prison official negligently failed to mail it within the 10-day period. The court held that the appellant should not be deprived of his right of appeal because of the negligence of the state employee, and therefore concluded that the notice had been constructively filed with the county clerk by delivery to the prison mail clerk. Similarly, in People v. Frye, 117 Cal.App.2d 101, 255 P.2d 105, the appellant delivered his notice to the mail clerk of the state prison on the 9th day and requested that it be forwarded, but, due to delay in the prison, it was not mailed until the 13th day. This court held the filing timely. See also People v. Aresen, 91 Cal. App.2d 26, 204 P.2d 389, 957. In People v. Calloway, 127 Cal.App.2d 504, 274 P.2d 497, the appellant relied on assurances of the prison officials, which were false, that he would have time to file after release from quarantine. The filing, three days late, was accepted.

Other cases to the same effect could be cited. All of them involve situations where a bona fide effort to file was made within the 10-day period, the actual notice so prepared was received a few days late, and the late filing was caused by the acts of the prison officials. In the instant case all that appears is that the notice was prepared within time and deposited at the spot in the county jail designated for the picking up of mail. The notice was never received. If it had been deposited in a mail box, appellant would have assumed the risk of non-delivery. Here, there was nothing more. No official of the jail is charged with having received the letter, or having delayed it, or in having misled the appellant. Under such circumstances, the appeal was filed too late.

The notice of appeal having been filed too late, the appeal must be and is dismissed.

BRAY and FRED B. WOOD, JJ., concur.

130 Cal.App.2d 616

The PEOPLE of the State of California, Respondent,

v.

Alfred PECHAR, Appellant.

Crim. 3027.

District Court of Appeal, First District, Division 2, California.

Feb. 7, 1955.

Hearing Denied March 9, 1955.

Prosecution for violation § 288 Penal Code. The Superior Court, City & County of San Fransisco, Melvyn I. Cronin, J., sitting without jury, entered judgment of conviction. Accused appealed. The District Court of Appeal, Dooling, J., held that under constitution, accused's right to trial by jury could only be waived by use of language, and where transcript showed no expression of waiver by accused personally, waiver by accused's counsel was not sufficient.

Judgment reversed.

1. Jury ⇐29(6)

Provision of constitution which requires waiver of trial by jury by accused in criminal prosecution to be "expressed in open court by defendant and his counsel" requires an express as distinguished from an implied consent to waiver by accused personally, as well as by his counsel. West's Ann.Const. art. 1, § 7.

2. Jury ⇐29(6)

The right to trial by jury in a criminal case is a sacred one and the method of waiver provided in constitution must be strictly followed. West's Ann.Const. art. 1, § 7.

3. Trial ⇐18

The common method of conducting all court proceedings is by the use of language. West's Ann.Const. art. 4, § 24; West's Ann. Code Civ.Proc. § 1884.

4. Jury ⇐29(6)

Purpose of requirement of constitution that waiver of right to trial by jury be expressed by defendant in open court is to make it clear beyond any possibility of doubt that defendant did affirmatively waive his constitutionally guaranteed right to trial by jury. West's Ann.Const. art. 1, § 7.

5. Jury ⇐29(6)

In criminal prosecution accused's waiver of right to trial by jury must be made by use of language. West's Ann.Const. art. 1, § 7.

6. Jury ⇐29(6)

In prosecution for violation of § 288 Penal Code, where accused was tried by court without jury, and record did not show any expression of waiver of right to trial by jury by defendant personally, waiver by accused's counsel was not sufficient. Pen. Code § 288; West's Ann.Const. art. 1, § 7.

Wainwright & Racanelli, Harry S. Wainwright, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of the State of California, Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., San Francisco, for respondent.

DOOLING, Justice.

[1, 2] Defendant appeals from a judgment of conviction of violating Penal Code section 288 rendered by the court sitting without a jury. At the outset appellant presents the argument that the record does not show a waiver of jury trial in the manner provided in Art. I. sec. 7 of the California Constitution, which requires such waiver to be "expressed in open court by the defendant and his counsel". This has been construed repeatedly to require an express as distinguished from an implied consent to the waiver by the defendant personally, as well as by his counsel. People v. Garcia, 98 Cal.App. 702, 277 P. 747; People v. Wilkerson, 99 Cal.App. 123, 278 P. 466; People v. Spinato, 100 Cal.App. 600, 280 P. 691; People v. Woods, 126 Cal.App. 158, 14 P.2d 313; People v. Washington, 95 Cal.App.2d 454, 213 P.2d 70. The right to trial by jury in a criminal case is a sacred one and accordingly the method of waiver provided in the constitution must be strictly followed. For this reason "it is necessary that the defendant personally express in open court that he consents to a

waiver of a trial by jury". People v. Washington, supra, 95 Cal.App.2d at page 455, 213 P.2d at page 71. Even in civil cases statutes providing for waiver of jury trial must be strictly followed. People v. Metropolitan Surety Company, 164 Cal. 174, 128 P. 324.

The reporter's transcript showed no expression of waiver by defendant personally. It showed only a waiver by appellant's counsel and by the district attorney. The record showed in this respect the following:

"The Court: Does the defendant waive trial by jury?

"Mr. Wainwright (Appellant's Attorney): Yes, sir.

"The Clerk: Do you consent, Mr. District Attorney?

"Mr. Rudden: Surely."

A motion to augment the record was granted by this court on the affidavit of Mr. Rudden, the prosecuting attorney, that when the court asked "Does the defendant waive trial by jury?" and after his counsel answered "Yes, sir", the defendant "moved his head downward in a nodding motion." This affidavit was supported by one of the trial judge to the effect that, while he had no independent recollection, it has been his custom always to require affirmative action from the defendant personally waiving a jury. From the custom the trial judge concluded: "It is my sincere belief that this custom was followed in the case of People v. Pechar * * *."

Affidavits of appellant and his attorney were filed in which they asserted that they had no recollection of appellant moving his head as stated in Mr. Rudden's affidavit.

Appellant argues that the language of the constitution "*expressed* in open court by the defendant" can only be satisfied by the defendant's consent given verbally. The attorney general argues that consent may be "expressed" by conduct clearly indicating consent as well as by words. The verb "express" can bear both meanings. It is defined in Webster's New International Dictionary, 2d Ed.: "To represent in words, utter; as to *express* an opinion" (so far the definition refers to verbal expression only, but it continues) "hence, to make known or manifest; to give or convey a true impression of * * * to show; signify * * *" (definitions which may be satisfied by other than verbal communication).

The real problem is which meaning of "expressed" was intended when the constitution was amended in 1928 to permit the waiver of a jury trial in criminal cases.

[3, 4] The common method of conducting all court proceedings is by the use of language. The constitution requires all court proceedings to be conducted in the English language, Cal.Const. Art. IV, sec. 24, and where a witness does not understand and speak the English language an interpreter must be sworn to interpret for him, Code Civ.Proc. sec. 1884. The careful trial judge and the careful attorney always admonish a witness who attempts to answer a question by a motion of the head to put his answer into words "so that the reporter can get it." The purpose of requiring the consent to the waiver to be *expressed* by the defendant in open court is to make it clear beyond any possibility of doubt that the defendant did affirmatively waive his constitutionally guaranteed right to trial by jury.

The facts of this case illustrate the uncertainty which can arise if the waiver is indicated by the defendant in any other way than by the use of language. One person, the prosecuting attorney, swears that he remembers that the defendant "moved his head downward in a nodding motion." The other three, including the trial judge, have no recollection of this having occurred. The court reporter made no record of any such action (the affidavits are in dispute as to whether the reporter could see the defendant at the time). If the defendant had waived the jury verbally such a situation would not be likely to arise. To this may be added the fact that any motion of the head or body must be *interpreted* by the one who sees it. It is much more liable to misinterpretation or differences of interpretation than an expression in words.

The attorney general suggested on oral argument that if the waiver of a jury trial must be expressed in words no deaf-mute could ever waive a jury trial. This is not

so. A deaf-mute who spells out his words by the use of his fingers is expressing his thoughts in words as truly as any normal person who uses his vocal chords in oral speech.

[5, 6] Having in mind the sanctity of the right to trial by jury in criminal cases and the evident purpose of the constitutional provision that no defendant should be deprived of that right unless he unequivocally and personally expressed his consent to such waiver in open court, we have concluded that such waiver must be expressed by the defendant in the manner which can involve no question of misinterpretation, doubt or uncertainty at the time or afterwards, i. e., that such waiver must be by the use of language.

The case is a close one depending entirely on the testimony of a five year old child but our conclusion on the question of waiver of trial by jury makes it unnecessary to consider the other points raised.

Judgment reversed.

NOURSE, P. J., and KAUFMAN, J., concur.



130 Cal.App.2d 639

David S. ROBERTSON, Plaintiff and Appellant,

v.

Anna A. BOGERT, Defendant and Respondent.

Civ. 20610.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1955.

Purchaser brought action against vendor to recover damages for refusal of vendor to convey realty in accordance with contract, on ground that refusal was because of bad faith. The Superior Court, Los Angeles County, Allen W. Ashburn, J., entered judgment for vendor, and purchaser appealed. The District Court of Appeal, Fox, J., held that evidence sustained finding that vendor was not guilty of bad faith and that therefore purchaser was not entitled to recover.

Judgment affirmed.

1. Appeal and Error ⇐843(2)

If a judgment is amply supported by findings, which are sustained by sufficient evidence, questions relative to other findings become immaterial on appeal and may be disregarded.

2. Appeal and Error ⇐854(2)

A judgment will not be reversed because certain conclusions of law are not legally sound, if the judgment is in fact a proper one.

3. Appeal and Error ⇐854(2)

The District Court of Appeal does not reverse for what it regards as bad logic, but for what it considers bad law.

4. Appeal and Error ⇐854(2)

If ultimate conclusion, on which judgment rests, is not erroneous in view of facts found, fact that some of the conclusions of law are not properly drawn from the facts is no ground for reversing the judgment.

5. Vendor and Purchaser ⇐343(4)

If refusal of vendor to convey realty to purchaser pursuant to contract obligation, is found to be without just cause or excuse, such refusal may be sufficient to show bad faith, so as to entitle purchaser to damages. West's Ann.Civ.Code, § 3306.

6. Vendor and Purchaser ⇐352

Question whether vendor is guilty of bad faith in refusing to convey realty to purchaser pursuant to contract obligation, so as to entitle purchaser to recover damages, is a factual question. West's Ann.Civ. Code, § 3306.

7. Vendor and Purchaser ⇐350

In action by purchaser against vendor to recover damages for refusal of vendor to convey realty in accordance with contract, on ground that refusal was because of bad faith, burden of proving that vendor acted in bad faith rested on purchaser. West's Ann.Civ.Code, § 3306.

8. Vendor and Purchaser ⊜350

In action by purchaser against vendor to recover damages for refusal of vendor to convey realty in accordance with contract, on ground that refusal was because of bad faith, evidence sustained finding that vendor was not guilty of bad faith and that therefore purchaser was not entitled to recover. West's Ann.Civ.Code, § 3306.

Robertson, Harney & Behr, Los Angeles, for appellant.

Shepherd & Shepherd, Los Angeles, for respondent.

FOX, Justice.

Plaintiff appeals from a judgment denying his right to recover damages for an alleged breach of a contract to convey real property.

The present litigation is a sequel to a suit for specific performance of the same contract which plaintiff commenced in April, 1952. In that suit, defendant [1] sought rescission and cancellation of the contract. The judgment in that case denied plaintiff relief "by way of or in the nature of specific performance" upon findings, among others, that the agreement was not just, fair or reasonable as to the defendant because the contract price was $50,000 and the value of the property $64,000. The affirmative relief of cancellation and revision prayed for by defendant was likewise denied. The judgment in that suit (hereafter called the first action) is now final.

On July 3, 1953, plaintiff filed the present action for damages for breach of a written contract for the sale of certain real property owned by defendant for the sum of $50,000, alleging that at the time of defendant's breach the property had a market value of $64,000, and that he has been damaged in the sum of $14,000. Although it is provocative of serious doubt as to whether the complaint adequately alleges bad faith on the part of defendant, this possible deficiency in the pleading was not objected to below in any fashion. The answer denies the existence of a contract, defendant asserting that although the instrument is signed by her and Mr. Bogert it was signed in plaintiff's behalf by an agent lacking written authority, Civil Code, sec. 2309; further, it is alleged, that prior to the commencement of any action, defendant gave notice to plaintiff that she would not perform thereunder and withdrew the offer. By way of further defense and in bar of plaintiff's action, defendant also pleaded the final judgment in the first action as res judicata and as constituting an election of remedies.

Upon the trial of the present matter, virtually the only evidence relied upon by the parties was the judgment roll in the first action.[2] In its findings in the instant case, the trial judge in large measure almost literally incorporated many of the findings of fact recited in the first action. So far as they are germane for the purpose of this decision, the findings in the case before us present the following picture of the transaction: Defendant Anna Bogert and her husband were the owners of 320 acres of land in Lancaster, California. Plaintiff was an attorney at law interested in purchasing said property in behalf of himself and two other persons. Ralph Boyd was a licensed real estate broker and a partner in the real estate brokerage firm of Boyd & White, located in Lancaster. Prior to March 17, 1952, Boyd undertook to act as plaintiff's agent in an endeavor to procure the Bogerts to sell their Lancaster property for the sum of $50,000 on terms which would entail a down payment as small as $5,000. Boyd was not to receive any specified compensation

1. Originally, Anna Bogert and C. D. Bogert were the parties defendant. Upon the latter's decease, Mrs. Bogert was made, by stipulation, the sole defendant. For convenience, we will at all times refer to defendant in the singular, except when the term "Bogerts" is used.

2. It was stipulated that defendant had employed an attorney to defend the first action, to whom she paid a fee of $1,000; that she paid an appraiser a reasonable sum, to wit, $600 in connection with the defense of said action; and that she made numerous trips from her home in Lancaster to Los Angeles for the same purpose.

from plaintiff or his associates for his services in this transaction; instead, Boyd's services were being rendered in the anticipation that he would be compensated through the sale to plaintiff and his associates of other real property.

Boyd had known the Bogerts for about two years prior to March 17, 1952, and had acted as their agent in the sale of real property. The Bogerts were inexperienced in real estate transactions and had full confidence in Boyd's judgment, honesty and integrity. For about six months prior to March, 1952, the Bogerts resided in San Luis Obispo County. During this time, Lancaster was the scene of great activity in the real estate field. The Bogerts, however, residing at a distance therefrom, were not familiar with the current value of their property at the time of the transaction subsequently related. Mr. Bogert was so ill from a heart condition during the period beginning March 13, 1952, and continuing subsequent to March 25, 1952, that he was precluded from transacting business of any substantial extent. All of these factors with relation to the situation of the Bogerts were well known to Boyd.

Boyd undertook to negotiate with the Bogerts for the sale of their 320 acres to plaintiff. In this transaction, Boyd acted also as the agent for the Bogerts, who knew he was simultaneously representing the plaintiff, but had no other knowledge regarding the basis of Boyd's agency relationship with the plaintiff. As a result of these negotiations, between March 18, and March 20, 1952, the Bogerts each signed their names to an instrument by whose terms they agreed to sell plaintiff their acreage for the sum of $50,000, of which $5,000 was to be deposited as a down payment in escrow prior to the close thereof, plaintiff to pay the balance of $45,000, which was to be secured by a note and trust deed, in amounts of $5,000 or more per year, plus six percent on the unpaid balance. This instrument was signed by Boyd, as agent, on behalf of plaintiff, who had orally authorized Boyd to execute the agreement. Boyd's authority to execute this agreement was at no time evidenced by any writing subscribed by plaintiff. The instrument also referred to the deposit by plaintiff of a check for $500, of which, however, Boyd was the payee.

The findings further recite that although the court in the "first action" found it not to be true that the Bogerts' consent to execute the above agreement was obtained by fraud on the part of Boyd, that court did find that, while acting as plaintiff's agent in the negotiations with the Bogerts, Boyd represented that the purchase price of $50,000 was a fair price and was the fair market value of their land, and urged them to sell; that Boyd well knew at the time that $50,000 was not a fair price and that a fair market value of said property was a sum in excess of $60,000; and in urging the Bogerts to sell, Boyd well knew that the price was inadequate, and it was to the disadvantage of the Bogerts to sell, in that he knew that the property could be sold at a price in excess of $60,000.

The findings proceed to relate the subsequent events as follows: On about March 22, 1952, Boyd, as plaintiff's agent, caused an escrow to be opened relating to the sale of the Bogert property and directed the preparation of escrow instructions. These instructions provided that any portion of the 320 acres "for which the buyer has wholly paid would be released from the lien of the trust deed securing a note of $45,000 at the rate of $156.25 per acre." No such provision appeared in the sales contract. These instructions were never signed by the Bogerts. Boyd also endorsed over to the escrow agent the check of $500, which at all times was retained by the escrow holder. No instructions were ever given either by the Bogerts or plaintiff relative to the disposition of the check and the Bogerts never received that check or any part of the proceeds thereof.

On about March 25, 1952, the Bogerts refused to enter the above escrow and notified plaintiff that they would not carry out the sale of the property under the terms of the above agreement and that they withdrew the offer to sell their property on those terms. At the same time, they made a written offer to plaintiff to sell the property to him if he would pay in addition to the $50,-

000, the sum of approximately $8,325.00. Thereupon, on April 2, 1952, plaintiff filed the "first action" for specific performance, which was denied him after a five day trial, on the ground that the contract providing for a consideration of $50,000 as the purchase price of property having a market value of $64,000 was not fair or reasonable.

The court's last finding is that "the sellers had just cause for refusing to and not performing the alleged agreement of sale, and *were not guilty of bad faith* in refusing to and not performing the same." (Italics added.)

Plaintiff contends that certain of the findings of fact are in truth conclusions of law, and that these "conclusionary" findings, as well as certain other conclusions are erroneous and against the law. Some of the principal findings and conclusions thus attacked are (1) the finding that no contract was formed because the instrument of sale was executed for plaintiff by an agent lacking written authority (see Civ.Code, sec. 2309); (2) the conclusion that the contract was invalid under the provision of section 1624 of the Civil Code in that it was executed by an agent of plaintiff who was not authorized in writing to subscribe the instrument; (3) the conclusion that the sellers received no consideration for their promise to sell; (4) the conclusion that before plaintiff ratified the agreement of his orally authorized agent by bringing suit the proposed sellers withdrew the offer therein contained; (5) the finding that plaintiff rejected the offer contained in the instrument of purported sale by directing the escrow agent to prepare instructions differing from the terms and conditions therein recited; and (6) that plaintiff failed to perform the obligations on his part to be performed under the alleged agreement in that he did not place $5,000 in escrow, nor did he execute the note and trust deed in the amount of $45,000 referred to therein. Certain other findings are objected to on the ground that they find no support in the evidence.

[1–4] In view of the fact that the court concluded plaintiff was not entitled to a recovery of the difference between the price agreed to be paid and the actual value of the property to be conveyed at the time of the breach because the Bogerts were found not to be guilty of bad faith in refusing to perform, nor was plaintiff entitled to any other damages, it becomes unnecessary, if such finding is supported by the record, to consider in detail the validity of the findings and conclusions previously enumerated. It is fundamental that if a judgment is amply supported by findings which are sustained by sufficient evidence, questions relative to other findings become immaterial upon appeal and may be disregarded. Logan v. Forster, 114 Cal.App.2d 587, 602, 250 P.2d 730; American Nat. Bank v. Donnellan, 170 Cal. 9, 15, 148 P. 188; Moore v. Mosher, 88 Cal.App.2d 324, 325, 198 P.2d 714; Guild v. Stockton Ice Rink Co., 77 Cal.App.2d 17, 22–23, 174 P.2d 338. Further, it has been consistently held that a judgment will not be reversed because certain conclusions of law are not legally sound, if the judgment is in fact a proper one. Spencer v. Duncan, 107 Cal. 423, 426, 40 P. 549; Platner v. Vincent, 194 Cal. 436, 444, 229 P. 24; Hammond Lumber Co. v. Gordon, 84 Cal.App. 701, 706, 258 P. 612; Fitts v. Mission Health etc. Shop, 58 Cal.App. 362, 364, 208 P. 691. As stated in Spencer v. Duncan, supra, in quoting the language of two decisions of the Supreme Court, 107 Cal. at pages, 426–427, 40 P. at page 550: " 'But we do not reverse for what we regard as *bad logic,* but for what we consider *bad law.* * * * Where some of the conclusions of law in a decision are not properly drawn from the facts found, this is no ground for reversing the judgment, if the ultimate conclusion upon which the judgment, rests is not erroneous in view of the facts found' ". (Emphasis added.)

Thus, even assuming *arguendo* that the contract between the parties was in force at the time of defendant's refusal to convey, plaintiff has failed to establish his right to the recovery of damages. Section 3306 of the Civil Code provides that the measure of damages for breach of an agreement to convey real property "is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the

difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." Clearly, there is no showing of any expense incurred in connection with the examination of title and the preparation of necessary papers, and the undisputed finding is that defendant never received the $500 which plaintiff paid to Boyd as a deposit. That money was deposited in the escrow to which defendant never became a party, and has never been claimed by defendant.

[5–8] Plaintiff's right to any recovery, therefore, must rest upon his assertion that he is entitled to the damages outlined in section 3306 of the Civil Code because of the bad faith of the Bogerts in refusing to convey. It is true, of course, that a refusal to convey property pursuant to contract obligation, if such refusal is found to be without just cause or excuse, may be sufficient to show bad faith. Farnsworth v. Hunter, 11 Cal.2d 27, 77 P.2d 840. However, the question of bad faith is a factual one. Engasser v. Jones, 88 Cal.App.2d 171, 177, 198 P.2d 546; Hamaker v. Bryan, 178 Cal. 128, 172 P. 391. The burden of proving defendant had acted in bad faith rested upon plaintiff. Wilson v. Rosenkranz, 112 Cal.App. 511, 513, 297 P. 44; Cook v. Nordstrand, 83 Cal. App.2d 188, 197, 188 P.2d 282. Plaintiff's attack on the finding that defendant did not act in bad faith is not supported by the record. On the contrary, there is substantial evidence to support that finding. This evidence, as carried into the findings, is that the Bogerts were inexperienced in real estate transactions, lived at a distance from the site of their property, and were unaware of the current value of their property caused by the recent upsurge of activity in the real estate market in Lancaster; that at the time of the transaction, Mr. Bogert's cardiac condition inhibited his ability to engage in business dealings; that Boyd, who was their agent as well as plaintiff's and in whose probity and honesty they trusted, was aware of all those facts; that he represented to them that $50,000 was a fair price and urged them to sell to plaintiff though he knew that the price was inadequate and that it was to their disadvantage to sell at that price and that their property could be sold for more than $60,000. It is thus clear that while Boyd's conduct was found, somewhat inexplicably, to fall short of fraud, there was present in connection with his procurement of the contract a substantial degree of imposition and overreaching on his part. In the light of these probative facts, the court was fully warranted in finding an absence of bad faith on defendant's part in refusing to convey the property and under accepted rules of appellate review we may not disturb such finding.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



Mimi Stone SEFTON, Plaintiff and Appellant,

v.

Selbert L. SEFTON, Defendant and Respondent.

Civ. 16130.

District Court of Appeal, First District, Division 2, California.

Feb. 4, 1955.

Hearing Granted March 30, 1955. *

Divorced wife brought action against divorced husband to recover alimony payments. The Superior Court, City and County of San Francisco, Preston Devine, J., entered judgment adverse to divorced wife, and she appealed. The District Court of Appeal, Dooling, J., held that a judgment annulling a marriage, standing alone, does not constitute either conclusive or prima facie evidence of the invalidity of the marriage as to third parties, and, as to third parties validity of judgment must be supported by independent proof and must be relitigated with burden of proof on party

* Opinion vacated 291 P.2d 439.

asserting validity of annulment judgment, and that therefore the introduction in evidence by divorced wife of judgment of annulment of her marriage to third person did not prove the annulment and did not entitle her to continuance of alimony payments.

Judgment affirmed.

1. Divorce ⇐247

Invalidity of subsequent marriage of divorced wife to third party, if properly proved against divorced husband, would entitle divorced wife to continue to receive alimony payments from divorced husband, since marriage void ab initio is no marriage at all. West's Ann.Civ.Code, § 139.

2. Judgment ⇐742

Ordinarily, judgment by court, which has jurisdiction, determining a status is conclusive as to the existence of the status against all persons. West's Ann.Code Civ.Proc. § 1908, subd. 1.

3. Marriage ⇐65

Statutory provision that judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them, gives judgment of nullity the characteristics of a "judgment in personam" and not the characteristics of a "judgment in rem," since judgments in personam are only binding on the parties and their privies. West's Ann.Civ. Code, § 86; West's Ann.Code Civ.Proc. § 1908, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Judgment in Personam" and "Judgment in Rem".

4. Marriage ⇐65

A judgment annulling a marriage, standing alone, does not constitute either conclusive or prima facie evidence of the invalidity of the marriage as to third parties, and, as to third parties, validity of judgment must be supported by independent proof and must be relitigated with burden of proof on party asserting validity of annulment judgment. West's Ann.Civ.Code, § 86.

5. Marriage ⇐65

Where divorced husband sought to be relieved of the obligation of making monthly alimony payments to divorced wife because of her marriage to third person, the introduction in evidence by divorced wife of a judgment annulling her marriage to third person did not prove the annulment and did not entitle her to continuance of alimony payments. West's Ann.Civ.Code, § 86.

Franklyn M. O'Brien, San Francisco, for appellant.

Sefton & Gartland, San Francisco, for respondent.

DOOLING, Justice.

This is an appeal from a judgment determining that the defendant's obligation to make monthly alimony payments to plaintiff was terminated by plaintiff's marriage to one Marble. Civ.Code, sec. 139.

Appellant entered into a ceremonial marriage with Marble on June 12, 1952. Five days later she filed a complaint for the annulment of this marriage and defendant Marble having appeared and consented that the matter might be heard as a default, after taking testimony the court made and entered a judgment of annulment which decreed that the marriage to Marble was null and void *ab initio*.

Respondent in this action defended on the ground that his obligation to pay alimony was terminated by appellant's marriage to Marble. Appellant introduced the decree of annulment and rested on this issue. Respondent introduced no evidence on the subject. The trial court found that respondent's obligation to pay appellant alimony was terminated by her marriage to Marble.

[1] We may assume that the invalidity of her subsequent marriage properly proved against respondent, would entitle appellant to continue to receive alimony payments from him, since a marriage void *ab initio* is in law no marriage at all. See Sleicher v. Sleicher, 251 N.Y. 366, 167 N.E. 501.

The problem in this case is presented by sec. 86, Civil Code, which provides: "A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them."

[2, 3] Normally a judgment by a court having jurisdiction determining a status is conclusive as to the existence of the status against all persons. Sec. 1908(1), Code Civ.Proc.; Restatement, Judgments, sec. 74(1). However sec. 86, Civ.Code, expressly limits the conclusive effect of a judgment annulling a marriage to the parties and their privies. This gives such a judgment the characteristics of an *in personam* and not those of an *in rem* judgment, because it is the accepted rule in California and elsewhere that judgments *in personam* are only binding on the parties and their privies. Sec. 1908(2), Code Civ.Proc.; Morris v. Fortier, 59 Cal.App.2d 132, 134–136, 138 P.2d 368; Roman Catholic Archbishop of San Francisco v. Shipman, 69 Cal. 586, 590, 11 P. 343; Restatement, Judgments, sec. 93(b).

Appellant argues that though not conclusive against respondent the judgment of annulment should create a *prima facie* case against him. Sec. 1909, Code Civ.Proc., limits the *prima facie* effect of judicial orders which are not made conclusive by sec. 1908 to the parties and their privies and in the light of that section the same effect must be given to sec. 1963, subd. 17 of that code.

[4] The several code sections taken together make it clear that a judgment annulling a marriage standing alone does not constitute either conclusive or *prima facie* evidence of the invalidity of the marriage as to third parties. It was so expressly held in Price v. Price, 24 Cal.App.2d 462, 75 P.2d 655.

[5] This does not mean, as appellant seems to suggest, that unless the judgment of annulment is given the effect of a rebuttable presumption against a third party the validity of the judgment cannot be proved against him at all. It does mean that the validity of the judgment must be supported by independent proof of the facts upon which it is based and that those facts can then be disputed by the third party by contradictory evidence. In other words as to a third party the question of the validity of the annulment decree must be relitigated, Armstrong on California Family Law, p. 95, with the burden of proof upon the party asserting the validity of the annulment decree.

Judgment affirmed.

NOURSE, P. J., concurs.

KAUFMAN, Justice.

I concur in the opinion but wish to make the following comments:

It is my view that a reasonable construction of clauses in property settlement agreements between spouses about to be divorced providing that payments to the wife will cease upon her remarriage mean exactly that. It is the fact of the ceremonial remarriage that is in the minds of the parties and causes the payments to cease under the property settlement agreement. An annulment of the remarriage by the wife can not give new life to the husband's obligation which has terminated by the remarriage.

In some cases it is months or even years before an annulment of the remarriage is sought by the wife. Is it reasonable to say that the husband's obligation of support under such an agreement can be reinstated at the whim of the wife and at a time to be set by her?

It was held in the cases of In re Estate of Gosnell, 63 Cal.App.2d 38, 146 P.2d 42 and Price v. Price, 24 Cal.App.2d 462, 75 P.2d 655, that a decree of annulment is not conclusive as to persons not parties to the action.

In Re Estate of Gosnell the widow of Gosnell remarried; after several months the marriage was annulled; she then sought a family allowance from her first husband's estate. It was held that she was not entitled to the family allowance, that she lost her right to such an allowance upon her remarriage and that the annulment was of no effect in so far as to give her a right to a family allowance.

In Price v. Price the parties made a property settlement agreement in which it was provided that the husband should pay the wife $150 per month and further provided that in the event of a divorce and remarriage of the wife the obligations of the husband would cease. The parties were divorced and the wife entered into a marriage ceremony in Mexico. Thereafter the Mexican marriage was annulled by a California Superior Court. The Appellate Court held that under sec. 86, Civil Code, the decree of the California court nullifying the Mexican marriage was not binding upon the husband and did not have the effect of obligating him to carry out the terms of the property settlement agreement.



130 Cal.App.2d 631

Atha BURNETT, Anell L. Johnson, Pink C. Horne, L. B. Edwards, Franklin H. Kay, Calvin Jones, Samuel Lucas, Lucy Williams, Plaintiffs-Respondents,

v.

F. B. BANKS, Providence Baptist Church of San Francisco, a corporation, et al., Defendants,

F. B. Banks, Providence Baptist Church of San Francisco, a corporation, Appellants.

Civ. 16041.

District Court of Appeal, First District, Division 1, California.

Feb. 8, 1955.

Rehearing Denied March 10, 1955.

Hearing Denied April 6, 1955.

Action brought to compel the holding of an election of directors of a church corporation. From a judgment for plaintiffs in the Superior Court for the City and County of San Francisco, Edward Molkenbuhr, J., the defendants appealed. The District Court of Appeal, Bray, J., held that the court had the right to order an election where property or civil rights were involved, that plaintiffs were qualified to maintain the action and the court ordered election was fairly conducted.

Judgment and decree affirmed.

1. Religious Societies ⇐9

No directors of a religious corporation whatever their number may perpetuate themselves in office by refusing to call an election.

2. Corporations ⇐283(1)

Court has a right, when it appears that a corporation election will not be held because of failure of the directors to call it, or that such directors will not conduct a free, fair and full election, to order one held under the court auspices. Corporations Code, §§ 805, 2200, 2201, 2238.

3. Religious Societies ⇐24

General rule that courts will not interfere in a religious society with reference to their ecclesiastical practices is qualified by rule that civil and property rights will be adjudicated.

4. Religious Societies ⇐9

Where no election of directors of a church corporation had been held since its incorporation and the original three directors had resigned and by-laws providing for an election had not been complied with, court had right to order the corporation to conduct an election for directors, where civil and property rights were involved. Corporations Code, §§ 805, 2200, 2201, 2238.

5. Religious Societies ⇐9

Where plaintiffs were members of a church corporation and a restraining order was issued restraining defendants from removing plaintiffs from church membership, plaintiffs could maintain an action to compel the corporation to conduct an election of directors, where property or civil rights were affected. Corporations Code, § 804.

6. Religious Societies ⇐7

Where property rights were involved court had jurisdiction to determine the validity of removal of plaintiffs from membership in a church corporation. Corporations Code, § 804.

7. Religious Societies ⇐9

Members of a church corporation cannot obstruct the policy of the State

which requires that the affairs of the corporation be managed by fairly elected directors merely by staying away from a court ordered election of directors of which due notice was given. Corporations Code, §§ 2211, 2238.

8. Evidence ⇐25(2)

It is common knowledge that population around a church located in the Third Street area of San Francisco is a quickly-changing one.

9. Religious Societies ⇐9

Evidence established that a court ordered election of directors of a church corporation was fairly conducted as required by court order where there was no evidence that any member did not attend the meeting nor any claim that person present was not a member. Corporations Code, § 2238.

10. Religious Societies ⇐9

Evidence did not establish claim of defendants that they were prevented from holding an election of directors for church corporation in 1952 because membership rolls were then in the custody of the court in another action and they were denied custody to them.

11. Equity ⇐65(1)

Evidence did not justify denial of relief to plaintiff seeking an order for an election of directors of a church corporation on the ground that they came into court with unclean hands.

12. Pleading ⇐205(2)

In action seeking an election of directors of a church corporation, complaint as against a general demurrer sufficiently alleged the plaintiffs' membership.

13. Trial ⇐397(5)

Failure of court to make findings on matters which were not germane to the issues is not error.

Edward D. Mabson, San Francisco, for appellants.

Delany, Fishgold, Freitas & Rowe, San Francisco, for respondents.

BRAY, Justice.

Defendants Providence Baptist Church of San Francisco, a nonprofit corporation, and F. B. Banks, its alleged pastor, appeal from a judgment ordering an election of directors of the corporation and from the decree pursuant to report of referee determining the results of the election.

Questions Presented.

They are innumerable, many of which concern other actions between the parties, or some of them, not before this court. However, the main questions, of which some of the others are a part, are (1) the right of the court to order and conduct an election of directors in a church corporation, and whether such election was legally conducted. (2) Do plaintiffs have the right to maintain this action?

Record.

Plaintiffs alleged and the court found, that there is a church body known as "Providence Baptist Church" and a California nonprofit corporation also known as "Providence Baptist Church"; (that there is no dispute here between plaintiffs and the church body); that both plaintiffs and the individual defendants are members of the corporation; that since its incorporation in July of 1945 there has never been an election of directors; that two of the three directors named in the articles of incorporation have resigned, and no one elected to take their places; that defendant Banks, the third of said directors, purported to appoint as successors to the two who resigned, defendants Parker and Johnson, and although on numerous occasions plaintiffs and other corporate members have requested defendants to hold an election of directors and a meeting to promulgate by-laws, there being none, defendants have refused so to do; that it is necessary that an election of directors be held but that a fair election cannot be held if its conduct is in defendants' hands; that defendants intend to dismiss illegally plaintiffs as members of said corporation. After a trial, the court ordered that an election of directors under the supervision of a referee appointed by the court be held and that defendants in the meantime

be restrained from attempting to remove plaintiffs as members of the corporation. An election was so held. The referee reported the unanimous election of plaintiffs Burnett, Jones and Johnson. The court confirmed the report of the referee and declared said persons the duly elected directors of the corporation.

1. Right to Order Election.

[1] It is conceded that no election of directors has been held since the incorporation in 1945 and that two of the original three directors resigned in 1947. There is a conflict as to whether Banks, the third director, under the authority of Corporations Code, § 9502, validly filled the vacancies. The court resolved this conflict against defendants' contention that he did. It is unnecessary to detail the evidence on this subject, for whether he did or did not is unimportant on the question of whether an election was necessary. Certainly no directors of a corporation, whatever their number, may perpetuate themselves in office by refusing to call an election. Again there is a conflict as to whether the purported directors validly adopted by-laws September 16, 1952. This conflict, too, the court resolved against defendants. This, too, is unimportant here, as the purported by-laws provided for an election to be held the last Thursday in October, 1952. This was not done. There can be no question under the evidence of the necessity of holding an election.

The evidence shows that there is a bitter antagonism between defendant Banks, who as pastor organized the church, defendants Parker, Johnson and Fite who support him, on the one hand, and plaintiffs and apparently all other members of the church on the other. Defendant Banks, whom the court in Providence Baptist Church v. Superior Court, 40 Cal.2d 55, 61, 251 P.2d 10, found had been removed as pastor, took the position that he as pastor had the real control of the corporation as well as the church body. The evidence clearly supports the finding here (referred to in the above cited case) that a full, fair and free election cannot be held if it is to be conducted by either of the factions involved.

We are dealing, not with the church body itself, but with a corporation organized under the California corporation laws. Section 2200, Corporations Code, provides for an annual meeting of shareholders at which, § 2201, directors shall be elected. Section 805 states that the directors named in the articles of incorporation shall "hold office until the next annual meeting of shareholders and until their successors are elected, either at an annual or a special meeting of shareholders." Other directors shall "hold office until the next annual meeting, unless the articles provide for a shorter term, and until their successors are elected." Thus it is contemplated that there should be annual election of directors. In the chapter dealing with elections of directors and with court actions to determine their validity appears section 2238: "The court may determine the person entitled to the office of director or may order a new election to be held or appointment to be made, and direct such other relief as may be just and proper."

[2, 3] It is clear that the court has the right when it appears that a corporation election will not be held because of the failure of its directors to call it, or that such directors will not conduct a free, fair and full election to order one held under court auspices. This is not an ecclesiastical matter but a corporation one. But even if it were ecclesiastical, as the corporation owns real and personal property, the matter would come within the qualified rule set forth in Rosicrucian Fellowship v. Rosicrucian, etc., Church, 39 Cal.2d 121, 131, 245 P.2d 481, 487: "The general rule that courts will not interfere in religious societies with reference to their ecclesiastical practices stems from the separation of the church and state, but has always been qualified by the rule that civil and property rights would be adjudicated." See also Providence Baptist Church v. Superior Court, supra, 40 Cal.2d 55, 60, 251 P.2d 10.

2. May Plaintiffs Maintain This Action?

[4, 5] October 9th, the date of the filing of the complaint, plaintiffs were members of the church body. The same day a restraining order was issued restraining defendants from removing plaintiffs from church mem-

bership. Apparently believing that the removal of members from the church body (as distinguished from the corporation, although under the articles of incorporation only church members are shareholders of the corporation) was purely an ecclesiastical matter and could not be interfered with by the court, the Board of Deacons (appointed by defendant Banks and of which defendants Johnson and Fite were two of the five members) disregarded the injunction and attempted to remove plaintiffs from membership from the church body. Therefore, claim defendants, the plaintiffs lost their right to maintain this action and to be elected directors of the corporation. As to the latter contention,—under section 804, Corporations Code, it is not required that a director of a nonprofit corporation be a shareholder,[1] so even if the three plaintiffs elected directors lost their status as members of the church, those three alone as directors of the corporation could maintain this action. The evidence as to whether under church usages and customs, the deacons must be elected by the congregation rather than as here, appointed by the pastor, is highly conflicting. The trial court resolved that conflict against defendants. But defendants claim this was purely an ecclesiastical question with which a court may not concern itself. It would appear that because of the property rights involved here that rule would not apply to the question of membership in the corporation, at least, as distinguished from membership in the church. "The courts of some jurisdictions, however, will review the validity of church or corporate regulations governing expulsion and the accordance of expulsion proceedings therewith, and *such review is always in order where a property or civil right is affected.*" 20 A.L.R.2d 430, emphasis added. In Providence Baptist Church v. Superior Court, supra, 40 Cal.2d 55, 61, 251 P.2d 10, 14, the court said: "Apparently the church is the congregational type in which its affairs are controlled by the members. That type exists 'where each local group is in charge of all its affairs through majority vote of its members and there is no control from above.' Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church, supra, 39 Cal.2d 121 [133], 245 P. 2d 481, 488." The court indirectly so found here. "In the independent or congregational type of polity, for example, 'in all matters of procedure, or discipline, *the will of the majority of its members in good standing is exclusive, with no superior or directing power.*' Briscoe v. Williams (1946 Mo. App.), 192 S.W.2d 643 (Missionary Baptist Church)," 20 A.L.R.2d 432, emphasis added.

[6] While it is doubtful if the court in attempting to enjoin the deacons from removing plaintiffs from church membership had the power to do so, as being an interference in strictly ecclesiastical matters, it did have the power in view of property rights involved in the corporation question, to determine the validity of the removal as it affected their membership in the corporation. As said in Providence Baptist Church v. Superior Court, supra, 40 Cal.2d 55, 60–61, 251 P.2d 10, 13: "As long as civil or property rights are involved, the courts will entertain jurisdiction of controversies in religious bodies although some ecclesiastical matters are incidentally involved. * * That there are civil and property rights present is apparent from the findings and judgment. The real property of the organization and funds collected are involved." See also 20 A.L.R.2d 429, 430.

3. Conduct of the Election.

[7–9] In evidence in another case was the church membership roll containing some 3,000 names. The referee reported that he sent notices of the election to the members of the church, apparently to the names shown on that roll. Approximately 106 persons appeared at the time and place mentioned. The referee required all persons before voting to swear that they were members in good standing of the church. When the referee called for nominations, defendants Parker and Johnson and two other persons alleged to be friends of defendants

1. Unless the articles of incorporation or by-laws require it. Here neither the articles of incorporation nor the purported by-laws so require.

were nominated, in addition to plaintiffs Burnett, Jones and Johnson. However, the first-mentioned four declined the nominations and the three plaintiffs were elected without a dissenting vote. Defendants contend that the by-laws which they claim were previously adopted required the presence of a majority of the members. Section 2211 of the Corporations Code provides to the same effect, in the absence of by-laws. However, this was an election ordered under section 2238. Defendants and their supporters, if any, cannot be permitted to obstruct the policy of the state which requires that the affairs of a corporation be managed by fairly elected directors, merely by staying away from a court-ordered election of which due notice was given. In order that "just and proper" relief be given as required by section 2238, section 2211 (calling for a quorum) and the by-laws, if any, must be subject to the provisions of the first section. "An interpretation which gives effect is preferred to one which makes void." Civ.Code § 3541. Moreover, there is no showing that there was not a quorum present. The membership list was an old one. Some of the persons on it had died. Others have joined other churches. The church is located in the Third Street area of San Francisco. It is common knowledge that the population there is a quickly changing one. With such a fluid membership all that could reasonably be expected to be done by the referee was to send out the notices and vote those who responded and claimed membership. There is no evidence that any member did not attend the meeting called by the referee nor any claim that any person present was not a member (other than plaintiffs, whose membership has heretofore been discussed).

Other Questions.

[10] Defendants claim that they were prevented from holding an election in 1952 because the membership rolls were then in custody of the court in another action and they were denied access to them. The record shows that at no time did they apply to any court for either the rolls themselves or permission to inspect them. At most they applied to a deputy county clerk to inspect them "to see if those had been tampered with * * *." No demand was made of anybody that the claimed directors be permitted to see the rolls for the purpose of calling an election.

[11] Defendants contend that plaintiffs do not come into court with clean hands and therefore all relief should be denied them, citing DeGarmo v. Goldman, 19 Cal.2d 755, 123 P.2d 1. This charge of unclean hands is based on defendants' contention that in the church body's internecine warfare plaintiffs were at fault and defendants were not. Assuming that disagreement with the conduct of the church's affairs by its pastor could be a basis of a charge of unclean hands, it should be pointed out that the evidence here indicates and the court indirectly found that the fault was with defendants rather than with plaintiffs.

[12] Although the complaint does not directly allege that plaintiffs are members of the corporation and would have been specially demurrable therefor, it alleges membership sufficiently to get by general demurrer. For example, it alleges that defendants were "attempting to terminate the membership of said plaintiffs with said corporation" and unless restrained defendants will "expel the said plaintiffs * * *".

Other contentions made by defendants concerning the right of the directors of a corporation to manage its affairs, etc., are beside the point here. This action is brought merely to compel the holding of an election of directors which the directors, if any, will not hold or cannot hold fairly, and not to control the management of the affairs of the corporation.

[13] Defendants complain that the court did not make findings on many of the matters alleged in their answer. It was not necessary to do so for those matters were not germane to the issue here. Thus there was no issue here of "fraud or fraudulent conduct on the part of the ecclesiastical judicial tribunal" of the church, nor of the officers of the corporation (other than failure to call an election.)

The judgment and decree are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

130 Cal.App.2d 579

Bertha Ziv PINSKY, and Solly Ziv, Plaintiffs-Appellants,

v.

Helen SLOAT and Marian Wright, Defendants-Respondents.

Civ. 20301.

District Court of Appeal, Second District, Division 3, California.

Feb. 3, 1955.

Suit involving right in and title to a parcel of realty which was formerly a public highway. From a judgment of the Superior Court of Los Angeles County, Clarence L. Kincaid, J., the plaintiffs appealed. The District Court of Appeal, Vallée, J., held that where trust deed was definite, certain and unambiguous on its face and covered all of the roadway that was in controversy parol evidence was inadmissible to vary its terms and such evidence having been admitted on the trial of the action, it could not be considered on review to support findings contrary to the expressed language of the deed.

Reversed.

Prior opinion 277 P.2d 54.

1. Boundaries ⇐20(1)

A grant of land by lot, block or tract number with reference to a map which showed that property abutted on the highway generally conveys to the grantee the fee to the center of the highway.

2. Estoppel ⇐27(1)

A grantor is estopped by his deed and cannot be permitted to contradict it.

3. Estoppel ⇐32(1)

A grantor is estopped to assert that his deed, if its terms are sufficiently comprehensive, did not convey his estate in the land described, and he cannot subsequently claim title thereto.

4. Evidence ⇐390(1)

So far as a deed is intended to pass a right, it is the exclusive evidence of the contract and the parties thereto are concluded by its terms.

5. Evidence ⇐461(2)

Where there is nothing ambiguous or uncertain in the terms of the deed it speaks for itself and the inquiry is limited to words of the deed expressed without regard to any intention independent of those words.

6. Evidence ⇐390(1)

Intention of parties to a grant is to be gathered if possible from the language itself and is determined by proper construction of language used rather than by resorting to extrinsic evidence.

7. Evidence ⇐230(3)

After a deed is delivered its operative effect as a conveyance cannot be impaired by any subsequent act or declaration of the grantor.

8. Evidence ⇐458

Where language of a deed is plain, certain and unambiguous, surrounding facts will not be considered.

9. Evidence ⇐390(1)

Parol evidence is not admissible to add to, detract from, or vary the terms of the deed. West's Ann.Code Civ.Proc. §§ 1856, 1962, subd. 2, 2077, subd. 4.

10. Evidence ⇐390(4)

The estate granted by a deed cannot be limited or qualified by oral testimony. West's Ann.Code Civ.Proc. §§ 1856, 1962, subd. 2, 2077, subd. 4.

11. Evidence ⇐390(4)

Operation of a deed cannot be defeated by parol evidence of an intention by the grantor that it should have an effect different from that apparent on its face. West's Ann.Code Civ.Proc. §§ 1856, 1962, subd. 2, 2077, subd. 4.

12. Evidence ⇐384

The parol evidence rule is not a rule of evidence but is one of substantive law.

13. Evidence ⇐397(2)

As applied to contracts, the parol evidence rule is that as a matter of substantive law, the act of embodying the complete terms of an agreement in writing becomes the contract of the parties and as a matter of law the writing is the agreement.

14. Evidence ⇐397(1)

Extrinsic evidence is excluded as applied to contracts because it cannot serve to prove what the agreement was, such being determined as a matter of law to be the writing itself.

15. Evidence ⇐397(2)

The parol evidence rule is operative when there is single and final memorial of the understanding of the parties.

16. Evidence ⇐384
Trial ⇐105(4)

Parol evidence though admitted without objection must be ignored as of no legal import and its incompetency to vary a written contract is a matter of law.

17. Evidence ⇐460(6)

Where deed of trust described property conveyed as fronting on three sides of a roadway and the description was clear, definite and unambiguous, parol evidence was inadmissible to vary the terms of the deed. West's Ann.Civ.Code §§ 1107, 1112; West's Ann.Code Civ.Proc. §§ 1856, 1962, subd. 2, 2077, subd. 4.

18. Estoppel ⇐22(2)

Where deed of trust described property conveyed as fronting on three sides of a roadway and the description covered all of the roadway that was in controversy, the deed of trust was the exclusive evidence of the property conveyed and the grantors were concluded by its terms and were estopped to assert that it did not convey the property described.

19. Taxation ⇐531(1)

Where deed of trust described property conveyed as fronting on three sides of a roadway, its operative effect could not be impaired by the fact that subsequent to its execution defendant paid taxes on roadway since in so doing she was a mere volunteer.

20. Taxation ⇐531(1)

The fact that a person who pays taxes on another's property does so in the belief that she is its owner does not change the fact that she acts as a volunteer.

21. Appeal and Error ⇐1010(1)

The improper admission of parol evidence to vary the terms of the deed could not be considered on review as supporting findings contrary to the express language of the deed.

Paul D. Holland, Beverly Hills, for appellants.

Fred W. Chase, Glendale, for respondents.

VALLÉE, Justice.

This suit involves the rights in and the title to a parcel of realty in the county of Los Angeles which was formerly a public highway.

On July 2, 1948 defendant Sloat by grant deed acquired title to three parcels of property. Parcel one consisted of lot 1 and a part of lot 2; parcel two consisted of lots 24, 25, and a part of lot 26; parcel three consisted of a part of Scherzinger Lane. The deed by which Sloat acquired title described the three parcels separately. The part of Scherzinger Lane so conveyed is the property in controversy. It was formerly a dead-end public street. On March 31, 1950 Sloat executed a deed of trust which described parcels one and two "as per map recorded in Book 137 Pages 6 and 7 of Maps, in the office of the County Recorder of said County [Los Angeles]." The map in the recorder's office showed Scherzinger Lane as a highway surrounded on three sides by parcels one and two. Plaintiffs were named as beneficiaries in the deed of trust. On March 7, 1952 plaintiffs on foreclosure of the deed of trust acquired title to the property described therein.

On February 2, 1937, prior to the execution of the deed of trust, the board of supervisors of the County of Los Angeles abandoned that part of Scherzinger Lane surrounded by parcels one and two. The part abandoned had never been "improved as a street for public use." A strip about 14 or 15 feet wide had been black-topped and paved by Sloat for convenience in getting to the house on parcel one. Sloat testified that she did not include Scherzinger Lane in the deed of trust. Since parcel three was abandoned it has been assessed

and taxed separately, and the taxes have been paid by Sloat from the time she acquired title.

The court found that Sloat did not by the deed of trust convey parcel three, nor did she intend to do so; parcel three appears on the recorded map as a roadway surrounded on three sides by parcels one and two; a strip 11 feet wide in parcel three has been used as a roadway by plaintiffs for access to their home since they acquired title to parcels one and two; and defendants have interfered with and threaten to prevent plaintiffs' use of the 11-foot roadway. The judgment decreed that plaintiffs have an easement over the 11-foot roadway which is appurtenant to parcels one and two and enjoined defendants from interfering with plaintiffs' use of the easement. Plaintiffs appeal.

Plaintiffs' contention is that the conveyance by the deed of trust of parcels one and two as per the recorded map extended to the center line of Scherzinger Lane on which each parcel fronted, and that the fact that Scherzinger Lane had been abandoned as a public street did not affect that title. The contention must be upheld.

[1] A grant of land by lot, block or tract number, with reference to a map which shows that the property abuts on a highway generally conveys to the grantee the fee to the center of the highway. 11 C.J.S., Boundaries, § 35c(1) (b), p. 583; annotation, 2 A.L.R. 6, 17. Plaintiffs, as ground for reversal, rely on this well-settled proposition of law and cite Anderson v. Citizens' Savings & Trust Co., 185 Cal. 386, 197 P. 113, and Brown v. Bachelder, 214 Cal. 753, 7 P.2d 1027.

In the deed before the court in Anderson v. Citizens' Savings & Trust Co., supra, the property was conveyed to one Martin and was described by lot and block number on a subdivision map. The map showed that the lot was bounded by two streets, Grand and Vandal, each 60 feet wide. In 1898, while Martin was still the owner of the property and of the fee to half of the streets on which it abutted, the two streets, Grand and Vandal, were with Martin's consent abandoned as public streets by order of the board of supervisors of the county.

In 1911—that is, after the abandonment of the streets—Martin conveyed the property to one Lempertz by deed, likewise describing the property merely by its lot and block number according to the subdivision map. The plaintiff succeeded to any interest which remained in Martin. The defendant succeeded to the interest of Lempertz. The dispute was as to whether the deed from Martin to Lempertz operated to convey the 30-foot strips which were part of the adjoining streets as shown by the map. The court stated the controlling question thus, 185 Cal. at page 392, 197 P. at page 116:

> "Did or did not that deed, describing the property conveyed as lot so and so in block so and so as shown by a certain map, operate to convey the land in front of the lot to the center of the streets shown on the map, although such streets had been abandoned as public streets? There can be no question but that the deed would so operate, except for the circumstances that the streets had been abandoned, so that the question is, Does such abandonment change what would otherwise be the rule? * * *"

The court held, 185 Cal. at page 392, 197 P. at page 116:

> "In other words, where land is conveyed by a description which bounds it by a street, and the grantor is the owner of the fee in the street, as he is presumed to be, the real boundary line of the property is not the side line of the street, but its center line. * * *
>
> "A description of a lot as that shown on a certain map is a description of it as bounded by a street when the map shows it to be so bounded, so that to such a description the same reason and the same rule apply. [Citations.] Putting it in another way, the fee in the half of the street upon which the lot abuts is in fact a part of the lot, so that a conveyance of the lot conveys the fee in the street as a part of it.
>
> "Such being the reason or theory of the rule, it would seem that it should

make no difference that there is in fact no public street there, provided the conveyance be one which describes the lot as bounded by a street. By such a description a street is created as between the grantor and the grantee, regardless of whether or not there is an existing dedication as between the grantor and the public. This is the settled law of this state. [Citations.] Under these decisions, there can be no question but that Lempertz, under her deed from Martin, which, in effect, described the property as fronting on the two streets in question took the property as between herself and Martin as so fronting, whether there were public streets there or not. Such being the case, there would seem to be no reason for not applying as between them the rule that a conveyance of a lot bounded by a street carries the fee to the center of the street as a part of the lot. * * *

"[185 Cal. at page 394, 197 P. at page 117.] The final question after all is one as to the intention of the parties, and it would seem not unreasonable to consider such a description as one of a lot bounded by what is now private property, although once a street, so that the real boundary was the line of that property. But it is to be noted that the description in this case is a description of the lot as shown by the map, and the map shows the street as existing, and not as abandoned, so that by the description the boundary line of what is conveyed would normally be the center line of the street as shown. * * *

"[185 Cal. at page 396, 197 P. at page 118.] We hold, then, that in the absence of any circumstances showing clearly that the parties intended otherwise, the deed by Martin to Lempertz describing the lot by reference to the map of the tract, operated to convey as a part of the lot the fee in Martin to the center line of the streets, which the map showed as bounding the lots, although such streets had been previously abandoned as public streets."

Brown v. Bachelder, supra, 214 Cal. 753, 7 P.2d 1027, was a suit to quiet title to a strip of property 60 feet by 1340.46 feet delineated on a recorded map as a portion of Spring Street. The strip of land was never opened or improved as a public street but remained enclosed in its original state by a fence. The plaintiff asserted ownership of the entire strip. The defendant asserted ownership of the southerly half of the strip and disclaimed any interest in the northerly half. The trial court decreed that the plaintiff was the owner of the northerly half and the defendant the owner of the southerly half. The plaintiff appealed. Affirming the judgment, the court stated, 214 Cal. at page 755, 7 P.2d at page 1028:

"From a consideration of the description in the deed through which defendant Bachelder claims title to the parcel to the south of the strip in controversy, we are impelled to the conclusion that said deed carried the title of Bachelder to the center line of said 60-foot strip. Section 1112, Civil Code, provides as follows: 'A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant.' * * * The owner and dedicator of the street in the instant case contemplated that it should be reserved to public use. In the event of an abandonment or failure to accept a dedication, a strip of land the width of a street can be of little use to the dedicator who has parted with title to all lands on both sides of the street, as was done by the original dedicator in the instant case, and it will not in such circumstances be presumed that he intended to retain the fee as a remnant of his private estate.

"Anderson v. Citizens' Savings & Trust Co., supra, is authority for the proposition that the presumption applies where at the time the conveyance is executed a dedication has not been

completed by public user, or where the public use has been abandoned.

"In the case herein Bachelder's tract is described in the deed from Sproul, executed in 1878, as bounded on the west by the east side of East Avenue, and on the north by the south side of Spring street. The south side of Spring street is the south half thereof. By virtue of the presumption favoring a conveyance to the center line, a description of property as bounded by the south side of a street must be taken as carrying the title to the limit of the south side, which is the center line of the street. Had Sproul wished to exclude any portion of the strip marked as a street on the map, he no doubt would have adopted a description by metes and bounds which would have excluded such strip from the parcel conveyed."

As we read Anderson v. Citizens Savings & Trust Co., supra, 185 Cal. 386, 197 P. 113, it decides that where property is sold according to a map the grantee takes to the middle of a street designated on the map unless a contrary intention appears. See also Severo v. Pacheco, 75 Cal.App.2d 30, 34–35, 170 P.2d 40. Sanchez v. Grace M. E. Church, 114 Cal. 295, 46 P. 2, relied on by defendants, is not in point. That case was distinguished in Anderson v. Citizens' Savings & Trust Co., supra, on the ground, among others, that the map in that case did not show the lane on which the lots abutted as a part of the subdivision tract.

The question here is: When the deed is definite, certain, and unambiguous on its face, is parol evidence admissible to vary the terms of the deed; and such evidence having been admitted on the trial of the action, may it be considered on review as supporting findings contrary to the express language of the deed?

The obvious implication in Moody v. Palmer, 50 Cal. 31, is that the contrary intention must appear in the deed. In that case the court instructed the jury to the effect that if the grantor conveyed the lands upon and bounded by a public highway, the fee to such lands extended to the middle of such street and passed to the adjoining grantee. The court stated, 50 Cal. at page 36:

"It is well settled that land described in a deed as bounded by a public highway or street, will be considered as extending to the centre of the street or highway, unless it clearly appears that it was intended to make a side line instead of the centre line the boundary. The highway is a monument, and in legal contemplation the thread of the highway is the monument, unless a contrary intention clearly appears. That this is the rule is established by a multitude of authorities. But it is said that it clearly appears from the deeds in question that the side line and not the centre of Park Avenue and the cross-street was intended to be the boundary. * * *

"Public policy demands that deeds containing descriptions of this character shall be construed, if practicable, as including the land to the centre of the street; and the deed under discussion must be so interpreted.

"The abstract proposition, as set forth in the instruction given, was too broadly stated, in that it omits the qualification to the general rule, to the effect that if it clearly appears that the side line, and not the centre line, of the highway was intended to be the boundary, the deed will be construed accordingly. But as applied to the deeds in question here, the omission could not have prejudiced the plaintiff, inasmuch as these do not, as we have seen, bring the case within the exception. It was for the court to construe the deeds, and it is clear they fall within the general rule, which is correctly stated in the instruction. The omission was therefore harmless."

After quoting section 1112 of the Civil Code, the court in Allan v. City & County of San Francisco, 7 Cal.2d 642, at page 646, 61 P.2d 1175, at page 1177, observed:

"Undoubtedly as to all lots and blocks specifically described in said

deeds by number, the deeds carried the title of the grantees to the center of the street in front of the land conveyed. * * *

"In construing the deeds from Hayes to Williams and Mayne, it will be observed that Hayes conveyed to these grantees all lots, blocks, and parts of lots not theretofore sold by him. His intention was evidently to dispose of all his remaining interest in the Hayes tract. No intention is to be found expressed in either of these deeds, on Hayes' part, to reserve to himself any interest in the streets as shown by the map of said tract."

In Almaden Vineyards Corp. v. Arnerich, 21 Cal.App.2d 701, at page 704, 70 P.2d 243, at page 245, it is said:

"It is statutory that 'A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, *unless a different intent appears from the grant.*' [Emphasis the court's.] Civ.Code, Sec. 1112. The plaintiff's predecessor in interest, Charles Le Franc, executed a grant, bargain, and sale deed to A. E. Davis so describing the above-mentioned parcels. The plaintiff does not call our attention to any language contained in the grant deed, and we can find none, showing 'a different intent.' The grantee, A. E. Davis, conveyed the parcels to the railway company. * * * The plaintiff asserts that the railway company has merely an easement. Its deed refutes the assertion. It owns the fee to the lands conveyed to A. E. Davis as his deed was a grant, bargain and sale conveyance of the lands conveyed."

[2, 3] It has been held in other jurisdictions that an intention to exclude the part of the street to the center line must appear on the face of the deed. Paul v. Carver, 26 Pa. 223, 67 Am.Dec. 413; Salter v. Jonas, 39 N.J.L. 469, 23 Am.Rep. 229. It has also been held in other jurisdictions that parol evidence is not admissible to rebut the intention shown by the deed. Jacob v. Woolfolk, 90 Ky. 426, 14 S.W. 415, 416, 9 L.R.A. 551; Bergan v. Co-operative Ice & Fuel Co., 41 Ind.App. 647, 84 N.E. 833, 835.

Section 1856 of the Code of Civil Procedure provides:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: * * * [exceptions not pertinent here].

"But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

Section 1962 in part provides:

"The following presumptions, and no others, are deemed conclusive: * * *

"2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration * * *."

Section 2077 in part provides:

"The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it: * * *

"4. When a road * * * is the boundary, the rights of the grantor to the middle of the road * * * are

included in the conveyance, except where the road * * * is held under another title."

Every grant of an estate in real property is conclusive against the grantor and everyone claiming under him, with exceptions not pertinent here. Civ.Code, § 1107. A grantor is estopped by his deed; he is not permitted to contradict it. He is estopped to assert that his deed, if its terms are sufficiently comprehensive, did not convey his estate in the land described; and he cannot subsequently claim title thereto. Taylor v. Avila, 175 Cal. 203, 206, 165 P. 533; 15 Cal. Jur.2d 608, § 204.

[4–8] So far as a deed is intended to pass a right, it is the exclusive evidence of the contract and the parties thereto are concluded by its terms. Rhine v. Ellen, 36 Cal. 362, 371–372. Where there is nothing ambiguous or uncertain in the terms of a deed it speaks for itself and the inquiry should be limited to what the words of the deed express without regard to any intention independent of those words. Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 30–33, 276 P. 1017; Taylor v. Avila, 175 Cal. 203, 206, 165 P. 533; Riley v. North Star Mining Co., 152 Cal. 549, 556, 93 P. 194. The intention of the parties to a grant is to be gathered if possible from the language itself and is determined by a proper construction of the language used rather than by resorting to extrinsic evidence. Hartwig v. Central-Gaither Union School Dist., 200 Cal. 425, 427, 253 P. 733; Barnett v. Barnett, 104 Cal. 298, 299–300, 37 P. 1049; Mitchel v. Brown, 43 Cal.App.2d 217, 221, 110 P.2d 456; Mammoth Gold Dredging Co. v. Forbes, 39 Cal.App.2d 739, 746, 104 P.2d 131. A deed of trust has the same effect as a deed from the trustor would have had. Freelon v. Adrian, 161 Cal. 13, 17, 118 P. 220. After a deed is delivered its operative effect as a conveyance cannot be impaired by any subsequent act or declaration of the grantor. Rocha v. Rocha, 197 Cal. 396, 405, 240 P. 1010; Driscoll v. Driscoll, 143 Cal. 528, 536, 77 P. 471. Where the language of a deed is plain, certain, and unambiguous, the surrounding facts and circumstances will not be considered. Riley v. North Star Mining Co., 152 Cal. 549, 556, 93 P. 194; 26 C.J.S., Deeds, § 92, p. 345.

[9–11] Parol evidence is not admissible to add to, detract from, or vary the terms of a deed. Martin v. Holm, 197 Cal. 733, 742, 242 P. 718; Yuba Inv. Co. v. Yuba Consol. G. Fields, 184 Cal. 469, 474–478, 194 P. 19; Fitzgerald v. County of Modoc, 164 Cal. 493, 129 P. 794, 44 L.R.A.,N.S., 1229. The estate granted by a deed cannot be limited or qualified by oral testimony. Security-First Nat. Bank of Los Angeles v. Leatart, 75 Cal.App.2d 211, 215, 170 P.2d 687; Lewis v. Brown, 22 Cal.App. 38, 42–43, 133 P. 331. The operation of a deed cannot be defeated by parol evidence of an intention on the part of the grantor that it should have an effect different from that apparent on its face. Hebert v. Miller, 94 Cal.App.2d 211, 214, 210 P.2d 251; Security-First Nat. Bank of Los Angeles v. Leatart, supra, 75 Cal.App.2d at page 215, 170 P.2d 687.

[12–16] The parol evidence rule is not a rule of evidence but is one of substantive law. As applied to contracts, the rule is that as a matter of substantive law the act of embodying the complete terms of an agreement in writing becomes the contract of the parties. As a matter of law, the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself. The rule is operative when there is a single and final memorial of the understanding of the parties. In re Estate of Gaines, 15 Cal.2d 255, 264–265, 100 P.2d 1055; Nourse v. Kovacevich, 42 Cal.App.2d 769, 771, 109 P.2d 999; O'Melia v. Adkins, 73 Cal.App.2d 143, 148, 166 P.2d 298; Lifton v. Harshman, 80 Cal.App.2d 422, 432, 182 P.2d 222. Parol evidence, though admitted without objection, must be ignored as of no legal import, and its incompetency to vary a written contract is a matter of law. Lifton v. Harshman, supra.

[17–21] Section 1112 of the Civil Code specifically says that a transfer of land, bounded by a highway, passes the title of the grantor to the center of the highhway

"unless a different intent appears from the grant." (Italics added.) The words "unless a different intent appears from the grant" were added by amendment of 1873–74 at the recommendation of the Examiners of the Codes. Stat.1873–74, ch. 612, Amendments to the Codes, 1873–4, p. 225, § 133, Report of the Examiners of the Codes, 1874, p. 42. Anderson v. Citizens' Savings & Trust Co., supra, 185 Cal. 386, 197 P. 113, holds that the same rule applies to an abandoned highway when the description is by reference to a recorded map showing the property conveyed as fronting on the abandoned highway. The description in the deed of trust in the present case is complete, clear, definite, certain, and unambiguous. There is no room for interpretation. Defendant Sloat was the owner of the fee in the street. The deed of trust described the property conveyed as fronting on three sides of a roadway—Scherzinger Lane. The boundary line of what was conveyed on each side of the lane was the center of the roadway. The description covered all of Scherzinger Lane that is in controversy. The deed of trust is the exclusive evidence of the property conveyed and defendants are concluded by its terms. Defendant Sloat is estopped to assert that it did not convey the property described. Its operative effect cannot be impaired by the fact that subsequent to its execution she paid taxes on the roadway. In doing so, she was a mere volunteer. The fact that a person who pays taxes on another's property does so in the belief that she is its owner does not change the fact that she acts as a volunteer. Dinkins v. Lamb, 108 Cal.App. 2d 175, 179, 238 P.2d 630. The evidence, other than the deed of trust and the recorded map, was inadmissible and must be ignored.

We conclude, on the evidence in which there is no conflict, that plaintiffs are the owners and entitled to the possession of the property referred to as part of Scherzinger Lane and that defendants have no right, title, or interest therein.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

130 Cal.App.2d 620

Earl F. SHORES, doing business as Chip Steak Co., Plaintiff and Respondent,

v.

CHIP STEAK COMPANY, a corporation; Chip Steak Company So. Cal., a corporation, Defendants and Appellants.

Civ. 20484.

District Court of Appeal, Second District, Division 3, California.

Feb. 7, 1955.

Action for declaratory relief. From an order of the Superior Court of Los Angeles County, John J. Ford, J., denying a motion for change of venue from Los Angeles to Alemeda County, the defendants appealed. The District Court of Appeal, Ashburn, J. pro tem., held that where the obligation of noninfringement of the defendants' trade-mark was violated, if at all, and liability, if any, arose in Los Angeles County, venue was properly laid in such county.

Motion for change of venue denied, and order affirmed.

See also 279 P.2d 595.

1. Corporations ⇐503(3)

Constitutional provision respecting venue in actions against corporations is self-executing, and where plaintiff fails to bring his action in any of the counties specified, the corporation is entitled to change of venue to the county of its principal place of business. West's Ann.Const. art. 12, § 16.

2. Corporations ⇐503(3)

Where, in a transitory action against a corporation, principal place of business of the sole defendant is in a county other than the one wherein the action was brought, further burden rests upon movant seeking change of venue to establish that none of the other grounds of trial in the county exists, such that the contract sued on was not made or to be performed in that county, or that the obligation of defendant did not arise there or any breach of obligation occur there, and burden is discharged by showing that complaint states no cause of action and that plaintiff cannot state one. West's Ann.Const. art. 12, § 16.

3. Corporations ⇐503(3)

In a transitory action against a corporation having principal place of business in another county as respects a defective amendable complaint, a defendant corporation had not made the necessary showing for change of venue, that the contract in suit was not made or to be performed in the county of venue or that the obligation of the defendant did not arise there or any breach of obligation occur there, if it stops with the mere demonstration that the complaint does not state a cause of action. West's Ann.Const. art. 12, § 16.

4. Venue ⇐72

A motion for change of venue must be decided before a hearing of any demurrer.

5. Venue ⇐2

In the domain of venue, a complaint which seeks a declaratory exoneration from an alleged liability shown to be asserted by defendant must be viewed as if the defendant were a plaintiff attempting to enforce an obligation.

6. Courts ⇐489(3)

In an action for infringement of a patent, federal courts have exclusive jurisdiction, and plaintiff's election to sue for declaratory judgment that he is not an infringer does not give a state court power to hear the case.

7. Courts ⇐489(3)
Venue ⇐22(1)

Question of patent infringement cannot be litigated by either party in a state court, and an attempt to do so cannot defeat the defendants' right to a trial in their home county.

8. Courts ⇐489(1)

The Superior Court has jurisdiction of trade-mark infringement cases whether the trade-mark is one registered under the laws of California or those of the United States. West's Ann.Bus. & Prof.Code, § 14300.

9. Corporations ⇐503(2)

In action for declaratory relief against corporation whose principal place of business was in Alameda County, involving the question of infringement of defendant's trade-mark claimed by them to be valid and to have been violated by the plaintiff, where obligation of noninfringement was violated, if at all, and the liability, if any, arose in Los Angeles County, venue was properly laid in Los Angeles County, and the fact that plaintiff denied liability to the defendant was immaterial. West's Ann. Bus. & Prof.Code, § 14300.

Milo Ayer, Oakland, for appellants.

C. G. Stratton & Austin Clapp, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Appeal from order denying motion for change of venue from Los Angeles County to Alameda County. Respondent filed no brief, and the cause has been submitted (pursuant to rule 17(b) of the Rules on Appeal) upon the record and appellants' opening brief.

The action, one for declaratory relief, was filed in Los Angeles County by Earl F. Shores "doing business as Chip Steak Co." against two corporations, Chip Steak Company and Chip Steak Company So. Cal. It affirmatively appeared upon the motion that the principal place of business of each defendant is situated in Alameda County. There are no defendants other than the two corporations.

Plaintiff alleges that he, conducting business under the fictitious name Chip Steak Co., has been and is engaged in preparing, selling and distributing "thin sliced fresh beef, known in the trade and designated by him as 'chip steaks,'"—this in Los Angeles County and elsewhere; that defendants are and have been jointly engaged in like business of preparing and selling in Los Angeles County "thin sliced fresh beef, known to the trade in said County as 'chip steaks'"; that a controversy has arisen and now exists, plaintiff contending that "chip steaks" is a descriptive term which has not acquired a secondary meaning; that it does not refer to the goods of any particular producer, seller or distributor; and that "neither of the defendants,

nor anyone else, has the exclusive right to use 'chip steaks' to designate very thin sliced fresh meat, but that it is a descriptive generic term." Defendants' contentions are alleged to be that the term "chip steaks" is a valid trademark covering the commodity in question; that defendants have the exclusive right to use same in the County of Los Angeles; and "that the use of the term 'chip steaks' in said County by plaintiff for thin sliced fresh beef constitutes an infringement of purported rights to a valid trade-mark and of purported rights under a purported U. S. Patent No. 2,052,221 that have been assigned by William J. Dubil and Edward J. Hubik to first defendant, which alleged rights the first and second defendants have been and are claiming the right to use and are using in Los Angeles County, State of California, with the consent of first Defendant." The record does not affirmatively disclose whether defendants' claim of ownership of a trademark arises under Federal or state law. Plaintiff further alleges that defendants have "claimed the right to recover damages of plaintiff by reason of alleged violations of their asserted rights alleged to have been committed by the plaintiff in said County." The prayer is for declaratory judgment to the effect that defendants do not have an exclusive right to use the name "chip steak" for very thin sliced meat in Los Angeles County or elsewhere in this state; also for general relief.

[1] The venue of an action brought only against a corporation or corporations is fixed by Section 16 of Article XII of the Constitution. It says: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." This section is self-executing and "where the plaintiff fails to bring his action in any of the counties specified by the Constitution, the corporation then is entitled to a change of venue to the county of its principal place of business under the last clause of the constitutional provision." Hale v. Bohannon, 38 Cal.2d 458, 470, 478, 241 P.2d 4, 15.

[2, 3] Where it appears in a transitory action, as here, that the principal place of business of the sole defendant, a corporation, is in a county other than the one wherein the action was brought, the further burden rests upon the moving party to establish that none of the other grounds of trial in that county exists, namely, that a contract in suit was not made or to be performed in that county or that the obligation or liability of defendant did not arise there, or any breach of obligation occur there. Konig v. Associated Almond Growers, 37 Cal.App.2d 360, 364, 99 P.2d 678; Pacific Bal. Industries v. Northern Timber, 118 Cal.App.2d 815, 826, 259 P.2d 465; Cook v. Ray Manufacturing Co., 159 Cal. 694, 696, 115 P. 318; Walker v. Wells Fargo Bank etc. Co., 8 Cal.2d 447, 450, 65 P.2d 1299. This burden is discharged by a showing that the complaint states no cause of action whatever and that plaintiff cannot state one. Such is the holding in Clary v. Basalt Rock Co., 99 Cal.App.2d 458, 222 P.2d 24, a case upon which appellant principally relies. That was an action for declaratory relief wherein plaintiff sought to have defendant adjudged liable for a sales tax under an agreement of sale between the parties. The complaint disclosed that there was no agreement between them as to payment of the tax; that the state had and made no claim against defendant buyer; and that no implied obligation to pay the tax arose from the contract of sale. The court concluded that plaintiff had stated and probably could state no cause of action whatever and that the defendant corporation was entitled to a change of venue to the county of its principal place of business. We concur in the view that this is a sound conclusion with respect to an insufficient complaint which appears on its face to be not amendable. But as applied to a defective and amendable complaint we think the defendant corporation has not made the necessary showing if it stops with a mere demonstration that the

complaint does not state a cause of action. For "questions as to the legal sufficiency of the complaint to accomplish the purpose intended do not properly arise on the motion." Eckstrand v. Wilshusen, 217 Cal. 380, 382, 18 P.2d 931, 932; cf. Kaluzok v. Brisson, 27 Cal.2d 760, 765, 167 P.2d 481, 163 A.L.R. 308; Lefurgey v. Prentice, 36 Cal.App. 338, 342, 171 P. 1080. Indeed the motion must be decided before the hearing of any demurrer. Kostal v. Pullen, 36 Cal. 2d 528, 530, 225 P.2d 217.

There is no basis for holding this case in Los Angeles County other than the existence of some liability arising therein or a breach in that county of some cognizable obligation. Plaintiff in effect says that defendants have no rights which he must respect and hence that he has incurred no liability and breached no obligation. Defendants-appellants argue that the complaint is an attack upon a United States patent and a valid trademark, an issue which they say is not triable in the state courts; that this brings the Clary doctrine into play and they are entitled on that basis to a removal to Alameda County. However, their assumption that the validity of the trademark cannot be canvassed in the state tribunal is erroneous, as will appear.

[4] In the domain of venue a complaint which seeks declaratory exoneration from an alleged liability shown to be asserted by defendant must be viewed as if defendant were a plaintiff attempting to enforce that obligation. The rationale of the rule is that one who has breached, or is claimed to have breached, an obligation in the county of suit, cannot deprive the other party of his right to have the case tried there by anticipating such an action and molding the controversy into one for declaratory judgment negating the existence of defendant's claim. Such is the holding in Standard Brands of California v. Bryce, 1 Cal.2d 718, 37 P.2d 446. Plaintiff there sought a declaratory judgment exonerating him from liability for an invasion of his neighbor's realty, one which if existent would constitute a permanent trespass. The Supreme Court held that, a cause of action having accrued to defendant, the action was not declaratory in character, saying, 1 Cal.2d at page 721, 37 P.2d at page 447: "When, as here, the cause of action has already accrued and the only question for determination is the ultimate liability of one party on account of consequential relief to which another is shown to be entitled, it has been held that the nature of the action is not a cause for declaratory relief, but is defined by the subject-matter of the accrued cause of action. See In re Sterrett's Estate, 300 Pa. 116, 150 A. 159, 162; Kaaa v. Waiakea Mill Co., 29 Haw. 122, 127, 128; see, also, notes in 12 A.L.R. 74–76; 50 A. L.R. 43, 44; 68 A.L.R. 119. These considerations are applicable as well on the questions of the nature of the action and the subject-matter of the complaint in determining the defendant Bryces' motion for a change of place of trial. Consequently, the plaintiff, by bringing the action itself in anticipation of the defendant Bryces' claim against it, and by joining other defendants upon whom it attempts to fasten the claimed liability and who reside in a county outside the county where the real property is situated, may not deprive the owners of the property of their right to a trial in the county where the real property is located. The plaintiff may not, by this device, choose its own forum and thus evade the statutory provisions which require a trial in Los Angeles county of any cause of action shown by the complaint to have accrued." See, also, Fritz v. Superior Court, 18 Cal. App.2d 232, 235, 63 P.2d 872.

[5, 6] The complaint at bar challenges defendants' claims of valid trademark and valid United States patent. If this were an action for infringement of patent, the Federal courts would have exclusive jurisdiction. 21 C.J.S., Courts, § 525, p. 794; 40 Am.Jur. p. 652, § 169. And plaintiff's election to sue for declaratory judgment that he is not an infringer does not give the state court power to hear the case; the controversy remains one of exclusive Federal jurisdiction. Edelmann & Co. v. Triple-A Specialty Co., 7 Cir., 88 F.2d 852; Grip Nut Co. v. Sharp, 7 Cir., 124 F.2d 814; Lionel Corporation v. De Filippis, D.C., 11 F.Supp. 712, 716; Cheatham Elec. Switching Device Co. v. Kentucky S. & S.

Co., 213 Ky. 23, 280 S.W. 469, 471. The question of patent infringement cannot be litigated by either party in the state court and an attempt so to do cannot affect the defendants' right to trial in their home county for plaintiff can state no cause of action and the Clary rule applies. The same would be true of copyright infringement if it were directly presented. Loew's, Inc., v. Superior Court, 18 Cal.2d 419, 427, 115 P.2d 983.

[7, 8] But a different situation exists in relation to Federal trademarks. The state courts have concurrent jurisdiction of such infringement cases, 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 191, p. 531; 52 Am.Jur. p. 638, § 163; Philadelphia Storage Battery v. Mindlin, 163 Misc. 52, 296 N.Y.S. 176, 178; Brown & Bigelow v. Remembrance Advertising Prod., 279 App.Div. 410, 110 N.Y.S.2d 441, 443; 304 N.Y. 909, 110 N.E.2d 736; Traiser v. J. W. Doty Cigar Co., 198 Mass. 327, 84 N.E. 462; Nelson v. J. H. Winchell & Co., 203 Mass. 25, 89 N.E. 180, 23 L.R.A., N.S., 1150. And so the Superior Court has jurisdiction whether the trademark be one registered under the laws of California (see § 14300, Bus. & Prof.Code) or those of the United States.

[9] As above indicated plaintiff raises the question of infringement of defendants' trademark, claimed by them to be valid and to have been violated by plaintiff; they have threatened to sue him for damages. The state court has jurisdiction over the controversy. The obligation of non-infringement was violated, if at all, and the liability, if any, arose in Los Angeles County. The fact that plaintiff denied liability to defendant is not of consequence. That is the heart of a contested case. It is the claim of liability, not the fact as ultimately found, that determines the matter of venue. The cited authorities, especially Standard Brands of California v. Bryce, supra, establish Los Angeles County as the proper place of trial.

The motion for change of venue was properly denied and the order is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

130 Cal.App.2d 627

Earl F. SHORES, doing business as Chip Steak Co., Plaintiff and Respondent,

v.

CHIP STEAK COMPANY, a corporation; Chip Steak Company So. Cal., a corporation, Defendants and Appellants.

Civ. 20483.

District Court of Appeal, Second District, Division 3, California.

Feb. 7, 1955.

Action for trade libel and for use of labels on meat packages allegedly calculated to deceive the public. From an order of the Superior Court, of Los Angeles County, John J. Ford, J., denying motion for change of venue from Los Angeles to Alameda County, the defendants appealed. The District Court of Appeal, Ashburn, J. pro tem., held that the motion was properly denied.

Motion denied and order affirmed.

1. Corporations ⇐503(3)

In action against corporate defendant for alleged unfair competition, fact that both defendants had their principal place of business in Alameda County was not determinative of venue, but they had the burden of further proving that their alleged wrongdoing did not occur in Los Angeles County, so as to authorize a change of venue to Alameda County, their principal place of business.

2. Libel and Slander ⇐130

The distinction between "libel" and "trade libel" is that the former concerns the person or reputation of plaintiff and the latter relates to his goods.

See publication Words and Phrases, for other judicial constructions and definitions of "Libel" and "Trade Libel".

3. Corporations ⇐503(2)

In action against corporate defendant whose principal place of business was in Alameda County, where first count charged the publication in a paper circulated in Los Angeles County of a trade libel and second count charged the using of a misleading label which was used in and cus-

tomers taken from the plaintiff in Los Angeles County, venue was properly laid in Los Angeles County. West's Ann.Const. art. 12, § 16.

4. Venue ⇐68

Defendant moving for a change of venue must take the complaint as he finds it and establish from it or from the affidavit that none of the conditions for suit in the county of filing actually exist.

Milo Ayer, Oakland, for appellants.

C. G. Stratton & Austin Clapp, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

This action is between the same parties and was filed at the same time as the one involved in Civil No. 20484, 279 P.2d 591. The appeal is from an order denying motion for change of venue from Los Angeles County to Alameda County and has been submitted pursuant to rule 17(b).

The two corporations, Chip Steak Company and Chip Steak Company So. Cal., are the only defendants. The complaint is in two counts. Plaintiff repeats the allegations of the other action to the effect that he, conducting business under the fictitious name Chip Steak Co., has been and is engaged in preparing, selling and distributing "thin sliced fresh beef, known in the trade and designated by him as 'chip steaks,' "—this in Los Angeles County and elsewhere; that defendants are and have been jointly engaged in like business of preparing and selling in Los Angeles County "thin sliced fresh beef, known to the trade in said County as 'chip steaks' ". The first count then adds allegations intended to state a cause of action for wrongful disparagement of his goods, or trade libel. It is averred that plaintiff's chip steaks were being sold in San Joaquin County by Gerry Gott Company and by plaintiff himself in Los Angeles County; that defendants falsely and maliciously published in the Stockton Record, "a newspaper that was and is circulated in the Counties of San Joaquin and Los Angeles," an advertisement stating in substance that plaintiff's steaks were in counterfeit packages which were imitations of defendants' packages, that plaintiff's product was not "quality" food, or prepared or packaged by modern, safe or sanitary methods, that plaintiff had no right to sell chip steaks in San Joaquin or Los Angeles County; that all these statements in the advertisement were untrue; that by final decree of the United States District Court "all pertinent claims of U. S. Patent No. 2,052,221," under which both plaintiff and one defendant had been licensed, were declared invalid; that prospective purchasers of plaintiff's meats were misled and so bought from defendants, all to plaintiff's damage. The prayer sought damages, an accounting and an injunction.

The second count describes the labels used by plaintiff and defendants, respectively, on their meat packages, alleges similarity calculated to deceive the public, use of said misleading label by defendants in Los Angeles County, to plaintiff's damage; and plaintiff prays for damages on that second cause of action together with an accounting and an injunction.

It will be noted that we do not have any attack upon the said patent No. 2,052,221, nor any direct charge of infringement of trade-mark,—matters covered by our ruling in Civil No. 20484. This case presents two alleged causes of action for unfair competition. The complaint avers that this was accomplished in one instance through publication of a trade libel in a newspaper which was circulated in Los Angeles County as well as San Joaquin; in the second instance by use in Los Angeles County of a misleading label resulting in fraud upon plaintiff and his customers.

[1] As pointed out in our accompanying opinion in Civil No. 20484, the fact that both defendants have their principal place of business in Alameda County is not determinative of venue even though they are the only defendants. They have the burden of further proving their alleged wrongdoing did not occur in Los Angeles County. Konig v. Associated Almond Growers, 37 Cal. App.2d 360, 364, 99 P.2d 678; Pacific Bal

Industries v. Northern Timber, 118 Cal.App. 2d 815, 826, 259 P.2d 465; Cook v. Ray Manufacturing Co., 159 Cal. 694, 696, 115 P. 318; Walker v. Wells Fargo Bank, etc., Co., 8 Cal.2d 447, 450, 65 P.2d 1299.

There can be no doubt about the fact that defendants' alleged liability for using the misleading label arose, if at all, in Los Angeles County for same was used there and customers taken from plaintiff in that locality.

[2, 3] The first count falls in the same category. The gist of it is the publication in a paper circulated in Los Angeles County of a trade libel. And the question of venue arising therefrom is governed by Tingley v. Times-Mirror Co., 144 Cal. 205, 77 P. 918. Plaintiff Tingley, a resident of San Diego County, sued defendant in that county for libel. Its principal place of business was at Los Angeles and its newspaper was there published; it was alleged that the paper also was circulated in San Diego and other portions of the state. In affirming a refusal of defendants' motion for a transfer to Los Angeles County, the court said, 144 Cal. at page 206, 77 P. at page 919: "The liability arises where the injury occurs, and the injury in the case of libel is peculiarly at the county in which the plaintiff resides, if, as is alleged, the plaintiff has published and circulated the libelous article there, and there it is that plaintiff is most injured by the publication", and 144 Cal. at page 207, 77 P. at page 919: "In our opinion, libel may be maintained in the county in which the plaintiff resides, when the newspaper is circulated in that county, though published in another county, which latter is the principal place where defendant's business is located. Brady v. Times-Mirror Co., [106 Cal. 56, 39 P. 209]." A similar factual situation was presented in Buck v. James McClatchy Pub. Co., Inc., 105 Cal.App. 248, 287 P. 364, and like ruling made. The distinction between libel and trade libel is that the former concerns the person or reputation of plaintiff and the latter relates to his goods. Black & Yates v. Mahogany Ass'n, 3 Cir., 129 F.2d 227, 232, 235, 148 A.L.R. 841; Montgomery Ward & Co. v. United R. W. & D. Store Emp., 400 Ill. 38, 79 N.E. 2d 46, 52. From the venue standpoint the instant case is indistinguishable from Tingley v. Times-Mirror Co., supra.

[4] Appellant argues that when the plaintiff has failed to state a cause of action, whether in declaratory relief, or otherwise, the defendant corporation is entitled to have the cause transferred to the county of its residence, for the reason that the complaint does not allege any obligation accruing in Los Angeles County and counsel relies upon Clary v. Basalt Rock Co., 99 Cal.App.2d 458, 222 P.2d 24, which case, as shown in the ruling in Civil No. 20484, supports his position only when the complaint shows that plaintiff has no cause of action and that he cannot amend to state one. Of course, if he cannot do that he has suffered no delict in any place and defendant corporation has sustained its burden under Section 16 of Article XII. But short of that, he must take the complaint as he finds it, Warren v. Ritter, 61 Cal.App. 2d 403, 405, 142 P.2d 948, and establish from it or from affidavits that none of the conditions for suit in the county of filing actually exists. It is therefore unnecessary for us to pass upon the sufficiency of plaintiff-respondent's pleading at bar. It is enough to know that the nature of the cause of action of each count is as above stated and that it shows a liability arising in Los Angeles County. Likewise, and for the same reasons, there is no occasion to discuss the contention that a change of venue must be granted if either cause of action "is not within the provisions of Section 16 of Article XII, supra."

The motion for change of venue was properly denied and the order is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

130 Cal.App.2d 646

Sam NEIDER, Plaintiff and Respondent,

v.

Virgil D. DARDI, General Refrigerator Corporation, a corporation, et al., Defendants and Appellants.

No. 16201.

District Court of Appeal, First District, Division 1, California.

Feb. 9, 1955.

Action for an accounting for proceeds from joint venture for management and use of lease of real property. From order contained in interlocutory decree of the Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., appointing a receiver, the defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that where evidence disclosed that defendant joint venturer had excluded plaintiff joint venturer from participation in management of joint adventure from enjoyment of any share in its profits, from all knowledge of its transactions and that there had been a dissipation of considerable portion of receipts of enterprise, court was justified in appointing a receiver to protect assets of joint adventure.

Order appointing receiver, contained in interlocutory judgment, affirmed.

1. Joint Adventures ⇐5(1)

Where evidence disclosed that joint venturer had excluded coadventurer from participation in management of joint adventure, from enjoyment of any share in its profits, from all knowledge of its transactions, and that there had been a dissipation of considerable portion of receipts of enterprise, court was justified in appointing a receiver to protect assets of joint adventure. West's Ann.Code Civ.Proc. § 564.

2. Joint Adventures ⇐5(1)

In action by plaintiff joint venturer against defendant and a corporation controlled and used by defendant joint venturer in conduct of joint venture for accounting for proceeds from joint enterprise, court was not precluded from appointing a receiver until after it had been determined whether plaintiff was entitled to an award and whether joint venture included business conducted by corporation. West's Ann. Code Civ.Proc. § 564.

3. Receivers ⇐30

A proper court may appoint a receiver whenever a proper case is made even though neither party has asked for it. West's Ann. Code Civ.Proc. § 564.

4. Joint Adventures ⇐5(1)

In action for accounting for proceeds from joint adventure for management and use of a lease of real property, fact that plaintiff had not paid rent for cigar store located on premises and subleased to plaintiff did not preclude plaintiff from seeking an accounting or prevent court from appointing a receiver, when reason for not paying rent was failure of parties to determine amount of rent due under sublease. West's Ann.Code Civ.Proc. § 564

5. Joint Adventures ⇐5(1)

The right of one joint venturer to sue another at law does not preclude a suit in equity for an accounting, nor does possession of other remedies preclude appointment of a receiver in a proper case. West's Ann. Code Civ.Proc. § 564.

6. Appeal and Error ⇐1056(1)

Evidence concerning scope and accuracy of accounting, even if improperly excluded, would not be significant upon appeal involving only propriety of appointment of receiver in action for accounting for proceeds from joint venture. West's Ann.Code Civ.Proc. § 564.

Phillip Barnett, Rodney H. Robertson, San Francisco, for appellants.

Harold B. Lerner, San Francisco, for respondent.

FRED B. WOOD, Justice.

Upon this appeal by the defendants from an order appointing a receiver, contained in an interlocutory decree rendered in this action brought by one against the other of two joint venturers (plaintiff Neider and defendant Dardi) and a corporation (Gen-

eral Refrigerator Corporation) controlled and used by defendant Dardi in the conduct of the joint venture, the question is whether or not the trial court committed an abuse of discretion in ordering the appointment of a receiver.

There is no dispute concerning the existence of a joint venture. Admittedly, it includes the management and use of a lease of certain real property for a period of ten years commencing January 1, 1948, owned jointly by plaintiff and by defendant Dardi. Dardi unsuccessfully claimed in the trial court that this venture also includes a certain refrigerator sales and repair business and that Dardi is entitled to substantial offsets on account of losses in that phase of the venture, questions with which we are not now concerned, however material they may become upon appeal, if any, from the final decree when rendered.

It also clearly appears that defendant has been in sole control of the venture, executing subleases, collecting rents and making disbursements through the medium of the defendant corporation.

There is substantial evidence that during the period January 1, 1948, to August 1, 1952, rentals received and accrued grossed in excess of $106,000 and netted in excess of $55,000; that Dardi made no accounting to plaintiff prior to suit and has paid over to plaintiff none of the proceeds; that the lease requires the lessees to pay all taxes, yet ad valorem taxes levied upon the leased premises in excess of $11,000 were unpaid as of July 31, 1952, and the property remained sold to the state for nonpayment of 1948–49 taxes; that Dardi credited himself with $9,600 as salary for managing the venture—despite the absence of an agreement between the venture for payment of any such compensation (see 30 Am.Jur. 705, Joint Adventures, § 53); that Dardi withdrew $90,000 in varying amounts over a four-year period and repaid about one-half thereof to the leasehold venture account; that Dardi diverted in excess of $14,000 for the equipment, maintenance and repair of the premises used for a restaurant business belonging to him personally and not to the joint venture; and that on July 31, 1952, at the close of the accounting period, the bank balance showed a total of $1,730.02 on deposit and there appeared to be tax liabilities amounting to more than $22,000.

These facts were developed during the course of a trial of several days followed by an accounting and report by a referee appointed by the court, culminating in an adjourned hearing at which the referee was examined by counsel for plaintiff and for the defendants.

A clearer case could hardly be found for not disturbing the exercise by the trial court of its sound discretion to appoint a receiver. It comes well within the purview of section 564 of the Code of Civil Procedure which provides that in the superior court "a receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, in * * * an action * * * between partners or others jointly owning or interested in any property or fund [joint venturers], on the application of the plaintiff, or of any party whose right to or interest in the property or funds, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured * * *."

[1] When, as here, there is substantial evidence that defendant Dardi has excluded his associate from participation in the management of the enterprise, from enjoyment of any share in its profits and from all knowledge of its transactions, the evidence would seem sufficient to support the decision of the trial court. When, in addition, there is evidence of dissipation of a very considerable portion of the receipts of the enterprise and the hazarding of the loss of its sole asset, the need for the appointment of a receiver to protect and conserve the assets and the plaintiff's share of future rentals is well-nigh compelling. See Hampton v. Rose, 3 Cal.App.2d 167, 39 P.2d 447, receiver appointed pending an action for an accounting and dissolution of a partnership; Moore v. Oberg, 61 Cal.App.2d 216, 142 P.2d 443, affirming appointment of a receiver for a joint venture, in a situation very similar

to that of the instant case; Baldwin v. Baldwin, 67 Cal.App.2d 175, 153 P.2d 567, a receiver appointed in action for accounting where one partner threatened to ruin the business; Armbrust v. Armbrust, 75 Cal.App.2d 272, 171 P.2d 75, verified pleadings, used as affidavits, showed the probable interest of the respondent and the danger of misappropriation sufficiently to support the decision of the trial judge to appoint a receiver; McNeil v. Graner, 92 Cal.App.2d 371, 206 P.2d 1120, an order appointing a receiver must be affirmed if there is substantial evidence supporting it.

[2] Dardi's principal attack seems to be upon the nonappealable portion of the interlocutory judgment, which awards plaintiff $29,000 and was predicated upon the accounting had during the trial and upon findings that the joint venture does not include the refrigerator business. He then contends that until those issues are finally determined there can be no receiver appointed. Such an argument ignores the main purpose of a receivership, that of receiving "the rents, issues and profits of the land or other thing in question pending the suit, where it does not seem reasonable to the court to entrust either party with such right. He is an officer or representative of the court, appointed on behalf of all the parties who may establish rights in the cause, to take the charge and management of property which is the subject of litigation, for the purpose of preservation and ultimate disposition according to the final judgment therein. He is a custodian of the property committed to his charge." 22 Cal.Jur. 428, Receivers, § 2.

[3] Dardi claims the court was without jurisdiction to appoint a receiver because, assertedly, the complaint does not in so many words request a receiver. The statute does not prescribe the form, written or oral, in which a plaintiff or other interested party may make such an application. It suffices in the instant case that the verified complaint stated facts sufficient to sanction the appointment of a receiver and included a prayer for general relief. Indeed, it has been held that a proper court may appoint a receiver whenever a proper case is made even though neither party has asked for it. Venza v. Venza, 94 Cal.App.2d 878, 883–884, 211 P.2d 913.

[4] Dardi also claims plaintiff was entitled neither to an accounting nor to the appointment of a receiver in view of his asserted breach of the contract of joint venture which included a provision that "should a new lease be made with the lessor it is agreed that the cigar stand located upon the said premises shall be leased to Neider on a pro rata basis of the total rent paid for the entire premises * * *." Plaintiff testified that, although he received a bill for his rental of the cigar stand every month, he paid no rent because the amount of rent was never determined between the parties and because he was waiting for an accounting to set off the rent he owed. That explanation seems entirely reasonable. Plaintiff's withholding of his rent payments as sublessee under those circumstances furnished no basis for denying him an accounting or for refusing to appoint a receiver. Moreover, in the accounting, which was made by the referee appointed by the court, plaintiff was debited with accrued rent in the sum of $6,875, one of the many items of the accounting which will be subject to review upon appeal from the final judgment should either party feel aggrieved and take an appeal therefrom.

[5] Defendants contend that plaintiff has a plain, speedy and adequate remedy at law which proscribes an accounting or the appointment of a receiver. We are not persuaded. The right of one joint venturer to sue another at law does not preclude a suit in equity for an accounting, Keyes v. Nims, 43 Cal.App. 1, 10, 184 P. 695, nor does the possession of other remedies preclude the appointment of a receiver in a proper case, Sunset Farms, Inc., v. Superior Court, 9 Cal.App.2d 389, 405, 50 P.2d 106; and Sibert v. Shaver, 113 Cal.App.2d 19, 21, 247 P.2d 609.

[6] Finally, defendants assert in their brief that the court "erred throughout the trial in refusing to allow counsel to elicit parol evidence concerning the agreements involved, particularly in regard to the consideration involved in the agreements and

what was intended thereby," but they furnish no citations to those portions of the record where such rulings were made or offers of proof tendered. Apparently they refer to evidence tendered as to the scope of the joint venture, i. e., whether or not it included the refrigerator business. Such evidence, even if improperly excluded (which we do not assume), would not be significant upon the current appeal which involves only the propriety of the appointment of the receiver, not the scope and accuracy of the accounting.

The order appointing a receiver, contained in the interlocutory judgment, is affirmed.

PETERS, P. J., and BRAY, J., concur.



Raymond E. HILYAR, a minor, by Leslie Earl Hilyar, his Guardian Ad Litem, Plaintiff and Appellant,

v.

UNION ICE COMPANY, a Corporation, and Charles Irwin Ingram, sued as Charles Irwin Ingerman, Defendants and Respondents.

Civ. 20413.

District Court of Appeal, Second District, Division 2, California.

Feb. 10, 1955.

As Corrected March 3, 1955.

Rehearing Denied March 3, 1955.

Hearing Granted April 6, 1955.*

Action for injuries to five year old boy who was struck by ice truck operating on private streets of trailer court. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., rendered judgment for defendants and the plaintiff appealed. The District Court of Appeal, Moore, P. J., held that evidence was insufficient to raise question for jury as to whether driver was negligent in respect to lookout, speed and warning.

Affirmed.

279 P.2d—38½

* Opinion vacated 286 P.2d 21.

1. Negligence ⇐134(1)

Before a man can be saddled with a judgment to pay money for his negligence, his carelessness must be established by reliable evidence.

2. Automobiles ⇐162(1)

A higher standard of care is owing by motorist where children are known to be in the vicinity and the motorist has knowledge of such facts.

3. Automobiles ⇐245(8, 40)

In action for injuries to five year old boy who was struck by ice truck operating on private streets of trailer court, evidence was insufficient to raise question for jury as to whether driver was negligent in respect to lookout, speed and warning.

Benjamin Elconin, Los Angeles, for appellants.

George P. Kinkle, Jr., Los Angeles, for respondent Union Ice Co.

Crider, Tilson & Ruppé, Los Angeles, for respondent Ingram.

MOORE, Presiding Justice.

The question at issue is whether the record contains such substantial evidence of negligence in the operation of an ice truck on private grounds as would constitute a proximate cause of the injuries suffered by a five-year-old boy. The accident in question occurred about two p.m. August 12, 1952 at the Del Amo Trailer Court in Long Beach.

The trailer court is private property. The portion of the court of interest to this action is an area of about 1,600 square yards. It contains two north-south streets, each about twenty-two feet wide, designated B and C. Both are unpaved and unlined. The distance between them is sixty-five feet. The trailers face streets B and C. The accident involved a ton-and-a-half ice truck driven by defendant Ingram. It bore the name Union Ice in large letters, although the ice company disclaimed having an employment contract with Ingram.

The first appearance of the truck in this story was on C street at a point about twen-

ty feet north of the east-west street where the driver delivered ice to a Mrs. Nicholson, occupant of the first trailer north of the east-west street. He had made daily deliveries to the court on week days for about three years. As he started to leave the position in front of the Nicholson trailer, he warned some children to get away from his truck and checked to see that no children were in his way. He moved slowly southward, turned left into the east-west street on which he proceeded easterly to B street. He turned left on B and had gone about 30 feet when he discovered that he had collided with a child who lay on the ground. He blew his horn at no time. On observing the fallen child which had apparently been struck by some part of his vehicle, Ingram promptly leaped from his moving truck and ran to the unhappy boy. The only witness to the movements of the vehicle preceding the accident testified that it "was just creeping." At the hospital the lad told the investigating officers that he "was walking alongside an ice truck and the truck turned a corner, knocking him to the ground and ran over his back." There was no other evidence.

Appellant contends that not all reasonable men would draw the same inference as to Ingram's freedom from negligence and therefore that issue should have been submitted to the jury. However, he does not indicate how a different deduction could have reasonably been made. There was no evidence of negligence. Ingram exercised the highest standard of care: he warned the children to keep out of his way; he proceeded very slowly; because there was no apparent danger he did not honk his horn; there was no evidence that he did not look out for children; he had a license from long, continuous use of the streets; there was no evidence as to where the child was walking when he encountered the truck; no positive proof as to where his body was found. Also, no evidence showed that Ingram had ever transgressed the high standard of care required of persons operating dangerous instrumentalities where children play. The exclamation of Ingram when he beheld the stricken child, to wit, "My God! My God! I hit him," cannot reasonably be interpreted as proof of a consciousness of guilt. Under the stress of anxiety, it is more likely that he feared he had hit the lad, for he had not been conscious of the child's presence in front of him or of his following behind the vehicle.

[1] Before a man can be saddled with a judgment to pay money for his negligence, his carelessness must be established by reliable evidence. To conclude Ingram's negligence from the facts proved, a court would be required to do some speculating and conjecture that Ingram did not keep a look-out although he did; that he moved rapidly although he moved slowly; that he saw danger although he testified he sensed none.

The law is that where the evidence received leaves a case in a mist of speculation, while it may be inferred from the injured condition of the body of the victim that he had been struck down, " 'yet these physical facts present no reasonable theory to the exclusion of many others as to the circumstances under which the accident occurred. * * * The evidence is consonant with any of many theories which may be advanced with equal force, but all of which are speculative and rest in mere conjecture.' " Greene v. Atchison, Topeka and Santa Fe Ry. Co., 120 Cal.App.2d 135, 142, 260 P.2d 834, 838. The evidence does not show that Raymond followed the truck or ran under it. Certainly there was no proof that he ran around it or otherwise came into Ingram's area of vision.

[2] Appellant cites many authorities supporting the rule of a higher standard of care where children are known to be in the vicinity and the defendant has knowledge of such fact. The doctrine so announced is sound, but there is no contrary evidence received to show that Ingram failed to exercise the proper degree of care or that he did not comply with the standards prescribed by law. The uncontradicted evidence proves his high regard for the safety of others as evidenced by the speed at which he moved and the care he exercised in his driving within the trailer court.

[3] Appellant asserts that Ingram's failure to blow his horn constitutes negligence and that the significance of such failure

should have been submitted to the jury. "There was no danger whatever apparent, and therefore, under such circumstances, it cannot be fairly maintained that a duty was imposed upon the driver of the truck as a reasonably prudent person to sound his horn." Moss v. Stubbs, 111 Cal.App. 359, 368, 295 P. 572, 575, 296 P. 86. This doctrine of apparent danger was observed by respondent in the circumstances at bar. That he complied with the higher standard of care cannot be denied. Respondent cannot reasonably be required to answer to a still higher degree of care than the circumstances require. The law does not demand that an ice truck driver alight at every three, five or ten feet to search the premises for concealed children.

The contention that the police officers' testimony points to the negligence of Ingram cannot be sustained. Such testimony was merely that they found what they thought was a blood stain on the street; no more, no less. No definite conclusions were drawn as to the circumstances under which the purported blood stain originated. There is no evidence imputing negligence to respondent Ingram.

In support of appellant's contention that the issue of respondent's negligence should have been submitted to the jury, appellant has cited a number of authorities. All are factually distinguishable. In Conroy v. Perez, 64 Cal.App.2d 217, 148 P.2d 680, the defendant remained in his truck and kept the engine running while several children played in and around the vehicle. The three-year-old daughter of plaintiff tripped about his car which he was washing while Perez waited. One witness saw the child standing two feet back of the truck and other children playing around it. She saw Perez back his truck without looking, and crush the child to death. Perez actually knew the children were playing around his truck and told them to leave.

In Freeland v. Jewel Tea Company, 118 Cal.App.2d 764, 258 P.2d 1032, plaintiff's 30-month-old daughter Karen and other children were playing around the truck of defendant. After inducing the children to leave the street, the driver pulled forward for an instant, then proceeded to back without sounding his horn. He collided with Karen who was out of the range of his vision. She and her sister had been pursuing the truck after it left the east side of the street. From then until she was knocked down, the driver moved forward and without warning backed into a public street where he *knew* the children were at play. That knowledge made plaintiff's case complete. In the case at bar, Ingram first directed the children to avoid his truck. He then drove slowly south, on C street, turned east, watching in his rear view mirror and out on both sides of the truck, moved to B street where he turned north at about three miles an hour. He neither saw nor heard anything to indicate the presence of a child until he had gone about thirty feet north. From the time he left the Nicholson truck he drove in second gear. Not a witness placed the little boy at any time while Ingram drove from C street until the lad had fallen on B street. Not having seen a child as he proceeded, having left the children at Nicholson's, Ingram saw no need for sounding his horn.

In Frederiksen v. Costner, 99 Cal.App.2d 453, 221 P.2d 1008, the defendant was as careless as the defendants in the two cases last above discussed.

In De La Torre v. Valenzuela, 102 Cal. App.2d 586, 228 P.2d 13, the court had evidence that would have justified the court's finding that there was apparent danger of injuring the workmen which required a warning of a truck's approach. In Lever Bros. Company v. Stapleton, 313 Ky. 837, 233 S.W.2d 1002, the proof showed an accident in a congested area. Just before the accident, a school bus had discharged about 25 children. Defendant driver approached at a speed in excess of 50 miles per hour. Clearly, he was negligent.

The other cases cited by appellant, Edelson v. Higgins, 43 Cal.App.2d 759, 111 P.2d 668; Bessierre v. Alabama City, G. & A. Ry. Co., 179 Ala. 317, 60 So. 82; Kircher v. Atchison, T. & S. F. Ry. Co., 32 Cal.2d 176, 195 P.2d 427, are as readily distinguishable.

In the Kircher case, while there were no eye witnesses, the plaintiff testified fully as to how the accident occurred.

In view of the conclusions above announced as to the lack of proof of Ingram's negligence, a discussion of the other contentions is not necessary.

Affirmed.

McCOMB and FOX, JJ., concur.



130 Cal.App.2d 652

Charles Young CARSON, a/k/a C. Y. Carson, Plaintiff and Appellant,

v.

Alvin Ethon VINDING, Alvin Ethon Vinding, d/b/a Pacific War Surplus, Defendant and Respondent.

Civ. 20476.

District Court of Appeal, Second District, Division 2, California.

Feb. 10, 1955.

Action by employee against employer for compensation, allegedly evidenced by $1,500 check, for services rendered in connection with the sale of a store, and for unpaid salary, allegedly evidenced by check for $4,450. The Superior Court, Los Angeles County, James G. Whyte, J., rendered judgment for the employer and the employee appealed. The District Court of Appeal held that evidence sustained finding that the employer had received no consideration for the checks.

Affirmed.

1. Appeal and Error ⇐1011(1)

Where evidence is conflicting, a finding by trial court is final if the evidence supporting it is substantial.

2. Appeal and Error ⇐996

When two or more inferences can reasonably be drawn from the evidence, the reviewing court may not choose to adopt that which had been rejected by the trial court.

3. Appeal and Error ⇐837(1)
Bills and Notes ⇐493(1)

Presumption that checks were based on valuable consideration was rebuttable and could not be reconsidered by reviewing court for purpose of making a new finding contrary to finding of trial court.

4. Appeal and Error ⇐1012(1)

Although reviewing court must consider evidence, it cannot reweigh it.

5. Master and Servant ⇐80(9)

In action by salesman to recover compensation, allegedly evidenced by $1,500 check, for services rendered in connection with sale of employer's store, and unpaid salary, allegedly evidenced by check for $4,450, evidence sustained finding that employer had received no consideration for the checks.

6. Evidence ⇐594

The court is neither required blindly to believe a witness nor to find in accordance with his testimony merely because witness was not contradicted.

M. C. Schrager, Los Angeles, for appellant.

Jones & Wiener and Wm. M. Anderson, Los Angeles, by Edward Clayton Jones, Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the findings are supported by the evidence.

The court found that defendant, doing business as Pacific War Surplus, had employed appellant to work primarily at his Huntington Park Store, with incidental duties at his similar establishment in Bell Gardens; that about September 1, 1952, he authorized his agent to complete two checks, previously signed, and deliver them to appellant, which order was obeyed. Both checks are payable to the order of appellant in the sums of $4,450 and $1,500 and respectively dated August 5 and August 12,

1952; but respondent received no consideration for the checks; appellant knew at all times that respondent did not have sufficient funds to pay the checks on presentment; when the check for $4,450 was presented, payment was refused for lack of funds; defendant is not indebted to plaintiff in the sum of $6,679.15, but he owes plaintiff only $353.08 with interest from September 20, 1952; no moneys are owing defendant by plaintiff by reason of the latter's employment for any period; plaintiff has no property of defendant. During July and August 1952, defendant was not of unsound mind; neither was he wholly or absolutely incompetent to understand the nature of his transactions, nor was he incapable of making a contract, and plaintiff knew such facts. That plaintiff has been fully paid for all services rendered to defendant and for all money advanced to or on behalf of defendant, but defendant still owes plaintiff the said $353.08.

The Evidence

Although the finding is that respondent was not incompetent at the time the two checks were delivered to appellant, yet he was not a well man. His resistance was low and he was an easy prey to suggestion. In December 1951 he suffered a skull fracture, a brain injury and the loss of an eye. He was confined to the psychopathic ward of the General Hospital for 28 days in August and September 1952 and thereafter for two months in a state hospital for the insane. During respondent's stay at the General Hospital, appellant caused the issuance of the two checks to himself. Although they had been signed in blank, for them to have commercial value, they required the name of "C. Y. Carson" inserted as payee and the amounts of each to be inserted. Appellant visited respondent in the "acute section" of the psychopathic ward and there procured respondent to instruct the latter's bookkeeper to fill in the checks. Pursuant to the instruction, the bookkeeper supplied the omissions in the checks and delivered them to appellant who was then operating respondent's business. The latter had been called upon to pay other checks that had been dishonored.

Contrary to appellant's testimony, respondent testified that it was agreed appellant's duties were: "to clerk as a salesman; occasionally visit the other stores; deliver merchandise; and possibly other errands." His wages were to be $50 a week and $15 a week as expenses. "In 1950, I raised his check allowance to $60 a week, with same expenses. From the time of his employment I paid him his wages until I entered the hospital and paid him the expense account. I never told him that I would pay him $50 a week as expense money."

Checks were received in evidence showing payments to appellant for 160 weeks in sums ranging from $45.80 to $52.32.

With reference to the check for $1,500, appellant testified that respondent promised him ten per cent of the sales price for "help to get the store in Bell Gardens closed out and sold." At the time of such asserted promise, respondent was in a sanitarium. Appellant concedes he did not locate the buyer or negotiate the sale; that during the three weeks while he was "digging out" stock for the Bell Gardens store he was doing his service at the Huntington Park store, the place at which he was regularly employed for which employment he was paid a salary. He did all of his "digging out" during the day. Respondent denied that he had promised to pay appellant any sum for services rendered in connection with the sale of such store.

Substantial Proof Supports Findings

[1–5] Where the evidence is conflicting, a finding by the trial court is final if the evidence supporting it is substantial. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. When two or more inferences can reasonably be drawn from the evidence, the reviewing court may not choose to adopt that which has been rejected by the trial court. Crawford v. Southern Pacific Company, 3 Cal.2d 427, 429, 45 P.2d 183. Appellant had the burden to establish his allegations. Respondent's contradiction of appellant's testimony is itself substantial proof. Appellant contends that the presumption that the checks were based upon a valuable consideration is the final proof

on that subject. But such presumption is rebuttable. It was rebutted by the testimony of respondent and the trial court adopted that testimony. It cannot be reconsidered by the reviewing court for the purpose of making a new finding. 4 Cal. Jur.2d p. 487, sec. 606; Crawford v. Southern Pacific Co., supra. Although the evidence must be considered, it cannot be reweighed by the appellate court. In re Teel's Estate, 25 Cal.2d 520, 527, 154 P.2d 384. A rebuttable presumption issues from no divinity. Arrayed against valid writings or testimony, it is just so much proof. It may outweigh the memory of a witness who controverts it; but it might not, and in this instance, the court found that it did not: that finding is final. 18 Cal.Jur.2d p. 495, sec. 68; Scott **v.** Burke, 39 Cal.2d 388, 398, 247 P.2d 313.

[6] But the aura surrounding the testimony of appellant was such as was not calculated to bestir the credulity of a judge. His testimony that his ill employer, while in the sanitarium, promised him $1,500 to assist in the sale of the Bell Gardens store, while such labors were a part of his general duties at the Huntington Park store; his visit to respondent in the psychopathic ward to obtain payments (1) for the asserted "bonus" for his alleged services in helping to make such sale and (2) for the $4,450 check, which amount appellant claimed was due him for salary despite the proof that weekly checks had been delivered to appellant for consistently reasonable sums for over two years—such facts depreciated the value of appellant's testimony and warranted the trial court in rejecting it. A court is neither required blindly to believe a witness nor to find in accordance with his testimony merely because he was not contradicted. Travis Glass Co. v. Ibbetson, 186 Cal. 724, 727, 200 P. 595; 4 Cal.Jur.2d p. 485, sec. 604.

Appellant claims that from the beginning of his employment he was paid in cash large sums for expenses. He could give no satisfactory explanation why such sums should have been paid in cash, nor did he show that his expenses were as much as claimed. He did not report it on his income tax returns. His testimony that he was paid half of his wages in check and half in cash, because his salary was reduced with the promise to make it up later, justified the court in finding that his story of such withholding is highly improbable. The checks cashed by appellant were confirmatory of respondent's testimony that at the commencement of the employment the salary was fixed at $50 a week, expenses at $15 and that after 1949 the wages should be $60 weekly instead of $50. The trial court may reasonably have reasoned (1) that no sane employer would offer an advance in salary to an employee if he could not deduct such increase as additional expense; (2) that any honorable man who has received or been entitled to receive $50 cash as wages would report it as "income"; that a toiler who permits his unpaid salary to grow to the sum of $4,450 without demanding a written acknowledgement thereof excites suspicion in the mind of a reasonably prudent court that the claim for such sum must arise out of the fact that his employer was too ill to direct his own affairs. Neither can the court be criticized for rejecting the demand for the $1,500 claimed as a bonus allegedly promised by respondent as extra compensation for helping sell the Bell Gardens store. The promise was allegedly made (1) while appellant was busy at his regular employment at Huntington Park; (2) while respondent was in a sanitarium; (3) and on the eve of the close of the escrow for the sale.

In view of the impression reasonably created by appellant's testimony, it cannot be said that the court acted arbitrarily in adopting the testimony of respondent as the basis of its decision.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

130 Cal.App.2d 557

In the Matter of the ESTATE of Jennie CESARE, Deceased.

Frank FERLITO, Special Administrator, Appellant,

v.

Paul CESARE, Respondent.

Civ. 16087.

District Court of Appeal, First District, Division 1, California

Feb. 3, 1955.

Probate proceeding. The Superior Court, County of San Mateo, A. R. Cotton, J., made rulings in favor of deceased's husband, and deceased's son appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that finding of facts as to community nature of property, where amply supported, could not be disturbed by reviewing court.

Orders affirmed.

1. Trial ⇐66

Trial court may reopen a case any time before decision to permit introduction of further evidence, so long as this power is exercised with due regard to adverse party's right fully to present his side of the case.

2. Trial ⇐66

In probate proceeding, wherein party's status as decedent's husband was in question, and opposing parties were given full opportunity to present all testimony they desired on the issue, reopening case to allow purported husband to introduce evidence of a marriage ceremony was not abuse of discretion.

3. Marriage ⇐50(1)

In probate proceeding, wherein party's status as decedent's husband was in question, evidence supported finding that a second and ceremonial marriage had taken place after decedent's decree of divorce from former husband had become effective. West's Ann.Civ.Code, § 79.

4. Trial ⇐140(1)

It was for trial court, who saw witnesses in probate proceeding, to pass upon their credibility.

5. Husband and Wife ⇐262(1)

That properties had been conveyed to decedent's wife in her name after marriage raised a rebuttable presumption that they were wife's separate properties. West's Ann.Civ.Code, § 164.

6. Husband and Wife ⇐264

Husband's testimony, in probate proceeding, that at time properties were conveyed to wife in her name, the parties intended and he believed that property was to remain community property, was sufficient to rebut presumption that properties were wife's separate property. West's Ann.Civ.Code, § 164.

7. Husband and Wife ⇐264

In proceeding in probate of deceased wife's estate, evidence was sufficient to support finding that all the commingled property, including property conveyed to wife in her name after marriage, was community property.

8. Appeal and Error ⇐1010(1)

Finding of facts as to community nature of property, where amply supported, could not be disturbed by reviewing court.

9. Evidence ⇐441(8)

In proceeding to probate deceased wife's estate, wherein nature of ownership of property was in issue, husband could testify that he and wife had had oral agreements, contrary to forms of deeds, as to ownership and title of properties which he had conveyed to wife.

10. Witnesses ⇐240(2)

Trial court's discretion in allowing leading questions on direct examination can be upset only by proof of abuse.

11. Appeal and Error ⇐1048(3)

Where trial court in probate of proceedings observed that a witness was difficult and not very intelligent and needed help, and case was tried without jury, allowing leading question to be put to this witness on direct examination was not prejudicial. West's Ann.Code Civ.Proc. § 2046.

12. Executors and Administrators ⇐181

Where residence of husband and deceased wife was community property, trial

court could, in probate proceeding, assign husband an absolute fee simple homestead. Probate Code, § 661.

13. Executors and Administrators ⇐180

In a proper case, probate court may allow support to a surviving spouse even if he or she has separate property.

14. Executors and Administrators ⇐180

Where surviving husband testified that, because of his health, he was no longer employable, and a doctor corroborated his testimony, trial court was justified in granting him a family allowance from wife's estate, even though husband had a separate bank account.

15. Executors and Administrators ⇐194(1)

In proceeding in probate of wife's estate, husband could petition for assignment of exempt property prior to the filing of the administrator's inventory. Probate Code, § 660.

16. Appeal and Error ⇐1056(5)

Where probate proceeding was tried to court alone, and judge knew nature of excluded evidence, exclusion of evidence on issue of party's credibility was not prejudicial.

17. Appeal and Error ⇐607(1), 640

Appellant's opportunity to correct transcript was in proceeding for that purpose, and where he apparently secured some correction, and trial court certified transcript as correct, reviewing court could not pass upon correctness of transcript. Rules on Appeal, rule 8(b).

O'Keefe & O'Keefe, Redwood City, for appellant.

Frank V. Kington, Redwood City, for respondent.

PETERS, Presiding Justice.

Jennie Cesare died testate on June 30, 1952. Left surviving her were Paul Cesare, who claimed to be Jennie's husband, and three sons, who were the issue of Jennie and Salvatore Ferlito from whom Jennie had been divorced, the interlocutory decree having been obtained on February 13, 1930, and the final having been entered on April 1, 1931. Frank Ferlito, one of the sons, was appointed special administrator of the estate. Paul Cesare then filed a petition in the probate proceeding asking for the assignment to him of certain personal property exempt from execution, for a probate homestead, and for a family allowance. He alleged that he and the deceased were husband and wife, and had been for twenty years preceding her death; that they had no issue; that the property, both real and personal, standing in the name of Jennie, was in fact community property; that he was 54 years of age, in such physical condition as to be unemployable, and that $125 a month was a reasonable amount for the claimed family allowance. The special administrator opposed the petition. He claimed that the properties listed in the inventory and standing in the name of Jennie were her separate property, and that Jennie and Paul were, in fact, not legally married. After a lengthy trial the lower court found that all of the property listed in the inventory, and certain other designated property, was intended by the parties to be and was the community property of Paul and Jennie, and that any separate property owned by Jennie had become indistinguishably commingled with the community property. It also found that the items of property listed by Paul and certain other items were property assignable to Paul as property exempt from execution; that petitioner needed $75 a month as and for his support, and that a certain house on Vera Avenue, Redwood City, which was the only real property in the estate, was acquired as community property. This property was set aside to Paul as a probate homestead in fee simple absolute. Frank Ferlito has appealed from these orders.

At the trial and on this appeal the two main questions presented were whether Paul and Jennie were husband and wife, and, if so, what was the nature of the property involved, community or separate?

The marriage issue simply presented a question of fact. Admittedly, Jennie secured her interlocutory decree from Ferlito on February 13, 1930. Admittedly, Paul and Jennie went through a marriage ceremony on December 20, 1930. That mar-

riage was, of course, invalid, because Jennie was then still married to Ferlito, the final decree not being entered until April 1, 1931. But Paul and his witnesses offered evidence to the effect that early in April of 1931, after the divorce from Ferlito had become final, Paul and Jennie were married a second time by a clergyman under the provisions of section 79 of the Civil Code. Admittedly, they lived together as husband and wife from 1930 until Jennie's death in June of 1952.

This evidence as to the second marriage came into the case under the following circumstances. Paul, during the presentation of his case in chief, merely proved the divorce from Ferlito and his, Paul's, marriage to Jennie. At the conclusion of Paul's case appellant moved to dismiss the proceedings on the ground that the evidence demonstrated that Paul and Jennie were not lawfully married. Counsel for Paul expressed surprise that the marriage issue had been raised, and moved to reopen the case in order to prove the second marriage. The court granted the motion, and the evidence was then introduced.

[1, 2] Appellant contends that the granting of this motion constituted an abuse of discretion. The point is without merit. It is too well settled to require extended discussion that the trial court may reopen a case any time before decision to permit the introduction of further evidence (see cases collected 24 Cal.Jur. p. 768, § 49, et seq.) "'* * * so long as the power is exercised with due regard to the adverse party's right to fully present his side of the case there can be no prejudice of which he has the right to complain on appeal.'" Braden v. Lewis, 119 Cal.App.2d 84, 89, 259 P.2d 16, 19, quoting from Badover v. Guaranty Trust & Savings Bank, 186 Cal. 775, 778, 200 P. 638. In the instant case appellant was given full opportunity to present, and he did present, all the testimony he desired on the issue. There was no abuse of discretion in reopening the case.

[3] The main attack made by appellant on the issue of the validity of the second marriage is that the evidence produced by respondent on this issue was vague, uncertain and so inherently improbable that it should not have been believed by the trial court. But it was so believed, and the trial court found that such second marriage had taken place. We believe that the evidence supports the finding.

The evidence shows that Jennie was of Sicilian origin and unable to read or write English. The sister of Paul, Ida Johnson, testified that she had acted as the interpreter and witness for Jennie when Jennie secured her interlocutory from Ferlito in February of 1930. When Paul and Jennie were married in December of 1930, Ida became worried about the validity of the marriage, and, at the request of her brother, consulted a lawyer. She was unable to remember the name of the attorney, but remembered that he had offices in the Phelan Building. The attorney arranged for the validating ceremony under section 79 of the Civil Code. Ida testified, as did Paul, that they and Jennie went to a Protestant church in the Mission District in San Francisco, and were married by a clergyman whose name had been forgotten. Both Ida and Paul testified as to the performance of the ceremony and the issuance of a certificate of the marriage, which was delivered to Jennie. No written record of this second marriage was produced, nor could either Paul or Jennie remember the names of the lawyer, the minister or the church, nor could they fix the precise location of the church. The whole affair was kept as secret as possible to avoid scandal and embarrassment to the family, although several members of Paul's family testified that the fact that the second marriage had taken place was generally known to them. It should also be mentioned that Jennie, in two wills executed in 1940 and 1945 respectively, referred unequivocally to Paul as her husband.

In an effort to refute this testimony appellant produced his wife Louise Ferlito, who testified that she knew Jennie very well, and that, on several occasions, estimated at more than six, Jennie had told the witness that her marriage to Paul was invalid. But this witness was present when Jennie executed the 1945 will and knew that it contained a clause referring to Paul as

the testatrix' husband, and made no attempt to call this discrepancy to the attention of Jennie. The credibility of this witness was for the trial court.

In addition to submitting both Ida and Paul to a grueling cross-examination, in which the vagueness, uncertainty, and omissions in their testimony were highlighted, appellant produced two private investigators who were hired by appellant to check all the churches in the Mission District where the two witnesses had testified the ceremony took place. Their search disclosed no church in the area with a record of the marriage.

Section 79 of the Civil Code provides: "When unmarried persons, not minors, have been living together as man and wife, they may, without a license, be married by any clergyman. A certificate of such marriage must, by the clergyman, be made and delivered to the parties, and recorded upon the records of the church of which the clergyman is a representative. No other record need be made."

[4] Inasmuch as this section requires the church to keep a record of the marriage, and no such record could be found, appellant argues that he has established to a certainty that no such marriage took place. But the evidence is not so conclusive. The investigators based their investigations on the churches listed in a designated city directory for the year 1930–1931. They made their investigation in March of 1953. They could investigate, of course, only the churches in existence in 1953. Respondent called to the attention of the trial court the fact that other city directories showed that there were many Protestant churches in the area in 1930 that were no longer in existence in 1953. The trial court elected to believe the testimony of Paul and Ida. The fact that these two witnesses had forgotten names, and were vague and uncertain as to details, does not, as a matter of law, refute their testimony. This second marriage had taken place twenty-two years before the trial. Human memory is fallible. It is not surprising that the witnesses were not able to remember all of the facts surrounding the ceremony. The evidence that such a ceremony took place was neither unnatural nor improbable. It was for the trial court, who saw these witnesses, to pass upon their credibility. This it has done. This court cannot interfere with the finding.

As already pointed out, the trial court found that all of the property standing in the name of Jennie at the time of her death was in fact the community property of the parties, and not the separate property of Jennie. In this connection the court also found that during their marriage Paul and Jennie had so commingled their separate properties with the community property so that it was impossible to trace any of the separate properties of the parties; that although during their marriage the parties held title to various parcels of real property, moneys, bank accounts and evidence of debts in their joint names and in their respective separate names and sometimes in joint tenancy "it was at all said times their intent and the intent of each of them that such real and personal properties, [designating them] * * * were at all times community property of" Jennie and Paul.

These findings applied to the following properties standing in Jennie's name at the time of her death, and listed by appellant in the inventory filed by him:

1. $164.76 cash.
2. Household furnishings (itemized).
3. Promissory note of Ohlemutz, payable to Jennie Cesare, secured by deed of trust, with a balance owing of $5,462.19.
4. Promissory note of Wuebel, payable to Jennie Cesare, secured by deed of trust, with a balance owing of $739.77.
5. Promissory note of Osterhoudt, payable to Jennie Cesare, secured by deed of trust, with a balance owing of $5,561.42.
6. A house on Vera Street, Redwood City, California, in the name of Jennie Cesare, of appraised value of $10,500.

The court also applied these findings to a set of silverware in the possession of Tony Ferlito, and to a promissory note for $2,500 executed by Frank Ferlito, the appellant, and naming Paul and Jennie as payees.

There can be no doubt that the findings of the trial court are amply supported. Be-

fore pointing out the evidence that supports these findings, some reference should be made to the specific evidence in reference to the $2,500 Frank Ferlito note. According to the testimony, Frank borrowed $2,500 from Jennie and Paul and gave the note, naming both as payees, as evidence of the indebtedness. Appellant testified that Jennie had told him that he did not have to pay the note unless he was able to, and, in the presence of Paul, had returned the note to him, told him to destroy it, which he did, and that if she died that he did not have to repay the money at all. Paul denied this testimony, and also testified that on the day of Jennie's death he saw the note in the metal box in which he and Jennie kept their papers. This box came into the possession of appellant after he was appointed special administrator. The trial court found that appellant secured possession of the note in this fashion, and either still possessed it or had destroyed it, and that it was still owing.

So far as their properties are concerned, Paul and Jennie hopelessly commingled their separate and community properties. They were inveterate real estate speculators, although the only real property remaining in the estate at the time of Jennie's death was the Vera Street property in Redwood City, where they had lived for several years prior to Jennie's death. Some of these properties were taken in their joint names, and some in their individual names. Paul testified, and the court found, that the intent of the couple, regardless of whose name in which the properties were taken, was that the properties belonged to both of them as community property.

It is impossible to separate the separate property of the parties, if any, from their community property. Both had separate property when they married in 1930. Just prior to this marriage Jennie had collected $7,500 in a personal injury action. Paul, at that time, owned a small grocery store and lodging house. The couple lived in the lodging house, with Jennie's three boys, for many years. During those years Paul worked in the grocery store, in the shipyards, drove trucks for various companies, and operated a taxicab business. In 1950 he gave up the taxicab business in order to take care of his bedridden wife. His health is such that he is no longer employable.

It is a hopeless task to try and trace the source of funds of many of the purchases. A summary of some of the evidence most favorable to respondent follows: Jennie invested some of her original $7,500, which was admittedly her separate property, in purchasing two parcels of realty, one on James Street in Redwood City, and the other on Douglas Street in San Francisco. She also purchased from her separate funds a parcel at 21st and Alabama Streets in San Francisco, paying $2,500 down and assuming a $6,500 mortgage. This mortgage, according to respondent, was paid off with community funds. Then the couple acquired a second parcel on 21st Street, taking title as joint tenants. In 1939 they sold the Alabama Street parcel and the grocery store and lodging house owned by Paul before marriage, to one Mattula, taking back a deed of trust as community property to secure the unpaid purchase price. In 1942 they sold the other 21st Street parcel, receiving back jointly a deed of trust and a down payment. This down payment and subsequent payments on the deed of trust were placed in a joint bank account.

In the meantime, in 1937 and 1938 they purchased parcels in Redwood City on Bayshore Boulevard, and on Redwood Avenue. Title to each was taken in joint tenancy. Subsequently, property in Dumbarton Acres was acquired with title in Jennie's name alone. Paul testified that it was joint tenancy money that paid for it, and explained that title was taken in Jennie's name, because it was planned to let her son Joseph run the place as a chicken farm when he was released from San Quentin.

Next Jennie and Paul took title in joint tenancy to another parcel in Redwood City, and paid for it with their joint funds. This parcel was later sold. In August of 1940, they traded their Redwood Avenue parcel for some real estate at 25th and Castro Streets in San Francisco. Then, in March of 1941, that parcel was in turn traded for certain Valencia Street property. Jennie gift deeded her interest in this property to

Paul, but he testified that they did not intend it to be his separate property. At this same time Paul made over two deeds of trust they jointly held to Jennie alone. When Paul sold the Valencia Street property, he took a mortgage made out to both himself and Jennie, and they received the payments together. Paul and Jennie next purchased, as joint tenants, additional Redwood City property from one Green and his wife. In May of 1943, property on Birch Street, Redwood City, was purchased. Title was placed in Jennie's name alone, apparently without Paul's consent or knowledge. The respondent testified that he gave Jennie a check for $5,200 to make that purchase. There was evidence that Jennie had deposited that sum in her separate account and then paid $4,573.20 out of that account. Paul testified that funds in that account had come from himself and from a joint tenancy account they had in the same bank. The mortgage covering the balance of the purchase price on the Birch Street property, a sum of $3,000, was paid from the proceeds of further deals executed by the Cesares. Jennie subsequently deeded this property to Paul and took back from him a $10,000 mortgage. Paul stated that this was part of Jennie's plan to boost the valuation of the property and thus be able to sell it at a higher price to some stranger. The Birch Street property was in fact sold to one Wuebel who assumed Paul's mortgage. Part of that debt in the amount of $739.77 was still owing at the time of Jennie's death.

Using community funds, Jennie took title in her own name, and without Paul's knowledge, to certain property in San Carlos. She then conveyed it to Paul when he protested her action. He sold the property and received a check made to both of them for $7,072.19. Then Jennie took title in her own name to property on Finger Avenue in San Francisco, but when it was sold, both Paul and Jennie signed the conveyance, and both received the purchase check for $7,400.

Property on Cleveland Street in Redwood City was the next acquisition. The purchase was made with Paul's check for $4,000 plus another $500 for furniture. This same furniture was later moved to the Vera Street home where they lived at the time of Jennie's death, and it is, apparently, the furniture inventoried by the special administrator and found to be community property. Paul, at the time of acquisition, signed the deed over to Jennie, but he insisted that it was never their intention to make the property his wife's separate property. In addition, his sister stated that Jennie said at the time that it did not make any difference whether his name or hers was on the deed.

Property on Fay Street in Redwood City was purchased on October 14, 1948, and again Paul was directed by Jennie to sign over title to her, in the belief that the property belonged to both of them. They used the deed of trust on the Cleveland Street property as payment. Then Jennie deeded the Fay Street property to one Ohlemutz, whose note is part of the estate's assets.

On December 3, 1948, using as consideration the deed of trust given by Wuebel when he purchased the Birch Street property and assumed Paul's $10,000 mortgage, Jennie took title alone to certain Dumbarton Oaks property. Paul stated that he allowed her to do this after she had nagged him day and night. Ultimately, the property was sold to one Osterhoudt whose promissory note to Jennie was inventoried in her estate.

When they next bought real property, on Vera Avenue, Redwood City, it was a house and adjacent lot. They took title to this parcel in Paul's name alone. Paul stated that Jennie said that she wanted to show him that she did not mean anything wrong in putting property in her own name earlier. They sold the house to Tony Ferlito, Jennie's son, and sold the lot to another party who later resold the lot to the Cesares again with title, this time, in Jennie's name alone. To finance the repurchase, they jointly borrowed $1,400, and when they decided to build a home of their own on the lot, they contracted jointly for construction of the dwelling. Title was in Jennie alone, but as the building contractor testified, she stated the home was for both of them.

There is much more testimony in the record. Bank accounts were opened and closed, funds were indiscriminately trans-

ferred from bank to bank, and many properties purchased and sold. It is unnecessary to try and summarize this confused evidence. Enough has been stated to show how the separate and community funds of the parties were commingled. It is impossible to segregate them. As already pointed out, Paul testified that it was the intent of the parties, however title was held, that all their holdings were to belong to both as community property. Certainly, community property was used in large part in the acquisition of each of the items here under consideration.

Appellant's main attack on the findings that items here were community property is predicated on the testimony of Louise Ferlito, wife of appellant, to the effect that in 1939 or 1940 Jennie told her that she was unhappy with Paul and "that she was going to make a property settlement with him." This witness also testified that in 1943 Jennie told her that she, Jennie, had made such a settlement with Paul, by giving him the Valencia Street property and some cash. Appellant argues that the pattern of the conduct of the parties after 1943 indicates the separate character of their holdings. This testimony, while it might have supported a finding of the separate character of the property, was obviously not believed by the trial court, and did no more than create a conflict in the evidence.

[5–8] Of course, the fact that the properties here involved were in the name of Jennie, and were conveyed to her after marriage in that manner, raised a presumption that they were Jennie's separate properties. § 164, Civ.Code; see cases collected 10 Cal.Jur.2d p. 713, § 43. The presumption, as against the surviving husband, is rebuttable. (See cases collected 10 Cal.Jur.2d p. 716, § 44.) Paul testified that, in spite of the form of the conveyances, the parties intended and he believed, the property was to remain community property. This was sufficient to rebut the presumption. (See cases collected 10 Cal.Jur.2d p. 730, § 54.) This alone would support the questioned finding. But, in addition, Paul offered evidence that all of the properties here involved had been acquired after marriage, and that whatever separate properties the parties had before marriage had been commingled with community property. This raised a presumption that all of the commingled property was community. Falk v. Falk, 48 Cal.App.2d 762, 120 P.2d 714; see other cases collected 10 Cal.Jur.2d p. 702, § 35. Thus, the challenged finding is amply supported, and for that reason cannot be disturbed by this court. (See cases collected 10 Cal.Jur.2d p. 702, § 35.)

[9] Appellant contends that it was error to permit Paul to negative his several grants to his wife. Appellant's theory seems to be that this amounted to varying the terms of a written instrument by parol. The point is without merit. Paul merely undertook to prove, as is common in divorce or probate proceedings involving a deceased spouse, that he and his wife had certain oral agreements as to the ownership and title of the properties conveyed to the wife. Evidence of such agreements is admissible, and, if believed, will support a finding adverse to the form of the deed. In re Estate of Wilson, 64 Cal.App.2d 123, 148 P.2d 390; Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905; see also cases collected 10 Cal.Jur.2d p. 722, § 48.)

[10, 11] Appellant also complains that counsel for respondent was permitted, over appellant's objections, to ask his client several leading questions while respondent was testifying as to the understandings and intent of the parties contrary to the form of the deeds. There is no doubt that a series of leading questions on this subject were asked. Under section 2046 of the Code of Civil Procedure such questions are prohibited on direct examination "except in the sound discretion of the court, under special circumstances, making it appear that the interests of justice require it." Here the record shows sufficient facts to support the trial court's discretion, which can only be upset by proof of abuse. Davis v. Stulman, 72 Cal.App.2d 255, 164 P.2d 787. The witness was vague, uncertain and confused in his testimony. The trial court commented that the witness was "difficult," and "not

very intelligent," and apparently needed help if he was to explain anything. This was a sufficient showing of the "special circumstances" required by the code section. Moreover, this case was tried before the court without a jury, so that the possibility of prejudice is most remote. There was no prejudice to appellant in the ruling. Nylund v. Madsen, 94 Cal.App. 441, 271 P. 374.

[12] Appellant also objects to the order granting respondent an absolute fee simple homestead in the Vera Street property. This contention is predicated upon the argument that the Vera Street property was the separate property of Jennie. If that were so, under section 661 of the Probate Code, the court would have been without power to grant an absolute fee as a probate homestead. But where the residence of the parties was their community property, as here, the homestead is properly assignable in the discretion of the court for an unlimited period including an estate in fee simple. In re Estate of Claussenius, 96 Cal. App.2d 600, 216 P.2d 485.

[13, 14] Appellant contends that it was error to allow Paul $75 a month as a family allowance inasmuch as he admitted that he had a separate bank account of nearly $4,000. In a proper case, the court may allow support to the surviving spouse even if he or she has separate property. In re Estate of Secord, 84 Cal.App.2d 783, 192 P.2d 81. The matter rests in the sound discretion of the trial court. Paul testified that because of his health he was no longer employable, and his testimony was corroborated by that of a doctor. This was sufficient to justify the award.

[15] Appellant attacks the order awarding Paul certain personal property exempt from execution on the ground that section 660 of the Probate Code does not permit such an order based on a petition filed by the surviving spouse before the administrator's inventory is filed. Here Paul filed his petition on November 25, 1952. The special administrator did not file his inventory until December 30, 1952. Paul's inventory of what he thought should be included in the assignment contained in his petition differed in several respects from the inventory later filed by the appellant. The trial court in its finding and order on this issue consolidated the two lists. This was proper. The code section does not prohibit the filing of a petition for such assignment prior to the filing of the inventory, and no sound reason has been advanced as to why such requirement should be implied.

[16] It is next contended that the court improperly excluded testimony of an impeaching witness. Paul had been permitted to testify that he had not been drunk while employed as a taxicab driver, and that he drank wine only with his meals. Appellant produced a witness through whom he offered to prove that Paul drank on the job and had been frequently criticised for it. This testimony was offered to impeach Paul's credibility. Evidence of Paul's drinking was, of course, immaterial, but in view of the admission of Paul's testimony on the issue the proffered testimony probably was admissible on the issue of Paul's credibility. But its exclusion could not have been prejudicial, particularly since the trial court knew of the nature of the excluded evidence by reason of the offer of proof.

[17] Appellant's last contention relates to the record on appeal. The briefs fail to spell out appellant's precise contention. Apparently appellant desires to augment the record to include a transcript of a proceeding in which Paul and certain other witnesses testified as to what had happened at the trial. As far as we can tell it would appear that appellant, in the trial court, challenged the correctness of the transcript in several respects, and a proceeding was there had to determine the validity of the objections. The transcript as filed in this court bears the certification of the trial judge that the transcript "as corrected * * * is true and correct." The proceeding to which appellant refers was probably that designed to hear requests for corrections under rule 8(b) of the Rules on Appeal. If, as here, corrections are allowed, the judge then certifies the record as corrected. Appellant's opportunity to correct the transcript was in that proceeding, Williams v. Davis,

27 Cal.2d 746, 167 P.2d 189, and he apparently secured some corrections. This court cannot pass on the correctness of the transcript.

The motion to augment is denied; the orders appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



130 Cal.App.2d 507

VOLLSTEDT KERR LUMBER CO., a corporation, Plaintiff and Respondent,

v.

PRODUCTION HOMES, Inc., a corporation, Defendant, and

Clyde Conover, Ray Haley, Jr., and George W. Barker, Third Party Claimants and Appellants.

Civ. 20367.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1955.

Proceeding by supplier of lumber to attach lumber in collection of purchase money debt. The Superior Court, Santa Barbara County, Walter J. Fourt, J., determined that assignees for benefit of defendant's creditors had no right, title or interest in lumber, and assignees appealed. The District Court of Appeal, White, P. J., held that under statute providing that where materials have been furnished for construction of building, they are not subject to legal process to enforce any debt, except that for purchase money, so long as they are about to be applied to construction, where construction subcontractor's creditors stopped production by an attachment, and then took voluntary assignment, including assignment of contract with provision that they were authorized to continue work, and released their attachment, the assignment was ineffective as against supplier's subsequent attachment to enforce purchase money debt.

Order affirmed.

1. Assignments for Benefit of Creditors ⚷184

Assignees for benefit of creditors were not purchasers for value, and stood in position of those they represented.

2. Sales ⚷222

Statute providing that when materials are furnished for construction of building, they are not subject to process to enforce any debt, except debt for purchase money, so long as they are about to be applied to construction, was intended to protect supplier against other creditors in interim between delivery of materials and their incorporation into building. West's Ann.Code Civ.Proc. § 1202.1.

3. Mechanics' Liens ⚷166

As soon as materials furnished for construction of building have been incorporated into building, supplier has lien not only upon materials, but upon building and land. West's Ann.Code Civ.Proc. § 1181 et seq.

4. Assignments for Benefit of Creditors ⚷29

"Legal process" within statute providing that when materials are furnished for construction of building, they are not subject to legal process to enforce any debt, except that for purchase money, so long as they are about to be applied to construction of building, includes an assignment for benefit of creditors other than supplier. West's Ann.Code Civ.Proc. § 1202.1.

See publication Words and Phrases, for other judicial constructions and definitions of "Legal Process".

5. Assignments for Benefit of Creditors ⚷336

Under statute providing that where materials have been furnished for construction of building, they are not subject to legal process to enforce any debt, except that for purchase money, so long as they are about to be applied to construction, where construction subcontractor's creditors stopped production by an attachment, and

then took voluntary assignment, including assignment of contract with provision that they were authorized to continue work, and released their attachment, the assignment was ineffective as against supplier's subsequent attachment to enforce purchase money debt. West's Ann.Civ.Code, § 3470; West's Ann.Code Civ.Proc. § 1202.1.

Charles W. Jamison, Santa Barbara, for appellants.

Griffith & Thornburgh, Laselle Thornburgh, Santa Barbara, King, Miller, Anderson, Nash & Yerke, Robert S. Miller, Frederic A. Yerke, Jr., Portland, Ore., Paul R. Meyer, Berkeley, for respondent.

WHITE, Presiding Justice.

The instant appeal is taken from an order determining that third party claimants have no right, title or interest in certain lumber attached by respondent. Following is a résumé of the pertinent events and proceedings.

The defendant, Production Homes, Inc., was a subcontractor obligated to construct, at its Goleta plant in Santa Barbara County, wall sections and roof members for 337 living units, 377 garage and laundry units, one pump-house and one office building, and to erect them, in accordance with Navy specifications, on a certain site near Marine Corps Depot of Supplies, at Barstow, in San Bernardino County. Plaintiff sold lumber and delivered it to defendant at Goleta, "on the specific understanding and agreement between the parties that all such materials were to be used exclusively for the construction of particular buildings to be erected on certain premises located near the Marine Corps Depot of Supplies, Barstow, San Bernardino County, California". Between June 17 and September 17, 1953, under said agreement, defendant ordered and plaintiff delivered at defendant's Goleta plant lumber of the value of $145,958.92. Between June 17 and September 23, 1953, defendant constructed at Goleta and erected at Barstow, interior and exterior wall sections and roof members for 167 living units, 74 garages and 10 laundry units. September 17, such construction at the Goleta plant was suspended because a creditor of defendant, other than respondent, attached all the assets of defendant including the lumber now attached by respondent.

September 23, 1953, defendant executed and delivered to appellants an ordinary common law assignment of all its assets for the benefit of its creditors. On September 25, 1953, the attachment of such other creditor was released from the lumber here involved; and on the same day appellants recorded their assignment and took possession of defendant's Goleta plant and other assets, including the lumber now under respondents' attachment. Said assignment expressly authorized appellants to complete defendant's contracts. Appellants, however, did not "continue with carrying out the contract for furnishing materials" to the general contractor on the buildings for which the attached lumber was to be used exclusively. On September 29, 1953, appellants notified respondent, through their respective attorneys, that the general contractor had declared defendant in default and would not accept further materials under the contract. On or about October 29, 1953, respondents filed this action for lumber sold and delivered and attached the lumber then remaining at defendant's Goleta plant. By their third party claim, appellants aver that on September 25, 1953, they, "as trustees for the benefit of all the creditors" of defendant, took possession and "now are in full and complete possession of said assets", and that the attached property "belongs to" them. They also set forth that defendant's debts total approximately $504,000.00, its assets approximately $150,000 including the attached lumber.

After this action was filed, respondent allegedly discovered that $14,102.01 of the lumber sold to defendant had been "obtained by fraud". An action was brought in the United States District Court for rescission of the sale of that lumber, and the judgment sought in the instant action was reduced by that amount. Judgment by de-

fault was rendered in the instant action December 24, 1953, for $131,856.91. No appeal has been taken from the judgment.

The petition to determine title to property claimed by Third Party was heard upon stipulation of facts, and both oral and documentary evidence, and the instant appeal was taken from the Decree Determining that "Third Party Claimants Have No Right, Title, or Interest in Property Attached", dated December 21, 1953.

Appellants, in their Opening Brief, state that "The sole issue on appeal, is whether a Vendor who has sold building materials to a Vendee for use in a specific construction project can levy an attachment against such materials in an action for the purchase price, after title and possession of such materials has been transferred by Vendee to Assignees for benefit of creditors generally, and where it has become impossible for Vendee to continue to furnish said materials for said building project."

Appellants rely upon Brainard v. Fitzgerald, 3 Cal.2d 157, 163, 44 P.2d 336, 339, where it was held that the general assignment for the benefit of creditors prevailed over a subsequent attachment, and that the assignment was not a violation of section 3440 of the Civil Code, and wherein it was further said:

"* * * The assignment herein having been made in good faith, the property right passed out of the copartnership debtor, and thereafter no legal title existed in it on which the attachment could have fastened.

"Because of varying statutory provisions there involved, we shall not undertake to refer to the numerous authorities from other jurisdictions wherein common-law assignments have been held to take priority over subsequent attachments or executions of an opposing creditor. In the absence of any conflict with or violation of our statutory law, we are not inclined to interfere with the practice developed by local boards of trade of procuring assignments, executed in good faith, for the benefit of creditors generally. Experience has shown that this practice has much to commend it."

Appellants' statement of the "sole issue" hereinabove quoted ignores the real issue before us on this appeal, to-wit: Was title to said lumber transferred to appellants by defendant's assignment for the benefit of all his creditors?

[1] Appellants are not purchasers for value. See First National Bank of Stockton v. Pomona Tile Manufacturing Co., 82 Cal.App.2d 592, 609, 186 P.2d 693. Their position is the same as the positions of those they represent, the same as other creditors trying to enforce debts due by the purchaser of the lumber other than the "debt due for the purchase-money thereof". In principle there is no difference between appellants' position and that of an attaching creditor other than respondent, if, between the levy and release of the attachment, defendant had executed and delivered to him a bill of sale of the lumber.

According to Appellants' Brief, "At all times *after* the assignment of assets for the benefit of creditors, on September 23, 1953, Defendant was unable to continue to furnish the lumber to Harsh Construction Company (the general contractor) for use in the Barstow Project". (Emphasis added.)

Section 1202.1 of the Code of Civil Procedure provides: "Whenever materials shall have been furnished for use in the construction * * * of any building * * such materials shall not be subject to attachment, execution, *or other legal process*, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase-money thereof, so long as in good faith the same are about to be applied to the construction * * * of such building * * *." (Emphasis added.) This statute has not been construed by our courts, nor has our attention been called to any decision by the courts of another state on the question presented.

Appellants concede that the attachment on September 17, 1953, by a creditor other than respondent was ineffective under said section 1202.1; and they further concede that they or any or all of the creditors represented by them could not have attached or levied execution upon said lumber on September 23, 1953, to collect the debts due them from defendant. They further concede that a transfer at that time by opera-

tion of law because of defendant's death or bankruptcy would have been "other legal process" and would have given the creditors represented by them no right to have said lumber applied in payment of the debts due them.

But, appellants take the position that the procedure followed by them— (1) a wrongful attachment to assure that the lumber was no longer "about to be applied to the construction"; (2) a general common law assignment for the benefit of creditors; and (3) release of the attachment and delivery of the lumber to the assignees for the benefit of the creditors—effectively removed the lumber from the protection of section 1202.1, and is not such "other legal process" as is prohibited by said section.

[2-4] Appellants urge that "Section 1202.1 does not say that the purchaser cannot sell the materials or otherwise voluntarily divest himself of title", and that the purpose of the section is to protect the purchaser against his other creditors, and not to curtail purchaser's right to deal with the materials and to sell or transfer them as he sees fit. Manifestly, however, the main purpose of said section 1202.1 is to protect the supplier against the other creditors of his purchaser in the interim between the delivery of the materials and their incorporation into the building for which they were sold. As soon as the materials have been so used, the supplier is given a lien not only upon the materials, but upon the building and the land upon which they are used. Code of Civil Procedure, Section 1181 et seq. Considering these provisions together, it is clear that the Legislature, by its use of the phrase "other legal process, to enforce any debt due * * * except a debt due for the purchase-money thereof," intended that such materials "shall not be subject" to transfer to other creditors in satisfaction of their debts by assignment for the benefit of creditors.

[5] We are convinced that, under all the facts and circumstances disclosed by the record before us on this appeal, title to the lumber so attached by respondent had not passed to appellants as assignees for the benefit of creditors by defendant's voluntary assignment of all its assets to them under date of September 23, 1953. There is no evidence of any transfer, or attempt to transfer, said lumber at a later date when said lumber was not "about to be applied to the construction". Therefore the title to the lumber remained in defendant and was subject to respondent's attachment on October 29, 1953.

A further reason for holding that appellants did not take title to the lumber involved in the instant action is that "Property exempt from execution, and insurance upon the life of the assignor, do not pass to the assignee by a general assignment for the benefit of creditors, unless the instrument specially mentions them, and declares an intention that they should pass thereby." Civil Code, Section 3470; 5 Cal. Jur.2d 400; 4 Am.Jur. 347. Assuming that, at the time of defendant's assignment to appellants, said section 1202.1 of the Code of Civil Procedure in no way limited defendant's power to transfer said lumber, it undoubtedly exempted said lumber from execution, except by respondent. Consequently, as "property exempt from execution," said lumber did "not pass to the assignee by a general assignment for the benefit of creditors," because said assignment contains no special mention of the lumber and no declaration therein of an intention that the lumber "should pass thereby."

The order is affirmed.

We concur.

DORAN and DRAPEAU, JJ., concur.

130 Cal.App.2d 553

Marla J. ERICKSON, Plaintiff and Respondent,

v.

Edrie Mary BOHNE, also known as Edrie M. Bohne, James L. Meegan, and Beatrice Meegan, his wife, and Patricia Rebecca Pierce, Defendants,

Edrie Mary Bohne, also known as Edrie M. Bohne, James L. Meegan, and Beatrice Meegan, his wife, Appellants.

Civ. 8504.

District Court of Appeal, Third District, California.

Feb. 2, 1955.

Action to cancel deeds or alternatively for damages. The Superior Court, Sonoma County, Charles J. McGoldrick, J., denied motion of three of the four defendants for change of place of trial, and these defendants appealed from order denying same. The District Court, Schottky, J., held that complaint which alleged that two of defendants had fraudulently procured plaintiff's execution and delivery of deed conveying certain real property to one of them; that at that time plaintiff did not know she was signing deed; and that grantee then conveyed the property to other of the two defendants, who conveyed it to codefendant for consideration, and which demanded that the three deeds be cancelled and that all defendants be compelled to convey the property to plaintiff, stated good cause of action against such codefendant, so that action was properly brought in county of residence of the codefendant.

Order affirmed.

See, also, 120 Cal.App.2d 606, 261 P.2d 782.

1. Deeds ⇐76
Vendor and Purchaser ⇐239(9)

Deed fraudulently procured from grantor who did not know she was signing such a deed and had no such intention, would be void ab initio and could not be foundation of good title even under equitable doctrine of bona fide purchase, and action to avoid it could be brought at any time. Civ.Code, § 38.

2. Venue ⇐22(1)

Complaint which alleged that two of defendants had fraudulently procured plaintiff's execution and delivery of deed conveying certain real property to one of them; that at that time plaintiff did not know she was signing deed; and that grantee then conveyed the property to other of the two defendants, who conveyed it to codefendant for consideration, and which demanded that the three deeds be cancelled and that all defendants be compelled to convey property to plaintiff, stated good cause of action against such codefendant, so that action was properly brought in county of residence of the codefendant. Civ.Code, § 38

Stanley R. Sterne, Oakland, for appellants.

S. K. McMullin, Santa Rosa, for respondent.

SCHOTTKY, Justice.

Plaintiff filed a complaint against Edrie Mary Bohne, also known as Edrie M. Bohne, James L. Meegan and Beatrice Meegan, his wife, and Patricia Rebecca Pierce. The first three defendants reside in Alameda County and defendant Pierce resides in Sonoma County where the action was filed.

The complaint contains two counts. In the first count plaintiff seeks to recover from defendants and appellants Bohne and Meegan a money judgment in the sum of $4,500 and alleges in substance as follows: That on May 26, 1950, she was the owner of real property in Sonoma County; that she was then physically and mentally ill and wholly incapable of transacting business; that defendant Bohne, plaintiff's daughter, and James Meegan, a friend of defendant Bohne, took advantage of her condition and their confidential relationship to her and fraudulently procured her execution and delivery of a deed conveying the property to Edrie M. Bohne; that at that time plaintiff did not know she was signing a deed to said real property and had no intention of signing such a deed; that she received no consideration for the conveyance; that Edrie Mary Bohne then conveyed the property to James L. Meegan,

without consideration; that thereafter said defendant James L. Meegan and the defendant Beatrice Meegan, his wife, conveyed the property to defendant Patricia R. Pierce, receiving $4,500 in consideration therefor; that all three deeds were recorded, the first two being of record when Patricia Pierce bought the property; that upon learning of these matters plaintiff demanded that her daughter and the Meegans pay over to her the money they received from Pierce, which they refused to do. She prays judgment against them in that sum. The second count contains the same allegations as the first count, save that it omits all reference to plaintiff's demand that the Meegans and her daughter turn over to her the price received from Pierce. By her prayer to that count plaintiff demands that the three deeds be ordered delivered up, that they be canceled and adjudged to be void and that all defendants be compelled to reconvey the real property to plaintiff.

Defendants Bohne, James L. Meegan and Beatrice Meegan appeared and filed a demurrer to said complaint and also filed a motion for change of place of trial to Alameda County. Said motion was denied and said defendants have appealed from the order denying same. Defendant Patricia Rebecca Pierce has not appeared in the action nor did she join in the motion for change of place of trial. This court has heretofore granted a writ of supersedeas staying the proceedings in the superior court until the issues raised on the appeal are decided.

Appellants contend that the complaint does not state a cause of action against Patricia Rebecca Pierce, the only defendant who resides in Sonoma County, and that therefore the court erred in denying their motion. If appellants are correct in their contention that no cause of action was stated against Patricia Rebecca Pierce they were entitled to have the cause transferred to Alameda County.

It is clear that the first count alleges a transitory cause of action and states no cause of action against defendant Pierce However, in the second count plaintiff demands that the three deeds be canceled and adjudged to be void and that all defendants be compelled to convey the real property to plaintiff.

Appellants argue that no cause of action is stated against defendant Pierce for the reason that it is not charged that she knew of the fraudulent procurement of the deed from plaintiff to her daughter which was of record when defendant Pierce bought, and that she is therefore presumed prima facie to be an innocent purchaser in good faith, who, having paid value for the property, cannot have her title voided by reason of the allegations concerning the way in which the other defendants obtained the execution of plaintiff's deed. Respondent in reply contends that the complaint does state a cause of action against defendant Pierce and contends that the deed purportedly executed by her was void ab initio and that title did not pass from her.

In 15 California Jurisprudence 2d, at pages 420–421, it is stated:

> "A deed fraudulently executed or obtained by fraud is only voidable and subject to rescission, in most cases. Thus, where the grantor realizes that he is executing a deed but it differs only in detail from that which he intended, the deed is not void. But where its execution is secured by misrepresentation as to its nature, or it is delivered under a representation that it is an instrument of an entirely different character, a deed is void and title remains in the purported grantor."

In 12 California Jurisprudence, at pages 722–723, it is stated:

> "* * * In dealing with the effect of fraud, the courts distinguish between those cases in which a purported instrument never had any legal inception or existence—due to the fact that one party was induced to execute an agreement totally different from that which he apparently made, or where, due to the fraud, there was no execution at all—and those cases in which the agreement was induced by fraudulent misrepresentations or concealments which in no degree make the instrument anything other than it purports to be. In the first case it is clear

that the purported agreement is void ab initio and an action to avoid it may be brought at any time, or it may be treated as nonexistent; while in the second case the agreement is voidable and may be rescinded at the election of the party defrauded, but not at the behest of the party by whom the fraud was perpetrated.

"An illustration of a void transaction is afforded where one, at the time totally incapacitated from attending to business, is induced to sign a deed when, in fact, he believes, because of fraudulent misrepresentations, that he is merely signing a letter addressed to a third person."

And in 26 C.J.S., Deeds, § 68, at pages 307 and 308, it is stated:

"A void deed passes no title, and cannot be made the foundation of a good title even under the equitable doctrine of bona fide purchase. * * * * * * * * * * *

"Ordinarily a deed procured by fraud is not void but is merely voidable. Where the grantor knowingly executes the very instrument intended, but is induced to do so by some fraud in the treaty or by some fraudulent representation or pretense, his deed is merely voidable, although, where there is fraud in the factum, as where the grantor intends to execute one instrument but another is surreptitiously substituted in its place and the grantor is fraudulently made to sign, seal, and deliver an instrument different from that intended, it would seem that such fraud in the factum renders the deed not merely voidable but absolutely void, and, where without negligence chargeable to the grantor there is no effective delivery because of fraud or other cause, the deed will be held void."

[1, 2] Applying these well settled principles to the instant appeal we are convinced that the second cause of action does sufficiently state a cause of action against the defendant Pierce upon the theory that plaintiff's deed was void because it is alleged therein that she was wholly without understanding within the meaning of section 38 of the Civil Code. Under such circumstances there was no effective execution or delivery of the deed, and as stated in the quotation of 12 California Jurisprudence, supra, it was void ab initio and an action to avoid it could be brought at any time. And as stated in 26 C.J.S., supra, "A void deed passes no title, and cannot be made the foundation of a good title even under the equitable doctrine of bona fide purchase."

In view of our conclusion that a good cause of action was stated against defendant Patricia Rebecca Pierce, who admittedly was a resident of Sonoma County, the trial court correctly ruled that the motion for change of venue should be denied.

The order is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



130 Cal.App.2d 533

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Alfred John MASON and Rodney C. Owens, Defendants,

Rodney C. Owens, Defendant and Appellant.

Cr. 5230.

District Court of Appeal, Second District, Division 2, California.

Feb. 1, 1955.

Prosecution for violation of Pen.Code, § 288a. From conviction in Superior Court, Los Angeles County, Orlando H. Rhodes, J., and order denying new trial, defendant appealed. The Court of Appeal, Fox, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law ⇐553

To bring testimony of witness within rule of inherent improbability, testimony must be such that it is physically impossible

for it to be true, or its falsity must be apparent without resort to inference or deduction.

2. Criminal Law ⇐747

Any conflict or inconsistency in witness' testimony, and previous statement concerning matters testified about is question for jury to resolve.

3. Criminal Law ⇐1160

Determination of credibility of a witness, and truth or falsity of facts on which determination depends, is within exclusive province of trial judge and jury, and determination will not be disturbed on review.

4. Criminal Law ⇐893

Where verdict of guilty is based upon testimony of purported eyewitness, finding that witness observed conduct, about which he testified, is implicit in such verdict.

5. Sodomy ⇐6

Evidence sustained conviction for violation of Penal Code, § 288a.

6. Criminal Law ⇐824(1)

Failure of court, without request by defendant, to admonish jury, which had viewed premises, to disregard writing on wall, at scene of alleged offense under Pen. Code, § 288a, which linked given name of one defendant and surname of other defendant, did not deprive defendant of fair trial. Pen.Code, § 288a.

7. Criminal Law ⇐1158(1)

On appeal from order denying motion for new trial, determination of trial court, that failure to admonish jury to disregard writing on wall, at scene of alleged offense under Pen.Code, § 288a, which linked given names of one defendant and surname of other defendant, had not been prejudicial was determinative on appeal, where there was no clear abuse of discretion. Pen.Code, § 288a.

Richard A. Ibanez and Herbert E. Selwyn, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendants, Rodney C. Owens and Alfred John Mason, were convicted of violating section 288a, Penal Code. Defendant Owens appeals from the ensuing judgment and order denying his motion for a new trial.

The incident here involved took place in a public rest room in the city of Los Angeles. Police Officers Barlow and Houchen, at approximately 11:00 a. m. on the day in question, entered a room some four feet wide and 20 to 30 feet in length which extended the entire length of the building between the two rest rooms for women and men. From this space the officers could see into the men's rest room by means of a number of peep holes in the wall and thus there observed the occurrences here related. From this vantage point Officer Barlow saw appellant enter the rest room and go into one of the toilets. Two or three minutes later Mason entered. There was no one else in the rest room. The officer then witnessed an act of oral copulation. Appellant denied participating in such an act. But the jury found him guilty and upon their verdict the judgment was entered.

Appellant's first contention is that the evidence was insufficient to justify the verdict of guilty. He bases this argument on the theory that the testimony of Officer Barlow was inherently improbable. There is no basis in fact for such contention. The officer testified to having seen appellant arise from the commode in the stall where he had been seated, step forward, stop just outside of the partition separating the toilets, and half turn, being then at right angles to the witness so that he then saw appellant in profile from about his ankles to his neck. Appellant stood erect; his codefendant was on his knees. It was in this setting that the witness observed the illegal act.

[1–5] To come within the rule of inherent improbability the testimony must be such that it is physically impossible for it to be true, or its falsity must be apparent without resort to inference or deduction. People v. Frankfort, 114 Cal.App.2d 680,

700, 251 P.2d 401; People v. Klinkenberg, 90 Cal.App.2d 608, 627, 204 P.2d 47, 613. Under this rule it is plain that Barlow's testimony was not inherently improbable. Defendant, however, seeks to fortify his contention by quoting a sentence from the arrest report the officer had signed, which stated that "The defendant stood up and the codefendant immediately started copulating his penis." From this he argues that the officer would not have been able to see an act of copulation take place as appellant's body would be between the peep hole in the back of the stall and codefendant's mouth. The difficulty with defendant's argument is that he assumes (1) that the officer's testimony and the statement in the arrest report are in direct conflict, and (2) that the jury was required to accept as true the latter. Neither of these premises is sound. The officer's testimony as to the movements of the parties was in much greater detail than the statement in the arrest report. The jury could properly regard such testimony as merely amplifying the report. Furthermore, if there was a conflict or inconsistency in the witness' testimony and the statement in the arrest report that was for the jury to resolve. People v. Ashley, 42 Cal.2d 246, 266, 267 P.2d 271; People v. Frankfort, supra. In this connection it must be borne in mind that as a witness the officer was under oath and subject to cross-examination. What appellant is really doing is attacking the credibility of Officer Barlow. Such an attack was proper in the trial court "but on appeal it is sterile", People v. Lindsey, 90 Cal.App.2d 558, 563, 203 P.2d 572, 575, for it is the exclusive province of the trial judge and jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758. Implicit in the verdict of guilty is the finding that Officer Barlow observed the acts and conduct to which he testified. It cannot, therefore, be said that the evidence is insufficient to sustain the judgment of conviction.

[6] Appellant's second point is that the verdict is contrary to law because he was denied a fair trial. He bases this contention on an incident that took place while the jury, at his request, was inspecting the premises where the offense was committed. There was written on the east wall of cubicle No. 5 the following: "Rodney Mason is a queer. Where is Rodney? Me for Rodney?" This writing was apparently observed by the jurors. It will be noted that it included the given name of appellant and the surname of his codefendant. Appellant now asserts that although he did not request the court to admonish the jury to disregard this writing the failure of the court, on its own motion, to so instruct the jury was prejudicial and prevented him from having a fair trial. Although the matter of the writing was gone into after the trial was resumed, it was not shown that anyone connected with the prosecution had anything to do with placing the writing there. If either defendant or his counsel had felt that such writing was likely to prejudicially influence any of the jurors, an appropriate request to instruct the jury to disregard it should have been made. Such request would no doubt have been granted.

[7] This question was raised on a motion for a new trial. In denying the motion the court commented on the unlikelihood of this incident's prejudicially affecting appellant's case as follows: "I just can't conceive of that jury, or as far as that goes, any jury I have ever dealt with, giving the slightest bit of credence to a charge made in that way. Even the place where it was written would detract from any authenticity. * * * It is so unlikely it is almost beyond the realm of possibility, in the Court's opinion." The trial court thus had an opportunity to consider the likely effect of this incident on the jury. Its decision is determinative on appeal in the absence of a clear abuse of discretion. We find no such abuse. People v. Kross, 112 Cal.App.2d 602, 612, 247 P.2d 44; People v. Currie, 3 Cal.App.2d 31, 33, 39 P.2d 215.

The judgment and order are affirmed.

MOORE, P. J., and McCOMB, J., concur.

44 Cal.2d 81

Eleanor BADELLA et al., Respondents,

v.

Richard MILLER et al., Appellants.

S. F. 19042.

Supreme Court of California.
In Bank.

Feb. 11, 1955.

Proceedings on motion to change venue in wrongful death action. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., entered order denying motion after previously having vacated order granting motion and defendants appealed. The Supreme Court, Carter, J., held that where basis for vacating order granting change of venue was inadvertence of counsel, and not inadvertence of court, or result of error on part of clerk, vacating order made without notice to other party was ineffectual, such grounds requiring hearing on justifiableness of vacating order.

Order reversed.

Prior opinion 275 P.2d 5.

1. Venue ⇐75

An order granting a motion for change of venue requires no written findings.

2. Motions ⇐56(1)

Every direction of court or judge is an order, whether it be merely made in writing or entered in minutes; and, unless required by statute, an order becomes legally effective at time it is signed and filed, regardless of whether it is entered in minutes by clerk. West's Ann.Code Civ.Proc. § 1003.

3. Venue ⇐75

Where trial judge made and signed formal written order granting motion for change of venue, such order was an effective final order, granting motion to change venue and transferring action, although minute order was not entered until later.

4. Venue ⇐76

Where trial judge made and signed a formal written order granting motion for change of venue and subsequently entered minute order granting motion and also purporting to set aside motion granted, the order vacating the previous order was a separate and subsequent order.

5. Venue ⇐76, 80

Neither finality and appealability of an order changing venue nor requirement that court to which transfer is made should thereafter exercise jurisdiction precludes the court making the order from considering a motion to vacate such order on some recognized ground and according to recognized procedure. West's Ann.Code Civ. Proc. §§ 399, 963, subd. 2.

6. Venue ⇐76

Although court, after it has made an order transferring an action, may vacate order on ground that it was inadvertently made, such action may not be taken ex parte unless clerical error appears on face of record or existence of such error is dependent upon memory and knowledge of judge, or where statement on subject in decision is dictum. West's Ann.Code Civ. Proc. § 473.

7. Venue ⇐76

Where basis for vacating order granting change of venue was inadvertence of counsel, and not inadvertence of court or result of error on part of clerk, vacating order made without notice to other party was ineffectual, such grounds requiring hearing on justifiableness of vacating order. West's Ann.Code Civ.Proc. § 473.

Cooley, Crowley & Gaither, Cooley, Crowley, Gaither, Godward, Castro & Huddleson and Frank D. Tatum, Jr., San Francisco, for appellants.

Fitz-Gerald Ames, Sr., and Allen Spivock, San Francisco, for respondents.

CARTER, Justice.

By unverified complaint plaintiffs commenced an action in San Francisco for the alleged wrongful death of Philip Badella, the husband and father of plaintiffs. Named as defendants are Mr. and Mrs. Miller, Earl George and four other defendants. It is alleged the Millers were the owners and operators of riding stables in Sonoma County and were owners or part owners or

in charge of a horse named "Saltie"; that the Millers leased a portion of the stables to defendant George including a stall in which Saltie was stabled, and he, the Millers and the other four defendants jointly possessed and controlled the horse; that George resides in San Francisco; that on August 19, 1950, the horse was negligently left unattended at the stables and by reason of his known dangerous character, attacked Philip Badella, deceased, causing injuries to him which resulted in his death on February 1, 1951.

Defendant George answered raising general issues and pleaded contributory negligence; the other defendants demurred. All the defendants, except George, noticed a motion for a change of venue to Sonoma County, on the grounds that they were residents of that county and George was named defendant solely for the purpose of having the action tried in San Francisco under section 395 of the Code of Civil Procedure.[1] Under that section the action is properly triable in San Francisco if any of the defendants reside there unless such resident defendant was made a party solely for the purpose of having the action tried there.

It appears without question that all the defendants, except George, are residents of Sonoma County and that George resides in San Francisco. The injury occurred in Sonoma County.

The affidavits supporting the motion aver that George was joined solely to keep the case in San Francisco, asserting that before his death Badella commenced an action for his injuries in San Francisco and it was moved to Sonoma, no resident (George) being named defendant. After his death an action for wrongful death was commenced in San Francisco naming some Does as defendants residing in San Francisco. A motion was made to transfer that action and while it was pending plaintiffs dismissed it. Plaintiffs' counsel expressed "strong desire" to keep the trial in San Francisco and said he would file a new action so drawn that it could be kept there. The affidavits of defendants, other than George, stated their Sonoma County residence and that no relation of master and servant or principal and agent existed between the other defendants and them and that George had no control, possession of or connection with the horse. George stated in his affidavit that neither he nor any of his employees had any connection with the horse.

The motion was noticed for September 5, 1951, and due service was made on plaintiffs' attorneys. On that date the motion came on for hearing. Plaintiffs did not appear at the hearing nor file affidavits. The judge, on that date, made and signed a formal written order granting the motion and ordering the action transferred to Sonoma County on the ground that under defendants' affidavits George was named defendant solely for the purpose of having the action tried in San Francisco. On the same date, according to the clerk's minute book, a "Minute Order" was made as follows: "In this action, counsel for defendants present, the court ordered motion for change of venue granted.

"In this action, the court on its own motion, ordered order heretofore made granting motion for change of venue, be set aside." In explanation of the last sentence of the minute order, the following appears: The judge stated in a letter dated September 5, 1951, addressed to defendants' attorneys (copies sent to plaintiffs' counsel) which may be considered a memorandum opinion, that after defendants' counsel had left the court after the hearing on the mo-

1. "If the action be for injury to person, * * * or for death from wrongful act, or negligence, either the county where the injury occurs, or where the injury causing death occurs, or the county in which the defendants, or some of them, reside at the commencement of the action, shall be a proper county for the trial of the action. * * * If any person is improperly joined as a defendant, or has been made a defendant solely for the purpose of having the action tried in the county, * * * where he resides, his residence must not be considered in determining the proper place for the trial of the action." Code Civ.Proc. § 395.

tion and apparently after the filing of the formal order, plaintiffs' counsel appeared about two hours late and explained his failure to appear before, stating he had previously advised the judge's secretary that he would be late. The secretary so informed a deputy clerk but the latter did not advise the judge. He was satisfied that counsel's excuse was valid and while he might move to set aside the "order of the court" (presumably the formal order), it would not be necessary and the court has on its own motion set aside the order and the matter would be heard on September 12, 1951.[2] No notice of the proposed vacation of the formal order was given to defendants.

Thereafter the motion for change of venue was again heard. Plaintiffs submitted affidavits and the court denied the motion by minute order on October 25, 1951.

Defendants appeal from the order of denial. They contend that the formal order transferring the case to Sonoma County was not properly set aside, and that in any event they were entitled on the merits to a change of venue because George was made a defendant solely to have the trial in San Francisco.

[1, 2] In regard to the propriety of the order vacating the formal order of September 5, it should be preliminarily observed that plaintiffs assert that the formal order was not entered by the clerk until at the same time the order vacating it was made (the minute order heretofore quoted); that a judgment is not effective until entered and the order was nullified by the same minute order by which it was made and entered. The formal order was signed and filed by the court and it appears from the letter (opinion) by the judge that he had considered it made when he ordered it vacated on the basis of the excuse for the failure of plaintiffs' counsel to appear at the hearing. In Maxwell v. Perkins, 116 Cal.App.2d 752, 255 P.2d 10, it was pointed out that an order granting a motion for change of venue need not have findings and that a signed and filed order by the judge need not be entered to be effective, stating, 116 Cal.App.2d at page 755, 255 P.2d at page 13: "Section 1003 of the Code of Civil Procedure states that 'every direction of a court * * * made or entered in writing, and not included in a judgment, is denominated an order.' As was stated in Von Schmidt v. Widber, 99 Cal. 511, 514, 34 P. 109, 110: 'nor is there any provision of law which requires all the orders of a court to be entered at length in its minutes in order that they may be effective; and by section 1003, Code Civil Proc., every direction of a court or judge is an order, whether it be merely made in writing or entered in the minutes. If it is not entered it should, however, be filed, in order that it may form a part of the records in the case.' Unless otherwise required by statute, an order becomes legally effective at the time it is signed and filed, regardless of whether it is entered in the minutes by the clerk. * * *

[3, 4] "Nothing further was needed to give vitality to the order. * * * The entry of such order in the clerk's minutes served merely to fix the running of time for appeal. * * * The judge's assertion that it was his intention that his 'effective ruling' be set forth in a minute order to be prepared and entered in the minutes by the clerk cannot detract from the fact that the ruling which he had already signed and filed was itself his final judicial determination on the merits of the motion for change of venue." The formal order was, therefore, an effective final order, granting the motion to change venue and transferring the action. The order vacating it was a separate and subsequent order.

[5] It has been held that when a court makes an unconditional order transferring a case pursuant to motion to change venue, it loses jurisdiction to vacate the order as jurisdiction has passed to the court to which the action is ordered transferred. Chase v. Superior Court, 154 Cal. 789, 99 P. 355, where the trial court vacated the order for failure of defendant to pay fees in the coun-

2. Defendants claim that the opinion has no place in the record. It is proper for it to be in the record although it cannot control over the court's orders or judgments. Rules on Appeal, Rule 5(a) and (b); 4 Cal.Jur.2d, Appeal & Error, § 307.

ty to which the action was transferred as then required by the statute; now plaintiff must pay them; Code Civ.Proc. § 399; Refrigeration Discount Corp. v. Superior Ct., 91 Cal.App.2d 295, 204 P.2d 932. And it has been stated generally that once the order for transfer has been made, the court from which it is transferred has no further jurisdiction to make any further order or take any further steps in the action. Searcy v. Superior Court, 47 Cal. App. 124, 190 P. 202, trial court awarded alimony after order of transfer; Hatch v. Galvin, 50 Cal. 441, court proceeded to trial; Searcy v. Kay, 46 Cal.App. 792, 190 P. 49; Foote v. Superior Court, 122 Cal. App. 519, 10 P.2d 539; see Rilcoff v. Superior Court, 50 Cal.App.2d 503, 123 P.2d 540. Those cases proceed on the theory that an order transferring the action is final as it is appealable, Code Civ.Proc. § 963, subd. 2, and the provision that the court to which an action is transferred shall exercise jurisdiction over the action the same as if it had been commenced there. Code Civ.Proc. § 399. On the other hand, Baker v. Fireman's Fund Ins. Co., 73 Cal. 182, 14 P. 686, holds that after the court has made an order transferring an action it may vacate it on the ground it was inadvertently made, relying upon Wiggin v. Superior Court, 68 Cal. 398, 9 P. 646, which held that a court had inherent power to vacate an order (it was not a venue order) inadvertently made. The court in Christin v. Superior Court, 9 Cal.2d 526, 531, 71 P.2d 205, 112 A.L.R. 1153, in passing, states that a motion could be made in the transferring court to vacate the order of transfer. It does not appear that the finality and appealability of an order changing venue, nor the provision that the court to which the transfer is made should thereafter exercise jurisdiction, Code Civ.Proc. § 399, should preclude the court making the order from considering a motion to vacate such order made according to some recognized procedure and on some recognized ground. That court ordinarily is in a better position to pass upon such a motion and should have an opportunity to correct its errors. We believe, therefore, that Baker v. Fireman's Fund Ins. Co., supra, 73 Cal. 182, 14 P. 686, is controlling here. The other cases, except possibly Refrigeration Discount Corp. v. Superior Court, supra, 91 Cal.App.2d 295, 204 P.2d 932, do not involve that precise question; the Refrigeration case insofar as it does is disapproved.

There still remains, however, the question of whether the order vacating the order granting the motion to change venue was effectual inasmuch as no notice was given that it was to be made or hearing had upon it. We believe that the orderly procedure was to move to set aside the order granting the motion to change venue under section 473 of the Code of Civil Procedure[3] and notice thereof was required.[4] It was a proper case for application for relief under that section. See McGuire v. Drew, 83 Cal. 225, 23 P. 312; Bouvett v. Layer, 40 Cal.App.2d 43, 104 P. 2d 115; Gray v. Sabin, 87 Cal. 211, 25 P. 422; Yancey v. National Benev. Ass'n, 122 Cal. 676, 55 P. 604; Startzman v. Los Banos Cotton Gins, 82 Cal.App. 624, 256 P. 220; Bixby v. Hotchkis, 72 Cal.App.2d 368, 164 P.2d 808. The order changing venue was taken against plaintiffs in absence of counsel and on failure to file counter affidavits, that is, in effect, by default and hence presented the question of whether they should have relief under that section.

[6] On the question of notice it has been said generally "* * * that the [trial] court has inherent power either on its own motion, or on ex parte application, or on notice, to set aside an order or judgment taken through its own inadvertence or mistake; that a prematurely entered order is such an inadvertence, and that application pursuant to section 473 of the Code of Civil Procedure is not necessary."

3. The court may relieve a party from an order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect.

4. Notice must be given of a motion under section 473. McDonald v. Severy, 6 Cal.2d 629, 59 P.2d 98; Linstead v. Superior Court, 17 Cal.App.2d 9, 61 P.2d 355.

In re Estate of Costa, 37 Cal.2d 154, 157, 231 P.2d 17, 18. Some of the cases cited for that proposition, Key System Transit Lines v. Superior Court, 36 Cal.2d 184, 222 P.2d 867; Holtum v. Greif, 144 Cal. 521, 78 P. 11; Phillips v. Trusheim, 25 Cal.2d 913, 156 P.2d 25; Raines v. Damon, 89 Cal.App.2d 812, 201 P.2d 886, hold only that the court has inherent *power,* that is, power in addition to that granted by statute, to vacate an order made as a result of its inadvertence. Nothing is said about whether notice and hearing are necessary for the exercise of such inherent power. In the other cases, Robson v. Superior Court, 171 Cal. 588, 154 P. 8; Whitney v. Superior Court, 147 Cal. 536, 82 P. 37; Harris v. Minnesota Investment Co., 89 Cal.App. 396, 265 P. 306; People v. Curtis, 113 Cal. 68, 45 P. 180, it was held that the court could on its own motion, thus without notice, vacate its order made by reason of its inadvertence. It does not appear whether the court was speaking of a clerical error by the court or inadvertence in exercising its judicial power. In all of them, except possibly the Robson case, it seems that the inadvertence appeared on the face of the record, was within the judge's own knowledge, or the facts were undisputed. In the Robson case it was pointed out that the party as to whom the new trial was denied, which denial was later set aside, had not acted inadvertently or done or failed to do anything he should have done. In re Estate of Costa, supra, 37 Cal.2d 154, 231 P.2d 17, the hearing, resulting in the order which was set aside, was had at 10:00 a. m. instead of 2:00 p. m., the time stated for the hearing in the register of actions. And in Key System Transit Lines v. Superior Court, supra, 36 Cal.2d 184, 188, 222 P.2d 867, 869, the court pointed out that "Here the later order was in effect based on the inadvertence and mistake of the court in overlooking matters of record and facts within the court's judicial knowledge. On its face the record does not disclose invalidity for lack of jurisdiction. The order was within the court's general jurisdiction. It was made in the exercise of its inherent power under that jurisdiction. Factual sufficiency to support the exercise of the power is not controverted by the record." In Re Estate of Hultin, 29 Cal.2d 825, 178 P.2d 756, we were concerned with a clerical error as distinguished from a judicial error or inadvertence and whether notice and hearing were necessary to authorize the court to correct such error. We said, 29 Cal.2d at page 829, 178 P.2d at page 758: "It has been held repeatedly that an order correcting a clerical error in the record of a judgment may be made by the court ex parte without notice and on the court's own motion. * * * The above cases cited may be classified as follows: (1) Where a clerical error appears on the face of the record. * * * [Citing cases.] (2) Where the existence of such an error is dependent upon the memory and knowledge of the judge, some cases holding that his declaration on the matter is conclusive. * * * [Citing cases.] (3) Where the statement on the subject in the decision is dictum. * * * [Citing cases.]

"On the other hand there are cases indicating that where a clerical error does not appear on the face of the record but must be proved by evidence aliunde, notice of a motion to correct such an error is necessary if substantial rights are involved. * * * [Citing cases.]

"In any event where, as in the case at bar, the judge has no connection with or knowledge of the asserted error in the record (the issue here is solely one of the filing date of the notice of intention to move for a new trial, a matter solely in the domain of the clerk of the court) and it does not appear on the face of the record, notice of a motion to correct the alleged error should be a jurisdictional requirement."

[7] In the instant case, however, we do not have either clerical error or judicial inadvertence. The inadvertence, if any, was not that of the court and did not appear on the record. It was the inadvertence of counsel for plaintiffs in failing to present counter affidavits and appear

and oppose, at the time set for the hearing thereof, the motion for change of venue. He asserted he had an excuse and had endeavored to protect himself by calling the judge's secretary to say that he would be late. The court in vacating its order changing venue said, in effect, that if he had known counsel had advised his secretary that he would be late he would not have proceeded. That is nothing more than saying that plaintiffs had a justifiable excuse for relief under section 473 of the Code of Civil Procedure. The judge did not overlook any fact known to him or shown by the record. The orderly method to vacate the venue change order is under section 473 as it was granted by reason of the default of plaintiffs in failing to appear and oppose the motion for change of venue. Whether their counsel's failure to appear was justified is the important question to be decided and a hearing should be had on that question rather than having the judge circumvent the hearing by saying he would not have held the hearing on the motion if he had known counsel was going to be delayed, and thus calling it an inadvertence on the court's part and requiring no notice or hearing.

For the foregoing reasons we do not reach the question of whether, on the merits, the motion for change of venue should be granted. As pointed out above it appears that the order vacating the formal order granting defendants' motion for a change of venue is ineffectual. The formal order granting the motion for a change of venue stands subject to such further proceedings as may be proper. The order denying defendants' motion for a change of venue is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice.

I concur in the judgment solely on the ground that the trial court was "without power to set aside an order involving judicial action and regularly made, and enter another and different order *without notice* to the adverse party." (Harth v. Ten Eyck (1941), 16 Cal.2d 829, 834, 108 P.2d 675; Beyerbach v. Juno Oil Co. (1954), 42 Cal.2d 11, 28, 265 P.2d 1; Bond v. Farmers & Merchants Nat. Bank (1944), 64 Cal.App.2d 842, 848, 149 P.2d 722.)



44 Cal.2d 60

C. J. HAGGERTY, Individually and in a representative capacity for and on behalf of the California State Federation of Labor, an unincorporated association, its officers and members, Plaintiff and Respondent,

v.

ASSOCIATED FARMERS OF CALIFORNIA, Inc., a corporation, et al., Defendants,

and

County of Fresno et al., Defendants and Appellants.

S. F. 18825.

Supreme Court of California, In Bank.

Feb. 4, 1955.

Rehearing Denied March 3, 1955.

Action to enjoin enforcement of county anti-noise ordinance. The Superior Court, Fresno County, Edward L. Kellas, J., rendered judgment permanently enjoining enforcement of ordinance and the county and certain county officers appealed. The Supreme Court, Edmonds, J., held that the ordinance, on its face, did not unconstitutionally abridge right of free speech.

Reversed.

Carter and Traynor, JJ., dissented.

Prior opinion, 267 P.2d 370.

1. Counties ⇐21½

County anti-noise ordinance regulated conduct of all persons seeking to use sound amplification devices on public highways and imposed uniformly applicable restrictions and so was not invalid on any theory that a discretion was delegated to determine who could operate sound amplification

devices without prescribing standards for exercise of such discretion.

2. Constitutional Law ⇐90

County anti-noise ordinance defining prohibited loud and raucous noises emanating from public highways as human voice or recording thereof amplified so as to carry on to private property or to be heard by others using highways contained no such absolute prohibition against use of amplification devices as to abridge freedom of speech.

3. Counties ⇐21½

Definition, contained in county ordinance, of scope of ordinance is binding on court considering validity of ordinance.

4. Counties ⇐21½

County, in exercise of police power of state, has legitimate interest in preservation of safety and tranquility of its citizens, and anti-noise ordinance prohibiting the emanation from public highways of loud and raucous noises defined as human voice or recording thereof amplified so as to carry on to private property or to be heard by others using highways was reasonably directed to that end.

5. Constitutional Law ⇐258

County anti-noise ordinance prohibiting the emanation from public highways of loud and raucous noises consisting of human voice or recording thereof amplified so as to carry on to private property or to be heard by others using highways does not offend requirements of due process on any theory that words "loud and raucous" are so vague and indefinite as to establish no ascertainable standard of guilt.

6. Counties ⇐21½

The words "reasonably required" in county anti-noise ordinance prohibiting loud and raucous noises consisting of noises made by motor vehicles or aircraft not reasonably required in their operation were not so vague and indefinite as to establish no ascertainable standard of guilt.

7. Counties ⇐21½

The words "tend to interfere" in county anti-noise ordinance prohibiting loud and raucous noises of such volume, intensity or carrying power as to tend to interfere with peace and quiet of persons on private property or other users of public highway are not so vague and indefinite as to establish no ascertainable standard of guilt in view of recognized meaning of "interfere" as disarrange or disturb or hinder and of "tend" as to be directed or have a tendency to any end, object or purpose.

See publication Words and Phrases, for other judicial constructions and definitions of "Interfere" and "Tend".

Robert M. Wash, County Council, Maurice E. Smith, Asst. County Council, Fresno, Dearing, Jertberg & Avery and Kenneth G. Avery, Fresno, for appellants.

Todd & Todd, Clarence E. Todd and Henry C. Todd, San Francisco, for respondent.

Francis Heisler, amicus curiæ, on behalf of respondent.

EDMONDS, Justice.

The County of Fresno and certain county officers have appealed from a judgment permanently enjoining them from "enforcing or causing Ordinance No. 415 of the County of Fresno or any part or provision thereof to be enforced." The judgment is based upon the conclusion that the ordinance, upon its face, unconstitutionally abridges the right of free speech.

Known as the "Fresno County Anti-Noise Ordinance", it makes unlawful the emission or transmission of "any loud and raucous noise upon or from any public highway or public thoroughfare or from any aircraft of any kind whatsoever." A violation of the ordinance is punishable by a fine not to exceed $500 or detention in the county jail for a period not in excess of six months or both.

As defined by the ordinance, "loud and raucous noise" means:

"(1) Any noise made by the motor of any automobile, truck, tractor, motorcycle, or aircraft of any kind not reasonably required in the operation thereof under the circumstances and shall include but not be

limited to backfiring, motor racing, and the buzzing by airplanes.

"(2) The sound of the discharge of any gun or other explosive except by or with the permission of the governing body having control of the highway or thoroughfare.

"(3) The human voice or any record or recording thereof when amplified by any device whether electrical or mechanical or otherwise to such an extent as to cause it to carry on to private property or to be heard by others using the public highways or public thoroughfares.

"(4) Any sound not included in the foregoing which is of such volume, intensity, or carrying power as to tend to interfere with the peace and quiet of persons upon private property or other users of the public highways and thoroughfares."

Shortly after its enactment, several persons were arrested upon charges of violating the ordinance. All of them were members or representatives of the California State Federation of Labor or its affiliate, the National Farm Labor Union, and when arrested they were "caravaning" along certain public highways or roads adjacent to farms. By means of automobile horns and loud-speakers mounted on their cars, they were attempting to attract the attention of farm workers and to induce them to quit work and engage in a strike to enforce union demands for wages.

C. J. Haggerty, the secretary of the California State Federation of Labor and a member of its affiliated union, sued to enjoin the enforcement of the ordinance. The action was brought on behalf of himself and the members of the two labor organizations, including those persons previously arrested for violating the ordinance.

The trial court found that, unless restrained, the law enforcement officers of the county will continue to prosecute violators of the ordinance. This course of conduct, it found, would result in large numbers of lawsuits (presumably criminal prosecutions) and actions by members of the unions to enjoin their prosecution. According to another finding, the federation and the farm labor union have numerous members, and, although each of them has an interest in the subject matter of the action, it is impracticable to bring them all before the court. Also, Haggerty was authorized to prosecute this action, as their representative, to test the constitutionality of the ordinance.

Stated as findings of fact are the legal conclusions that "persons, including the class thereof represented by plaintiff, will be subject to arrest and prosecution under said Ordinance if they employ and use loud-speakers on the public highways for any purpose" and that the ordinance thus effectively prevents such use. "Insofar as it purports to prohibit the use of loud-speakers upon the public highways and thoroughfares of the County," it was concluded, the ordinance "is unconstitutional upon its face as an abridgment of the constitutional guarantee of the right of free speech." More specifically, the trial court held objectionable the provision defining "loud and raucous noise" as including "the human voice or any record or recording thereof when amplified by any device whether electrical or mechanical or otherwise to such an extent as to cause it to carry on to private property or to be heard by others using the public highways and thoroughfares," and concluded that this definition "is so inseparable from the other provisions of said Ordinance that the entire Ordinance must be found to be unconstitutional."

The county and the county officials have appealed from the judgment and from an order refusing to vacate the judgment. As grounds for reversal they contend that the ordinance is constitutional on its face. But even if it is unconstitutional, they argue, Haggerty has not shown a proper ground for equitable relief against its enforcement.

At the trial it was stipulated that the union members who were arrested were arraigned on a charge of violating Ordinance 415. The stipulation did not include the particular provisions of the ordinance applicable to the conduct for which the arrests were made. Attempts were made by Haggerty to show that the ordinance is unconstitutional in its particular appli-

cation to the activities carried on at the time of the arrests. He sought to establish the existence of a labor controversy and that the ordinance unlawfully circumscribes the rights of union members to engage in peaceful picketing in the furtherance of a legitimate labor objective. However, no finding was made concerning the nature and purpose of those activities. Instead, the judgment enjoining all prosecutions under the ordinance rests entirely upon these conclusions: (1) the restriction upon the use of amplification devices on the county highways establishes on the face of the ordinance an unconstitutional abridgment of free speech; and (2) the clause defining the scope of the prohibition against "loud and raucous noises" so as to include those devices is not severable from the other parts of the ordinance.

In Saia v. People of State of New York, 334 U.S. 558, 68 S.Ct. 1148, 1149, 92 L.Ed. 1574, an ordinance prohibited the use of "'any radio device, mechanical device, or loud speaker or any device of any kind whereby the sound therefrom is cast directly upon the streets and public places * * * where * * * maintained for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers * * * or of persons in neighboring premises.'" Excepted from the statutory ban was "'[p]ublic dissemination, through radio, loudspeakers, of items of news and matters of public concern and athletic activities * * * under permission obtained from the Chief of Police.'"

Saia, one of Jehovah's Witnesses, set up a loudspeaker in a public park and began broadcasting religious programs without having obtained a permit from the chief of police. He was convicted in the state court of violating the ordinance. In the opinion of a majority of the justices, the provision requiring a permit "is unconstitutional on its face, for it establishes a previous restraint on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action. To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted. The ordinance therefore has all the vices of the ones which we struck down in Cantwell v. [State of] Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213; Lovell v. [City of] Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; and Hague v. C. I. O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423."

The court then reviewed the Cantwell, Lovell and Hague decisions, stating that the ordinances there involved amounted to "previous restraint", "censorship 'in its baldest form'" and the "'arbitrary suppression of free expression'". It concluded that the challenged ordinance "has the same defects. The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine. * * * Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached. * * * The present ordinance would be a dangerous weapon if it were allowed to get a hold on our public life. Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled. But to allow the police to bar the use of loud-speakers because their use can be abused is like barring radio receivers because they too make a noise. The police need not be given the power to deny a man the use of his radio in order to protect a neighbor against sleepless nights. The same is true here.

"Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. In this case a permit is denied because some persons were said

to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice." 334 U.S. at pages 560, 561, 562, 68 S.Ct. at pages 1150, 1151.

Mr. Justice Frankfurter dissented with Justices Reed and Burton upon the ground that the limitations of the ordinance "upon the exercise of appellant's rights of utterance did not * * * exceed the accommodation between the conflicting interests which the State was here entitled to make in view of time and place and circumstances." 334 U.S. at page 566, 68 S.Ct. at page 1152. Mr. Justice Jackson stated in dissent that no issue of free speech was involved. As he viewed the problem, it was one of regulation of the use of sound apparatus which, in his opinion, the city had the right to bar completely from public property, or, if regulating its use, to entrust control of it to a chief of police.

Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 449, 93 L.Ed. 513, concerned an ordinance under which one could not lawfully operate "for any purpose whatsoever, on or upon the public streets, alleys or thoroughfares" of the city "any device known as a sound truck, loud speaker or sound amplifier, * * * or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle * * *." Kovacs was arrested when he operated a sound truck on a public street. The judgment of conviction was affirmed.

A determination of the precise basis for the decision is made difficult by the number of opinions filed. Mr. Justice Reed, joined by Mr. Justice Burton and Chief Justice Vinson, distinguished the Saia case upon the ground that the ordinance there concerned allowed a previous restraint within the uncontrolled discretion of the chief of police. "This ordinance," they said, "is not of that character. It contains nothing comparable to the above quoted * * * [section] of the ordinance in the Saia case. It is an exercise of the authority granted to the city by New Jersey 'to prevent disturbing noises,' * * * nuisances well within the municipality's power to control. The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people." 336 U.S. at pages 82–83, 69 S.Ct. at page 451.

The opinion accepted the construction of the statute given by the New Jersey court, 135 N.J.L. 584, 52 A.2d 806, as prohibiting vehicles with sound amplifiers emitting loud and raucous noises, and stated the decisive question as being "whether or not there is a real abridgment of the rights of free speech." It was said that "even the fundamental rights of the Bill of Rights are not absolute. The Saia case recognized that in this field by stating 'The hours and place of public discussion can be controlled.'" It was pointed out that sound trucks create a problem which differs from other means employed to communicate ideas. "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.

"City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control. We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities. On the business streets of cities like Trenton, with its more than 125,000 people, such distractions would be dangerous to traffic at all hours useful for the dissemination of information, and in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of advocates of particular religious, social or political persuasions. We cannot believe that rights of

free speech compel a municipality to allow such mechanical voice amplification on any of its streets.

"The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners * * * [but] [i]t is an extravagant extension of due process to say that because of it a city cannot forbid talking on the streets through a loud speaker in a loud and raucous tone. * * * Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets. * * Section 4 of the ordinance bars sound trucks from broadcasting in a loud and raucous manner on the streets. There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers. We think that the need for reasonable protection in the homes or business houses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance." 336 U.S. 86–89, 69 S.Ct. 453–454.

Mr. Justice Frankfurter and Mr. Justice Jackson concurred separately. Mr. Justice Rutledge stated his views in a dissenting opinion and Mr. Justice Black's conclusions in criticism of the decision were approved by Mr. Justice Douglas and Mr. Justice Rutledge. Mr. Justice Murphy dissented without opinion.

[1] As the ordinance of Fresno County does not delegate to any person or agency a discretion in determining who may operate sound amplication devices, it is not subject to attack for the reasons stated in the Saia case. Cf. Haggerty v. County of Kings, 117 Cal.App.2d 470, 483, 256 P.2d 393. It regulates the conduct of all persons seeking to use such devices, and the restrictions are uniformly applicable. The decisive question is whether the prohibition of the ordinance is a reasonable one.

According to the appellants, the Kovacs case stands for the proposition that a municipality constitutionally may enact an absolute prohibition against the use of soundtrucks and similar devices, although it cannot constitutionally allow their use subject to a permit the issuance of which is not governed by adequate standards. They point to the opinions of Justices Black and Jackson which construed the decision as necessarily holding that an absolute prohibition against use of those devices is constitutional and repudiating the rationale of the Saia case. Mr. Justice Frankfurter took the same position in stating that "So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection." 336 U.S. 97, 69 S.Ct. 458. Mr. Justice Reed, on the other hand, stated: "[a]bsolute prohibition within municipal limits of all sound amplification, even though reasonably regulated in place, time and volume, is undesirable and probably unconstitutional as an unreasonable interference with normal activities." 336 U.S. 81–82, 69 S.Ct. 451.

These cases present no clear-cut determination by the United States Supreme Court as to whether in any situation an absolute prohibition against the use of sound trucks may be upheld. Commentators in the field of constitutional law are in disagreement as to their implications. See comments, 22 So.Calif.L.Rev. 416; 34 Cornell L.Q. 626; 34 Iowa L.Rev. 681; 47 Mich.L.Rev. 1007; 14 Mo.L.Rev. 194; 62 Harv.L.Rev. 1228. The court has cited the Kovacs case as a recognition of the power of the state to protect, within constitutional limitations, "'the well-being and tranquility of a community'", Breard v. City of Alexandria, 341 U.S. 622, 640, 71 S.Ct. 920, 931, 95 L.Ed. 1233, and to prohibit "the making of artificially amplified raucous sounds in public places." Public Utilities Commission of District of Columbia v. Pollak, 343 U.S. 451, 464, 72 S.Ct. 813, 96 L.Ed. 1068. Since the Kovacs case, some state courts have upheld legislation absolutely prohibiting the use of sound trucks.

Brinkman v. City of Gainesville, 83 Ga. App. 508, 64 S.E.2d 344, 349; State ex rel. Nicholas v. Headley, Fla., 48 So.2d 80, 81.

[2, 3] It is unnecessary to decide whether an absolute prohibition within the limits of a county or municipality may be upheld. The ordinance here under attack is not of that kind. Although the appellants have made sweeping concessions as to the extent to which the ordinance is prohibitory, this court is bound by the statutory definition of its scope. Rideaux v. Torgrimson, 12 Cal. 2d 633, 636, 86 P.2d 826.

The provision defining proscribed noise does not include all use of "loud-speaking" devices, but only the amplification of the human voice "to such an extent as to cause it to carry on to private property or to be heard by others using the public highways or public thoroughfares." Other uses, such as broadcasting music or even the human voice when not amplified, are not excluded. Moreover, the prohibition extends only to a "public highway or public thoroughfare or from any aircraft". The use of such devices in other locations, such as private property, public parks, squares and meeting places, and similar places normally devoted to public assembly is not in any manner limited.

It is argued that the practical effect of the limitation upon the volume with which sound trucks may be operated is to exclude them from use upon the highways of the county. It may be conceded that geographical limitations are somewhat greater than those specified by the ordinance in the Kovacs case, but little if any difference appears in regard to the restrictions upon volume. There the court accepted the determination of "loud and raucous" made in the state court as sufficient to justify applying the ordinance to Kovacs. In a footnote to the opinion of Mr. Justice Reed are quotations from the opinions in the state court which, apparently, were relied upon as sufficient to justify that determination. It was observed: "The New Jersey courts may have concluded that the necessity of search by the patrolman to locate the sound truck on a street was sufficient evidence of loudness and raucousness" and again: "Perhaps the last-quoted paragraph assumes that all sound trucks emit loud and raucous noises." 336 U.S. at page 84, footnote 6, 69 S.Ct. 452. The limitations imposed by the definitions included within the present ordinance are no more restrictive than those statements.

[4] The present ordinance is declared to be an emergency measure "necessary for the immediate preservation of the public well-being and safety". The statement of that necessity is as follows: "The making, emitting, and transmitting of loud and raucous noises as herein defined upon or from public highways and public thoroughfares or from the air by aircraft seriously interferes with the peaceable enjoyment of private property, and the distraction thereof seriously interferes with the traveling public constituting a hazard to the safety of persons using said highways and thoroughfares." The county, in the exercise of the police power of the state, has a legitimate interest in the preservation of the safety and tranquility of its citizens. It cannot be said that the present ordinance is not reasonably directed to that end.

[5] Haggerty, however, contends that the ordinance also offends the requirements of due process in its other definitions of the activities properly to be included within the scope of its prohibitions. The contention that "loud and raucous" itself is so vague and indefinite as to establish no ascertainable standard of guilt was passed upon in the Kovacs case, where it was pointed out that "[w]hile these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." 336 U.S. 79, 69 Sup.Ct. 449.

[6] A similar contention is made with regard to the definition in clause one as including the noise of "the motor of any automobile, truck, tractor, motorcycle, or aircraft of any kind not reasonably required in the operation thereof under the circumstances. * * *" It is argued that

"reasonably required" is too vague and indefinite a standard of guilt. Reliance is placed upon cases which have held to be too indefinite such phrases as "reasonable profits", "greater or less than real value", "current rate of per diem wages in the locality where the work is performed". Cline v. Frink Dairy Co., 274 U.S. 445, 47 S.Ct. 681, 685, 71 L.Ed. 1146; International Harvester Co. of America v. Commonwealth of Kentucky, 234 U.S. 216, 221, 34 S.Ct. 853, 855, 58 L.Ed. 1284; Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322. These cases, however, involve loose definitions in fields where generally there may be great differences of opinion as to what conduct may be reasonable. A restriction upon the operation of motor vehicles so as to eliminate unreasonable noises operates in an area where a determination as to what is necessary and reasonable may be made more precisely and has a content of fairly fixed meaning to operators of such vehicles. More nearly in point are prohibitions against "unreasonable and unsafe speed", held constitutional in Ex parte Daniels, 183 Cal. 636, 647, 192 P. 442, 446, 21 A.L.R. 1172; and the use of horns emitting "an unreasonably loud or harsh sound". Vehicle Code, § 671.

[7] Clause four is attacked on the same ground of indefiniteness because of the use of the phrase "of such volume, intensity, or carrying power as to interfere with the peace and quiet" of other persons on private property or on the highway. Haggerty does not challenge the sufficiency of the terms, "peace and quiet", but concedes that if the entire ordinance were equated to that standard it would withstand constitutional challenge. His objection is to "interfere", and "tend to interfere" with such peace and quiet. There is no merit to this contention. Both "interfere" and "tend" have well-recognized, defined meanings. Cf. Conger v. Italian Vineyard Co., 186 Cal. 404, 407, 199 P. 503, 504, "the term 'interfere' bears the significance of 'disarrange,' 'disturb,' 'hinder.' "; State v. Hopkins, 64 N.D. 301, 252 N.W. 48, 51, "The word 'tend' means to be directed or have a tendency to any end, object, or purpose."; Smulson v. Board of Dental Examiners, 47 Cal.App.2d 584, 587, 118 P.2d 483, 485, upholding a statute prohibiting advertising statements which are of a character "tending to deceive or mislead the public."

Other contentions made by Haggerty, if accepted, would not require the court to hold that the ordinance, upon its face, is unconstitutional. Insofar as they tend to establish the invalidity of the ordinance in its application to him, they may be considered upon a retrial in connection with that question. No other contentions require discussion.

The judgment is reversed.

SHENK, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The sound trucks involved in the present controversy were being used on the highways and on roads adjacent to farms for the purpose of attracting the attention of farm workers as a means of inducing them to quit work and engage in a strike to enforce union demands for higher wages.

According to the majority opinion the question presented for determination is whether the prohibition of the ordinance under consideration is a reasonable one.

The ordinance (No. 415, clause (3) of subdivision (d) of section 2.) with which we are here concerned defines "loud and raucous noise" as "The human voice or any record or recording thereof when amplified by any device whether electrical or mechanical or otherwise to such an extent as to cause it to carry on to private property or to be heard by others using the public highways or public thoroughfares." The majority construes this to mean that no absolute prohibition was intended by the ordinance and finds it "unnecessary to decide whether an absolute prohibition within the limits of a county or municipality may be upheld." It is concluded that the county, in the exercise of the police power of the state, has a legitimate interest in the preservation of the safety and tranquillity of its citizens and that the ordinance is reasonably directed to that end.

The majority reasons that the ordinance does not constitute an "absolute prohibition" because *all* use of "loud-speaking" devices are not banned "but *only* the amplification of the *human voice* 'to such an extent as to cause it to carry on to private property or to be heard by others using the public highways or public thoroughfares.' Other uses, such as broadcasting music or even the human voice when not amplified, are not excluded. Moreover, the prohibition extends only to a 'public highway or public thoroughfare or from any aircraft'. The use of such devices in other locations, such as private property, public parks, squares and meeting places, and similar places normally devoted to public assembly is not in any manner limited." (Emphasis added.)

The unmistakable import of this statement is that the ordinance absolutely prohibits only the amplification of the human voice on the highways and thoroughfares. A prohibition against amplification of the human voice so as "to be heard by others" in such places silences it completely and constitutes a violation of the express mandate of the First and Fourteenth Amendments to the Constitution of the United States—that freedom of speech shall not be abridged. In singling out the amplification of the human voice as the "only" thing prohibited by the clause of the ordinance in question the majority clearly discriminates against human speech and the free dissemination of ideas thereby because without amplification so that it can be heard by others, freedom to use the human voice on the highways and thoroughfares is a freedom without value.

It should be remembered, however, that we are not concerned with something which might be done on "private property, public parks, squares and meeting places" but that which may, or may not be done, on public highways and thoroughfares. The right of free speech guaranteed by the Constitution includes not only the right to be free from restraints on speech in the privacy of one's own home, but the right, subject to reasonable regulation, to speak in other places where people may be reached. As the Supreme Court of the United States said in Saia v. People of State of New York, 334 U.S. 558, 68 S.Ct. 1148, 1150, 92 L.Ed. 1574, "Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached. * * *" What may be permitted in some other place has no bearing whatsoever on the public highways and thoroughfares; what may be permitted in the way of the normal human voice or music on highways is immaterial when one considers that the human voice is effectively silenced when not amplified through a loud-speaker when ideas are sought to be disseminated from the public highway. One may cry aloud his ideas in the wilderness, but that is surely not an effective way to share those ideas with the segment of the public one wishes to reach. To prohibit the use of sound trucks on public highways and thoroughfares is to prohibit the dissemination of ideas to a segment of the population which probably could be reached in no other way. Sound trucks on public highways are the way many "people are reached." A writer in 34 Cornell Law Quarterly 626 points out with considerable merit that it is unrealistic to argue that what is meant by freedom of speech is the native power of human speech. The fact that earlier holdings of the court only went so far as to uphold the right of unamplified speech does not imply that "* * * one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155. Similarly, it is unsound to argue that one may not be permitted to use a loud-speaker because free speech could be exercised in some other manner—that is, without an amplifying device. The broad language of the various opinions makes it plain that constitutional free speech is not limited to ancient forms of expression.

In Saia v. People of State of New York, supra, 334 U.S. 558, 559, 560, 561, 68 S.Ct. 1148, 1149, where a permit was required for the use of a sound truck, Mr. Justice Douglas speaking for a majority of the court, said that the ordinance in question "* * * establishes a previous restraint on the right

of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action. To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted. The ordinance therefore has all the vices of the ones which we struck down in Cantwell v. [State of] Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213; Lovell v. [City of] Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; and Hague v. C. I. O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423." The court also said: "Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached. * * *

"The present ordinance would be a dangerous weapon if it were allowed to get a hold on our public life. Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled. But to allow the police to bar the use of loud-speakers because their use can be abused is like barring radio receivers because they too make a noise. The police need not be given the power to deny a man the use of his radio in order to protect a neighbor against sleepless nights. The same is true here.

"Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice."

This is the only clear-cut expression by the Supreme Court of the United States. It is admitted in the majority opinion in the present case, and by all legal writers and commentators, 62 Harv.L.Rev. 1228; 47 Mich.L.Rev. 1007; 97 U.Pa.L.Rev. 730; 34 Cornell L.Q. 626; 34 Ia.L.Rev. 681; 14 Mo.L.Rev. 194; 22 So.Cal.L.Rev. 416, that the later case of Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513, while casting some doubt on the holding in the Saia case, because of the many opinions, has caused "hopeless confusion" in the field of regulation of sound trucks. There is no majority decision in the Kovacs case which holds, as the majority in effect does here, that sound trucks may be absolutely prohibited since three of the Justices (Reed, Burton and Vinson) upheld the ordinance on the ground that the state courts had interpreted it not as an absolute ban, but only as barring sound trucks that emitted "loud and raucous noises." The Saia case expressly points out that "[a]ny abuses which loud-speakers create can be controlled by *narrowly drawn* statutes." Also, as pointed out in the Saia case, an ordinance could be drawn relating to such sound trucks by regulating the volume of sound, the hours and places of use in the interests of the public peace and tranquillity without imposing either a prior, or absolute, restraint on the freedom of speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. As was pointed out in an article in 22 So.Cal.L.Rev. 416, 420, the crucial problem is one of differentiating between the right of local government legitimately to exercise proper police regulations which will encroach on constitutional rights, and the right of a group of individuals to be secure in their exercise of a constitutionally given freedom. A balance has been struck in other fields where individual freedoms must be somewhat circumscribed in the interest of the public good. No good reason appears why the same thing may not be accomplished in this field without the necessity of absolute prohibition.

The ordinance involved in the Kovacs case related to the use of sound trucks on the public streets, alleys or thoroughfares *within the city of Trenton,* New Jersey.

The area prohibited in the ordinance here involved is not so circumscribed. In State ex rel. Nicholas v. Headley, Fla., 48 So.2d 80, an ordinance of the City of Miami prohibited the operation on *city* streets of vehicles to which mechanical loud-speakers had been attached. It was held there that the right of a citizen to use the public streets was not absolute and unconditional but might be controlled and regulated in the interest of the public good. The appellant in the Headley case was arrested for using a loud-speaker attached to his vehicle while on a busy downtown street which was highly congested with traffic. In Brinkman v. City of Gainesville, 83 Ga. App. 508, 64 S.E.2d 344, an ordinance prohibited the operation of a loud-speaker upon the streets of the City of Gainesville. The ordinance was held constitutional as not violative of the freedoms of speech and religion. The ordinance involved in the case at bar makes unlawful the emission or transmission of "* * * any loud and raucous noise upon or from any public highway or public thoroughfare or from any aircraft of any kind whatsoever."

It may be agreed that Mr. Justice Reed was correct when he said, Kovacs v. Cooper, 336 U.S. 77, 81, 82, 69 S.Ct. 448, 451, 93 L.Ed. 513, that "[u]nrestrained use throughout a municipality of all sound amplifying devices would be intolerable." He added that "[a]bsolute prohibition within municipal limits of all sound amplification, even though reasonably regulated in place, time and volume, is *undesirable and probably unconstitutional* as an unreasonable interference with normal activities." (Emphasis added.)

I would affirm the judgment to the extent that it enjoins enforcement of clause (3) of subdivision (d) of section 2 of Ordinance No. 415 on the ground that it is unconstitutional on its face as an abridgement of freedom of speech guaranteed to the individual by the First and Fourteenth Amendments to the Constitution of the United States. I express no opinion concerning the constitutionality of the balance of the ordinance in question.

TRAYNOR, J., concurs.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

The PEOPLE of the State of California, Plaintiff,

v.

Eugene BURWELL and James Alonzo Rogers, Defendants.

Cr. 5486.

Supreme Court of California.
In Bank.
Feb. 1, 1955.
As Modified on Denial of Rehearing March 3, 1955.

Defendants were convicted of first degree murder. The Superior Court of Marin County, Thomas F. Keating, J., entered judgments on the verdicts and orders denying motions for new trials, and defendants appealed. The Supreme Court, Shenk, J., held that evidence sustained convictions.

Judgments and orders affirmed.

1. Criminal Law ⇐1144(13)

On appeal from judgments of conviction, Supreme Court would view conflicting evidence in light consistent with verdicts.

2. Homicide ⇐253(1)

Evidence sustained first degree murder convictions of inmates of prison who killed guards.

3. Criminal Law ⇐589(1)

Defendants were not denied a fair trial in murder prosecution by refusal of court to continue trial until after a decision in a collateral mandamus proceeding, involving right of defendants to inspect certain records taken from files of coroner's office at direction of the district attorney.

4. Criminal Law ⇐121

A motion for change of venue is directed to sound discretion of trial court.

5. Criminal Law ⇐121

Trial court did not abuse its discretion in denying motion for change of venue of murder prosecution.

6. Criminal Law ⇐736(2)

The attendant circumstances, which go to the free and voluntary nature of statements amounting to a confession, are preliminary questions for court and finally questions of fact for jury under proper instructions.

7. Criminal Law ⇐1158(4)

When question of free and voluntary nature of statements amounting to a confession, has been resolved against defendant, determination will not be disturbed on appeal unless it is without sufficient evidentiary support.

8. Criminal Law ⇐516

Test in determining whether statements amounting to a confession may be properly admitted in evidence without a denial of fundamental rights is one of trustworthiness.

9. Criminal Law ⇐531(3)

In murder prosecution, evidence sustained finding that defendants' statements amounting to a confession were freely and voluntarily given.

10. Criminal Law ⇐637

When reasonable precautions are taken to retain custody of an accused, fact that they bring before jury the information that accused is a convict and perhaps a dangerous character does not deprive accused of a fair trial.

11. Criminal Law ⇐637

Where prison inmates, who were being prosecuted for murder of prison guards, had previously been convicted of crimes of violence, and letters written by one of the defendants showed that he planned to escape from courtroom, fact that defendants were handcuffed to their belts and were restrained by chains while being transported from prison to court, and fact that armed guard was stationed at egress from courtroom, did not deny prison inmates a fair trial.

12. Criminal Law ⇐854(2)

Trial court has discretion to permit jury to separate during recesses and adjournments. Pen.Code, § 1121.

13. Criminal Law ⇐927(4)

Where defendants did not object to fact that jury was permitted to separate during recesses and adjournments, and affidavits of 10 jurors stated that they did not discuss case with anyone or even hear any comments, and another juror averred that when approached by a spectator he walked away and did not discuss or overhear comments on merits, and twelfth juror was unavailable because he had left the state, and on eight occasions court gave full statutory admonition to jurors when recesses were taken, and omission of court on four occasions to give admonition was not called to court's attention, court did not abuse its discretion in denying motions for new trial because jury was permitted to separate and mingle with spectators during recesses and because jury was not adequately admonished prior to recesses. Pen.Code, §§ 1121, 1122.

14. Criminal Law ⇐438

Photographs, when relevant to the issues, have evidentiary value.

15. Criminal Law ⇐438

Question of admissibility of photographs, which may have a tendency to inflame jury against accused, is generally within discretion of trial court.

16. Criminal Law ⇐438

In murder prosecution, trial court did not abuse its discretion in admitting photographs of bodies of deceased persons killed by defendants.

17. Criminal Law ⇐351(9)

In murder prosecution, letters, which were written by one of the defendants, and which revealed plans for escape during the trial, were properly admitted to show consciousness of guilt.

18. Criminal Law ⇐384

In murder prosecution, wherein the prosecution was permitted to introduce letters, which had been written by one of the defendants, and which revealed plans for an escape during the trial, other letters, which had been written by that defendant about four months before the homicides, and while that defendant was in prison, and which showed that he had no intention to escape from prison, were properly rejected on ground that they were too remote.

19. Witnesses ⇐274(2)

In murder prosecution, wherein character witnesses for one of the defendants tes-

tified as to reputation of that defendant for peace and quiet, it was proper for the prosecution to ask the character witnesses if they had heard of certain instances in which such defendant had not conducted himself in a manner consistent with the character attributed to him by the witnesses, though incidents occurred more than four years prior to homicides.

20. Witnesses ⇐255(8)

In murder prosecution, prosecution witnesses were properly permitted to refresh their memories from personal records made more than seven months prior to the trial concerning lengthy and detailed official prison matters. West's Ann.Code Civ.Proc. § 2047.

21. Criminal Law ⇐1166½(12)

In murder prosecution, court's reference to death of one of the jurors as "one more tragedy added to the list involved" was not reversible error.

22. Criminal Law ⇐1166½(12)

In murder prosecution, it was not reversible error for court to inquire of counsel if it was possible for them to give any estimate as to the additional length of the trial, so that jurors might make future plans.

23. Criminal Law ⇐822(1)

The use by the trial court of the word "confession" in instruction to jury in murder prosecution with respect to written statement attributed to one of the defendants, prior to time of the reading of the statement to the jury, was not reversible error where court immediately instructed jury to disregard the expression "confession," and stated that it was up to the jury to determine whether or not there was a confession.

24. Criminal Law ⇐700

In murder prosecution, conduct of district attorney and his chief deputy did not constitute such misconduct as to deny defendants a fair trial.

25. Witnesses ⇐70

It was not improper for prosecuting attorneys to testify for the People in murder prosecution concerning contents of extra-judicial statements made by defendants.

26. Witnesses ⇐68

A district attorney is not precluded from testifying as to material facts within his knowledge in a criminal case.

27. Criminal Law ⇐1171(3)

In murder prosecution, remarks of prosecuting attorneys in arguments to jury did not prejudice defendants within meaning of rule that it is prejudicial misconduct for a prosecuting attorney to base his argument on facts not in evidence.

28. Criminal Law ⇐720(9)

Where statements by prosecuting attorney in murder prosecution concerning his theory of manner in which homicides were committed are based on reasonable interpretations of evidence properly in the record, such statements are not improper.

29. Criminal Law ⇐720(6)

The prosecuting attorney has a wide range in which to state his views as to what the evidence shows and as to the conclusions to be drawn therefrom.

30. Criminal Law ⇐719(2)

In murder prosecution, district attorney did not overstep proper bounds in giving his theory of manner in which homicides were committed.

31. Criminal Law ⇐1171(6)

Where defendants, who were inmates of prison because they had committed crimes of violence, admitted that they embarked on a particularly vicious and brutal series of attacks on prison guards, resulting in two homicides and two other uncalled for deadly assaults, it was not reversible error for chief deputy district attorney in argument to jury to refer to defendants as depraved criminals and murderers.

32. Grand Jury ⇐2½

In murder prosecution, one of the defendants was not deprived of his constitutional right to a fair trial on ground that members of his race were systematically and purposefully excluded from the grand jury which indicted him.

Adams & Reynolds, John Adams, Jr., and R. J. Reynolds, San Francisco, for appellant Burwell.

Walter F. Freitas and S. J. Hugh Allen, San Rafael, for appellant Rogers.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., San Francisco, and W. O. Weissich, Dist. Atty., San Rafael, for respondent.

SHENK, Justice.

Eugene Burwell and James A. Rogers, inmates of the State Prison at San Quentin, were charged with murdering two San Quentin guards, Charles W. Wiget and Vern A. Mackin. Verdicts of conviction without recommendation as to penalty were returned by the jury and death sentences were imposed. There is here an appeal from the judgment of conviction and from an order denying a motion for a new trial as to each defendant.

[1] The defendant Burwell was the chief clerk of the library in the main prison or so-called "Quentin side" thereof. Burwell's friend, the defendant Rogers, lived in the so-called "Guidance Center side" of the prison awaiting assignment to his place in routine prison life, and his opportunities to visit Burwell were limited. On January 14, 1952, in violation of prison rules, Rogers exchanged clothes, identification cards and cells with Bragg, an inmate quartered in the main prison. Bragg was entitled to leave his cell for certain purposes between the hours of 6:00 and 8:00 p. m. On or about 6:30 p. m. of that evening Rogers posing as Bragg, met Burwell at the prison library where the latter was on duty. The only other occupant of the library at the time was inmate Wolfe, an assistant clerk at work in the librarian's office. The evidence of what took place thereafter is conflicting, but viewed in a light consistent with the verdicts, as we are required to do, People v. Daugherty, 40 Cal.2d 876, 885, 256 P.2d 911; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Perkins, 8 Cal.2d 502, 510, 66 P.2d 631; People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389, there is substantial evidence from which the jury reasonably could find that the defendants planned an escape; that the defendant Burwell and Officer Wiget were unfriendly due to a prior disagreement and altercation; that as a result thereof the defendant Burwell planned "to get" Officer Wiget; that the officer's visit to the library on a regular tour of duty was anticipated by the defendants and they planned to attack him; that weapons consisting of two knives, the separated blades of a pair of scissors and a hand axe were collected in anticipation of the attack; that at approximately 7:10 p. m. Officer Wiget knocked on the library door and was admitted by Burwell; that Rogers pretended to be ill as he lay on a table in a rear room off the main library reading room; that Officer Wiget first questioned Rogers' right to be in the library; that as he attempted to diagnose Rogers' trouble and to make an entry in his notebook, he was attacked by the defendants using the weapons theretofore concealed, and that in the ensuing struggle Wiget was killed. His death was attributed to multiple injuries, the main causes being a stab wound penetrating the chest and abdomen, and partial asphyxia due to compression from a necktie drawn tightly about his neck following the struggle. During the assault on Wiget, Burwell received a stab wound through his back and into his chest cavity. The wound was dressed by Rogers and external bleeding temporarily ceased.

Thereafter the defendants bound and gagged inmate Wolfe and placed him in a position not visible from the main library or the scene of the homicide. They dragged Officer Wiget's body into a small storeroom off the rear reading room. Defendant Burwell went into the corridor outside of the main library where he engaged in conversation with two prison guards, Officers Dascombe and Stewart. He informed these guards that Rogers was ill in the rear reading room and the officers accompanied Burwell to that room. Officer Dascombe left to obtain a hospital gurney to remove the supposedly ailing Rogers. As Officer Stewart bent over Rogers in an effort to make him more comfortable he was struck repeatedly from behind by Burwell using the hand axe. Rogers joined in the assault with a

scissors blade. The officer fell to the floor, where he remained for an indeterminate time. During that time Officer Dascombe returned. He could not or did not see Officer Stewart. The defendant Rogers was lying on a library table when Officer Dascombe re-entered and was assisted by the officer in arising. The officer noticed a blade from a separated pair of scissors in Rogers' trouser pocket and relieved him of it. Rogers was ordered to leave the library, but instead Rogers seized a broom and he and Officer Dascombe fought for possession of it. While this struggle was in progress, the defendant Burwell attacked Officer Dascombe from behind again, using the hand axe to beat the officer into unconsciousness. Meanwhile Officer Stewart had arisen and escaped from the library. Both of the officers suffered extensive multiple fractures of their skulls and mangled hands and fingers in attempting to ward off the blows from the axe. They both recovered.

Leaving the unconscious Dascombe and the body of Wiget in the library, the defendants sought an escape route. They proceeded through a mess hall in which a basketball game was in progress and met Officer Vern A. Mackin, who inquired as to their destination. They stated that they were bound for a projection booth overlooking the mess hall to obtain certain phonograph records for use in the library. Officer Mackin accompanied them to the projection booth, where inmate Gallegos was on duty playing musical recordings during the intermission of the basketball game. Mackin advised Gallegos of Burwell's and Rogers' purported purpose in coming to the booth. Mackin then noticed something amiss in the defendants' appearance and conduct and sought to summon aid by telephone. Rogers thereupon seized Mackin around the neck from behind. Gallegos attempted to assist Mackin but was unable to break Rogers' hold on Mackin. Rogers drew a knife and Burwell took the hand axe from his clothing and both assaulted Mackin with these weapons in such a manner as to cause his death. Gallegos escaped and gave the alarm that resulted in the apprehension of the defendants. Mackin's death was attributed to multiple injuries, the main cause being a stab wound directly into the heart, fractures of the skull and concussion of the brain.

[2] Evidence from which the foregoing account of the events which took place relating to the homicides in large part came from statements made by the defendants during preliminary investigations. The account to which they testified during the trial conflicts in some details with the recitation of facts set forth above, particularly with reference to the events leading up to the death of Officer Wiget who, they claim, launched an attack upon Burwell who, in turn, acted in self-defense. However, in view of the conflict in the evidence the jury was not required to believe the defendants' different versions of the killings. People v. Borrego, 211 Cal. 759, 765, 297 P. 17; People v. Shafer, 101 Cal.App.2d 54, 59, 224 P.2d 778. There is substantial evidence to sustain the verdicts that each defendant participated in both killings and that the homicides were murders in the first degree. Pen.Code, § 189.

[3] A preliminary question relates to the defendants' contention that they were denied a fair trial by the refusal of the court to continue the trial until after a decision in a collateral mandamus proceeding, hereinafter referred to, involving the right of the defendants to inspect certain records taken from the files of the coroner's office at the direction of the district attorney. The record shows that about a month after the homicides the court-appointed attorneys for Rogers asked the Marin County coroner to permit them to look at his file in the case. The coroner stated that he would have to secure the consent of the district attorney before he would allow them to do so. After two telephone conversations, the district attorney consented to the inspection of the file. It was about five o'clock in the afternoon when this consent was secured, and the attorneys, after thumbing through the file, indicated that they would continue their inspection the following morning in order not to inconvenience the coroner. In their brief inspection the attorneys noticed that the file contained copies of San Quentin

inspection reports, psychiatric reports, interrogations of both defendants, autopsy reports, personal property reports, pictures and other data concerning the homicides. When the attorneys returned to the coroner's office the next morning they were informed that the district attorney had directed that all material other than the coroner's report and the personal property report be turned over to his office, and that the coroner had complied with his request. The attorneys for Rogers then sought in the superior court a writ of mandamus to compel the production of material taken by the district attorney from the coroner's file on the ground that this material was part of a public record which the defendants were entitled to examine or that if the material was privileged, the privilege had been waived. Burwell later joined in this proceeding.

A hearing was held in the mandamus proceeding in the superior court. The coroner testified that the material taken by the district attorney in general consisted of San Quentin reports about the defendants and the killings; that he had requested copies of these reports from the warden; that they had been given to him with the understanding that the information contained therein was to be kept confidential until otherwise specified by the warden; and that he, as coroner, had read these reports and looked at pictures included in this material in determining whether or not to hold an inquest. The district attorney testified that the disputed material consisted of "unsworn summaries and statements from prison officials, employees and inmates, and photographs taken by prison personnel." He did not produce this material for examination by the trial court or relate more precisely the nature of its contents. At the conclusion of the hearing the superior court granted a writ only as to the papers containing answers to questions by the defendants. The district attorney and coroner appealed from the order which had the effect of staying the issuance of the writ; Rogers also appealed seeking to have the order broadened to include all of the papers removed from the coroner's file.

While the mandamus proceeding was pending in the District Court of Appeal and a few weeks prior to trial, the defendants moved for a continuance until the appellate court should determine the appeals. The judge who ruled upon this motion considered the record of the mandamus proceeding, which had been introduced in evidence. He stated that unless the district attorney delivered to the defendants the material ordered to be disclosed by the writ of mandamus he would grant the motion for a continuance. The defendants argued that a continuance should be granted until their appeal was ruled upon because the material which would not be turned over to them by the district attorney was necessary to their defense. The district attorney agreed to deliver the papers provided for in the writ of mandamus and the motion for continuance was denied. The case went to trial about ten days later.

After the verdicts were returned the defendants made motions in arrest of judgment, for a new trial, and for a 60 day continuance before sentence was pronounced in order to await the decision of the District Court of Appeal in the collateral mandamus proceeding then pending. The trial court granted the 60 day continuance. The district attorney sought a writ of mandamus to compel the superior court to pronounce sentence immediately. This was denied by the District Court of Appeal. The district attorney then made the remaining material from the file available for examination by the defendants and moved to dismiss the defendants' appeal in the mandamus proceeding on the ground that it was moot. The District Court of Appeal dismissed the appeal on that ground. This court denied a petition for hearing.

It is urged by the defendants that their appeal in the mandamus proceeding was improperly dismissed by the District Court of Appeal and that they are entitled to a determination of the merits on this appeal. It was stipulated that the record in the mandamus proceeding become a part of the record in the present proceeding. Assuming that this question is still open on this appeal it is clear that the defendants

must show more than a bare right to have had access to the additional material in the coroner's file prior to the commencement of the trial. They must show on this appeal that withholding the material resulted to their prejudice or that earlier access to the material would have been of some advantage to them. They were granted access to it prior to the motions for a new trial and neither there nor here have they shown that the claimed wrongful withholding of information was to their disadvantage either as a denial of a fundamental right resulting in an unfair trial, or as a miscarriage of justice.

The statement is made that the effect of the actions of a state through its officials which have been held to result in a denial of due process to one subjected to criminal prosecution has, in late years, through judicial decision, been materially enlarged upon. It is stated that convictions cannot be brought about by a method that "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Brown v. State of Mississippi, 297 U.S. 278, 285, 56 S.Ct. 461, 464, 80 L.Ed. 682, quoting from Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674. The acts which have been held improper are those which truly have offended a sense of justice such as the denial of counsel, Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, trial by mob domination, Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543, confessions extorted by torture, Brown v. State of Mississippi, supra, 297 U.S. 278, 56 S.Ct. 461, and other acts of a similar nature. In the present case the state did not act outside the realm of established judicial procedure. See Snyder v. Commonwealth of Massachusetts, supra, 291 U.S. 97, 54 S.Ct. 330; Rogers v. Peck, 199 U.S. 425, 434, 26 S.Ct. 87, 50 L.Ed. 256. The evidence was withheld under a claim of right supported by a judicial decision rendered in good faith by a competent court. The constitutional guaranties and prohibitions are not such as to require pretrial cooperation in a criminal case. See Stroble v. State of California, 343 U.S. 181 at page 197, 72 S.Ct. 599, 96 L.Ed 872. The defendants were given adequate notice of the charges against them, a reasonable opportunity in which to prepare their defense against those charges, and an opportunity to be heard and present in court such evidence as they desired. The action of the state involved here is far removed from the type of action denounced in the cited cases.

The claim of reversible error in denying motions for a continuance, for a new trial and in arrest of judgment pending final determination of the mandamus proceeding must rest upon, among other things, a showing that had the additional information been sooner disclosed the defendants might have been able to present a more effective defense. In this connection they contend that the material made available to them prior to the trial did not include the necktie found tightly knotted about the neck of Officer Wiget after his body was discovered and claimed by the prosecution to have been used as one of the instrumentalities in causing his death. This item of evidence, the defendants claim, was important on the issue of premeditation and deliberation necessary to constitute the killing of Officer Wiget the offense of murder in the first degree. Pen.Code, § 189. The record reveals that in the closing arguments to the jury the district attorney pointed to the testimony regarding the asphyxia caused by knotting the necktie about the neck after Wiget was rendered helpless as refuting the defendants' claim of self-defense against Wiget's assault. But this is not the only evidence of premeditation and deliberation, nor was it particularly relied upon in the prosecution's closing arguments. There was other pertinent evidence which may be deemed to be more conclusive on the point of premeditation and deliberation. Furthermore, the defense attorneys had ample reason to believe that the necktie would be referred to during the trial. The material in the coroner's files which was made available to them before trial revealed that in interrogations before trial the prosecution showed an interest in the possible use of the necktie as evidence. During the trial

the defense attorneys cross-examined extensively the prosecution witnesses who testified as to the asphyxia which might have been caused by the tightly knotted necktie.

There is no showing, and it does not appear, that the defendants might have prepared any defenses to refute the effect of the introduction of this evidence other than those interposed. They claim that they might have obtained fingerprint data from the tie which would have aided their cause, but there is nothing in the record nor in reason to support such a claim. The prosecution was not required to lay out for the defendants its order of proof and the fact that it emphasized the inferences to be drawn from the testimony relating to the necktie at a time which the defendants claim was "strategic" indicates only that the prosecution was presenting its evidence in a manner deemed by it to be most effective.

Other material claimed to be wrongfully withheld were lists of persons who might have some knowledge of the circumstances attending the killings but who were not called upon to testify. The defendants argue that such witnesses would testify favorably to the defense. But they fail to show what such testimony might be. Furthermore they had access to all the withheld material before motions for a new trial. They failed to show on those motions, as they have failed to show on this appeal, that an inspection of the material in question before trial would have been to their advantage.

The defendants moved for a change of venue on the ground that they could not have a fair trial in Marin County. They assign as error the court's denial of their motions. At the hearing on the motions they introduced evidence to the effect that after Officers Mackin and Wiget were killed a fund was set up for their families; that solicitors with collection boxes were placed in many public places and in stores throughout the county; that $8,271.83 was collected, mainly in small contributions, and that a benefit dance was held, the proceeds of which went into the fund. The foregoing in itself does not indicate any prejudice towards the defendants, but rather an expression of sympathy on the part of the people of the community in which the families of the deceased guards were living. Other evidence, consisting mainly of published newspaper articles, was claimed to indicate prejudice.

In opposition to the motions for change of venue, the People submitted affidavits which contradicted the assertions of the defendants. An affidavit made by the editor of one of the leading newspapers of the county averred that he was generally cognizant of news coverage and public opinion throughout the county; that his newspaper and others gave no more coverage than customary for an event of such importance; that in his opinion the newspaper accounts did not result in undue prejudice; that over four months had elapsed since the homicides; that the average person was no longer concerned with the events which took place, and that there was no recognizable bias or prejudice against either defendant within the county. It was further averred that the people of Marin County understood the problems associated with a prison and their sympathy and understanding had been expressed by prior acquittals of inmates alleged to have committed crimes within the prison walls. An affidavit of a deputy district attorney averred that a survey had been conducted to determine whether there was a general prejudice against the defendants, and that the result of the survey clearly indicated that the defendants would receive a fair trial in Marin County.

[4, 5] The trial judge, in denying the motions for change of venue, stated: "I have had a great deal of experience also with the people of Marin County as a public in connection with their tendency or lack of tendency to be stampeded. I was born here and have seen these things happen all my life, not often, but some of these things at San Quentin and it seems * * there is no tendency towards prejudice in a matter of this kind." A motion for change

of venue is directed to the sound discretion of the trial court, People v. Cullen, 37 Cal. 2d 614, 627, 234 P.2d 1; People v. McKay, 37 Cal.2d 792, 793, 236 P.2d 145, and no abuse of that discretion has been shown.

[6, 7] A portion of the People's evidence consisted of statements made by the defendants immediately after their apprehension. The defendants assert that the circumstances under which such statements were made showed that they should have been excluded. See People v. Jones, 24 Cal.2d 601, 150 P.2d 801; People v. Rogers, 22 Cal.2d 787, 141 P.2d 722. There is a conflict in the evidence as to what mistreatment, if any, the defendants were subjected to before making any statements. The attendant circumstances which go to the free and voluntary nature of such statements are preliminary questions for the court and finally questions of fact for the jury under proper instructions. People v. Fox, 25 Cal. 2d 330, 340, 153 P.2d 729. When the question has been resolved against the defendants, the determination will not be disturbed unless it is without sufficient evidentiary support. People v. Mehaffey, 32 Cal.2d 535, 554, 197 P.2d 12. It appears that after their apprehension in the projection booth, the defendants were both ordered to take off their clothing, including their shoes. Both defendants had carried weapons concealed in their clothing into the projection booth and Rogers was carrying a concealed weapon as he left the booth after Officer Mackin's death. The clothing of both defendants was heavily covered with blood. The People contended that the clothing was removed for evidentiary purposes and to make certain that no other weapons were concealed upon the defendants' persons. The defendants were then marched into and across a prison yard to a captain's office, where the questioning complained of took place. During the journey Burwell lagged behind, and was told to quicken his pace. He replied that he was in "no hurry." Upon a second refusal to respond to an order to move faster, one of the guards twisted his arm behind his back and hurried him along. Another guard struck Burwell across the back and buttocks with a night stick to speed him along.

During the apprehension and questioning to follow Burwell was suffering from the wound in his back which had been temporarily treated by Rogers in the library. Following a coughing spell while Burwell was being questioned in the captain's office, the wound reopened. Questioning ceased at this point and Burwell was given immediate medical attention. He was not questioned further until the following morning.

It is apparent that some force was used in producing the defendants at the captain's office. There were 250 inmates in the vicinity of the area through which the defendants were marched, a basketball game having been in progress. The officer in charge at the time, who admitted using force to hurry Burwell along, was concerned whether the violence which had resulted in the homicides was an outgrowth of a planned general prison break and he was not certain of the reaction of the other inmates to the apprehension of Burwell and Rogers. It was the duty of the guards to take the defendants across the yard without delay. It is difficult for a court to say how much force was necessary. Under the circumstances here disclosed it may not be said that more force was used than was necessary. A display of force in effecting an arrest has been held not to affect a confession subsequently made. Connors v. State, 95 Wis. 77, 69 N.W. 981; Romon v. State, 23 Ariz. 67, 201 P. 551. There is no evidence of undue discomfort suffered by the defendants on their way to the captain's office and no evidence of threats, or duress, after they arrived there.

[8] The test in determining whether statements amounting to a confession may be properly admitted in evidence without a denial of fundamental rights appears, by the latest expression of the Supreme Court, to be one of trustworthiness. Stein v. People of State of New York, 1952, 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522.

[9] There is substantial evidence in the record upon which the trial court and the jury reasonably could conclude, as it did, that all of the statements or confessions to which the defendants object were made freely and voluntarily, were not given

under threat or promise, were not coerced in any manner and indicated trustworthiness. Although Burwell had sustained some injury he nevertheless answered the questions asked of him in a manner which indicated that he had full control of his faculties. On the following morning he gave substantially the same answers when questioned by the district attorney. Immediately after questioning in the captain's office the chief medical officer of the prison examined him and later testified that he was in good physical condition; that his pulse and blood pressure were "practically normal"; that he was not suffering from shock, and that his responses to questions were logical and prompt.

The defendants contend that they were denied a fair trial because of the manner in which they were conducted to and from the courtroom and the circumstances under which their testimony was taken. The defendants were transported from San Quentin Prison to the court each day of the trial in a station wagon. Their hands were handcuffed to their belts and they were restrained by a short length of chain held from behind by one of the prison guards. These security measures were the usual practice of the Department of Corrections whenever an inmate was brought from the prison to the courthouse. No formal protest to this practice was made by the defendants during the trial. After they entered the courtroom the restraining devices were removed but an armed guard was stationed in an anteroom behind the bench and witness chair. This anteroom led to a doorway from which egress from the courtroom might be made. While the defendants were in the witness chair, the guard removed his gun from its holster but did not make any gestures toward them. This precaution was deemed necessary because of the close proximity of the witness chair to the doorway. The guards were not visible to the defendants while they testified, nor to the jury at that time.

[10, 11] When reasonable precautions are taken to retain custody of an accused the fact that they bring before the jury the information that a defendant is a convict and perhaps a dangerous character does not deprive him of a fair trial. People v. Kimball, 5 Cal.2d 608, 611, 55 P.2d 483; People v. Metzger, 143 Cal. 447, 77 P. 155; People v. Harris, 98 Cal.App.2d 662, 665, 220 P.2d 812. The defendants in the present case were in prison after conviction of crimes of violence, and were at the time accused of killing two prison guards and severely injuring two others. Furthermore, letters written by the defendant Burwell showed that he planned an escape from the courtroom with the aid of friends and with two revolvers which he intended to procure if he could through a guard he thought to be friendly. Under these circumstances the precautions taken were reasonable and necessary and the defendants cannot complain of any prejudice which might have resulted therefrom. See People v. Kimball, supra, 5 Cal.2d 608, 611, 55 P.2d 483.

[12, 13] The defendants claim that the court erred in permitting the jury to separate and mingle with the spectators during recesses, and that the jury was not adequately admonished prior to recesses and adjournments. These contentions were determined adversely to the defendants on motions for a new trial. The trial court has discretion to permit the jury to separate during recesses and adjournments. People v. Erno, 195 Cal. 272, 232 P. 710; Pen.Code, § 1121. The record does not show that any objection to this procedure was made by counsel for defendants. Nor is it apparent that any prejudice resulted from the claimed commingling. The affidavits of ten jurors stated that they did not discuss the case with anyone nor even hear any comments. Another juror averred that when approached by a spectator he walked away and that he did not discuss or overhear comments on the merits of the case. The twelfth juror was unavailable, having left the state.

On eight occasions the court gave the full statutory admonition. § 1122, Pen.Code. On other occasions the court gave a permissible short form of admonition. It is claimed that no admonition at all was given on four occasions when recesses were tak-

en. If they were not so given the court's attention was not called to the omission and under these circumstances the irregularity in the proceedings was not such as to require a reversal. Fricke, California Criminal Procedure, 2nd ed. p. 250 and cases there cited. See also Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689; Langley v. State, 53 Okl.Cr. 401, 12 P.2d 254, 256. No abuse of discretion is indicated by the court's denial of the motions for a new trial based on the foregoing contentions.

The defendants claim error in the trial court's rulings on the admissibility and exclusion of evidence and on the scope of cross-examination on occasions too numerous to mention. The trial was no doubt fraught with tense and spirited controversy between counsel. It consumed over seven weeks from the time the jury was sworn until verdicts were returned. There are 114 exhibits and 2987 pages of reporter's transcript. Objections were vigorously argued. It would serve no useful purpose to set forth in detail each of the points raised. They have been considered and do not require specific discussion except those which relate to: (1) the admission of photographs of the officers who were killed; (2) the admission and exclusion of letters written by Burwell in regard to a planned escape; (3) the scope of cross-examination of character witnesses for the defendant Burwell and, (4) the right of witnesses to refresh their memories by reference to notes before answering questions on examination.

[14–16] As to point (1) the admission of the photographs was objected to on the ground that as they depicted the condition of the bodies of the dead officers they were presented for no reason other than to prejudice the jury. Of the four exhibits now complained of, objections were not made at the trial as to two of them, a third was admitted over objection and the fourth was refused admission. It is the rule that photographs when relevant to the issue, have evidentiary value. They are often subjected to the objection that they may have a tendency to inflame the jury against the accused. The question of their admissibility is generally within the discretion of the trial court. People v. Gulbrandsen, 35 Cal.2d 514, 521–522, 218 P.2d 977. No abuse of discretion is here shown. See People v. Osborn, 37 Cal.2d 380, 383, 231 P.2d 850; People v. Guldbrandson, supra, 35 Cal.2d 514, 521–522, 218 P.2d 977; People v. Dunn, 29 Cal.2d 654, 659, 177 P.2d 553.

[17, 18] With reference to point (2) it appears that photostatic copies of letters written by the defendant Burwell, previously referred to, were admitted in evidence over objection. These letters revealed plans for an escape during the trial. Such evidence is admissible to how consciousness of guilt. People v. Schafer, 161 Cal. 573, 578, 119 P. 920; People v. Arnold, 199 Cal. 471, 497, 250 P. 168. To counteract this showing the defendant Burwell attempted to introduce letters written by him to members of his family about four months before the homicides. It was claimed that they would show that Burwell had no intention at that time nor at the time of the offenses to escape from prison. The offer was rejected, obviously on the ground that the letters were too remote to prove what was in this defendant's mind several months thereafter. No error in this ruling is indicated.

[19] As to point (3) it appears that character witnesses for the defendant Burwell were asked on cross-examination if they had heard of certain instances in which this defendant had not conducted himself in a manner consistent with the character attributed to him by his witnesses. This is proper cross-examination in the absence of a showing of bad faith. People v. McKenna, 11 Cal.2d 327, 335, 79 P.2d 1065; People v. Stevens, 5 Cal.2d 92, 99, 53 P.2d 133. This defendant chose to put in issue his reputation for peace and quiet, and the People had the right to counter this showing by evidence indicating an unruly and violent disposition, and to impeach the testimony of his own witnesses. The court properly exercised its discretion in allowing some and rejecting other questions relating to prior misconduct on the part of the defendant. Although

specific incidents to which the character witnesses were referred occurred more than four years prior to the homicides, the question of remoteness is within the sound discretion of the trial court and no abuse is here shown. See Michelson v. U. S., 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168.

[20] As to point (4) it appears that witnesses for the People, generally those connected with the administration of the prison, were allowed to testify by refreshing their memories from personal notes and records made at the time of or immediately after the incidents to which they related. While recognizing the right generally to so testify, Code of Civ.Proc. § 2047, the defendants insist that these witnesses were allowed undue freedom in refreshing their memories. In some instances considerable leeway was allowed in referring to the notes. This was justifiable because the conversations and events which were the subject of examination took place more than seven months prior to the trial and the witnesses were testifying concerning matters which were part of lengthy and detailed official prison records. Section 2047 not only allows a witness to refresh his memory from a writing but also to "testify from such a writing, though he retain no recollection of the particular facts" if such evidence is received with caution. The record shows that the proper cautionary safeguards were observed and that no error was committed. See Anderson v. Souza, 38 Cal.2d 825, 832–833, 243 P.2d 497; People v. Zammora, 66 Cal.App. 2d 166, 224, 152 P.2d 180.

[21] In addition to the foregoing the defendants charge misconduct on the part of the trial court. Complaint is made of certain statements made by the trial judge, and in particular to the following remarks in regard to the death of a 72 year old juror during the trial: "It might seem perfunctory, perhaps, to the members of the jury that we go on and continue these proceedings with one more tragedy added to the list involved, but all we can do is carry on without him. I had no particular opportunity, because of the nature of these proceedings, to know Mr. Hirschfield, but I did speak to him briefly on two or three occasions and learned perhaps something of what you ladies and gentlemen had learned perhaps in your direct association during the past two months. You are the ones, I think, actually qualified to speak for him. It seemed to me he had become your pet already, and I could see why, in the few conversations which I had with him that would be so. Counsel, of course, due to the nature of the matters here, have had no opportunity whatsoever to see those things except from afar, but I think it was appropriate for you gentlemen to move that the court be adjourned today out of respect to his memory and that will be the order."

The defendants have drawn the unfounded conclusion that by the phrase "one more tragedy added to the list involved," the judge was relaying to the jury his feeling that the defendants were responsible for the death of the juror and the two guards. There is no question but that the events which had occurred could properly be termed "tragedies" and in so referring to them there was no imputation of fault or responsibility chargeable to the defendants.

[22] Near the close of the prosecution's case the judge made the following inquiry of counsel: "I should like to ask you gentlemen if it is possible to give any estimate as to the additional length of this trial. I think a good many people connected with the case, jurors and others, have postponed or gone without vacations on account of this matter, and they would perhaps like to know when they can start one or attend to some other affairs. I have an estimate from the defendants, and if the District Attorney would rather not give an estimate separately I would like to have you get together and see if you can come to some kind of an arrangement so that I can give it to the Jury before they leave tonight."

The foregoing statement is assigned by the defendants as misconduct because, it is asserted, the judge indicated that the result of the trial was a foregone conclusion and that all parties should hasten to

accomplish that result. Such an inference cannot reasonably be drawn from the statement. If it is to be construed as a criticism of the undue length of the trial it probably should be ascribed to the prosecution since its case was still in progress. Such admonitions have been held not to be prejudicial when, as here, there was no purpose to divert the course of a trial from its orderly progress. People v. Williams, 32 Cal.2d 78, 195 P.2d 393.

[23] On another occasion the trial court gave the following instructions to the jury prior to the reading of a written statement attributed to the defendant Burwell: "The voluntary nature of the confession is at issue; the jury will disregard the expression 'confession'; it is up to the jury to determine whether or not there was one * * *." The defendants assert as error the reference to the statement as a "confession" as a predetermination of an issue to be decided by the jury. But the court immediately corrected what appeared to it to be a poor selection of a word. No objection was raised at the time and it was not incumbent upon the court to make a more elaborate statement to the jury on the subject. People v. Avery, 35 Cal.2d 487, 493, 218 P.2d 527. It does not appear that the defendants were prejudiced by the statement.

[24] The conduct of the district attorney and of his chief deputy is attacked as constituting such misconduct as to deny to the defendants a fair trial. The asserted instances are not serious as to any particular item, but it is argued that their cumulative effect requires a reversal. The following are assigned as misconduct: (a) persistence in asking leading questions despite continued admonitions from the court, sometimes on its own initiative, to refrain from doing so—but all objections properly made were sustained; (b) continued questioning of witnesses who could not testify without refreshing their memories from memoranda—but the procedure outlined in section 2047 of the Code of Civil Procedure was complied with; (c) attempts to introduce pictures with the objective, it is claimed, to inflame the minds of the jurors—but improper pictures were not admitted, nor did the jurors have any opportunity to view them, cf. People v. Whitacre, 79 Cal.App. 27, 32, 248 P. 924; (d) an attempt to introduce a newspaper clipping found in Rogers' pocket—but the contents of the article were not disclosed to the jurors, cf. People v. Pitisci, 29 Cal. App. 727, 738, 157 P. 502; (e) the suppression, prior to their introduction in evidence at the trial, of certain items of evidence, in particular the necktie and clothes of the defendants, which, it is claimed, came as a surprise to the defendants during the trial—but it is reasonable to assume that the existence of such evidence was known to the defendants from the time of the homicides; (f) demonstrations before the jury using items of physical evidence to show the probable manner in which events had occurred—but these were reasonable illustrations based on evidence in the record; and (g) the claimed lack of scientific tests or the introduction of the results of such tests—but it is not shown that such evidence existed.

It is clear, beyond legitimate controversy, that the foregoing instances of asserted misconduct do not, whether considered singly or collectively, constitute that degree of misconduct by a district attorney as would deprive a defendant of a fair trial. If they were misconduct at all it could not be reasonably concluded that they resulted in a miscarriage of justice.

[25–27] It is further contended that the prosecuting attorneys improperly led the jury to believe that they were possessed of incriminating evidence not in the record. Both attorneys were witnesses for the People, testifying to the contents of extrajudicial statements made by the defendants. This in itself was not improper. A district attorney is not precluded from testifying as to material facts within his knowledge. People v. Hamberg, 84 Cal. 468, 473, 24 P. 298. In their arguments to the jury on other matters both prosecutors stated that they knew certain events had happened in particular ways, and it is argued that the implication is that the prosecuting attorneys knew such facts from first hand informa-

tion. However, the context of the arguments refered to indicates that the word "knew" was used in the sense that "the evidence establishes." Care was taken by counsel and the court to make certain that the prosecuting attorneys did not argue in regard to the implications which could have been drawn from events to which they had personally testified. In People v. Owens, 11 Cal.App.2d 724 at page 727, 54 P.2d 728, the court rejected a similar contention based upon the same reasoning. It appears that the prosecuting attorneys made other arguments to the jury in which they stated that certain facts had taken place in their presence. In all of these instances the events referred to had otherwise been properly put in evidence at the trial. In recounting what had occurred, counsel spoke in the first person, giving his version thereof. This was not proper, but in all of the instances to which the defendants object, counsel's version varied but slightly from the testimony otherwise developed, and references were made only as to inconsequential events. They consisted of what took place in posing the defendant Rogers for a newspaper photograph in which he was shown pointing to one of the weapons used by the defendants; of why the officer whose tour of duty Officer Wiget had taken on the night of the homicides was not able to work that evening; of minor details relating to a visit to Mrs. Wiget in seeking an exemplar of her husband's handwriting; of why the district attorney interrogated the defendants before trial, and of matters of similar nature. There is nothing in these remarks that could have prejudiced the defendants within the rule that it is prejudicial misconduct for a prosecuting attorney to base his argument on facts not in evidence. See People v. Kirkes, 39 Cal.2d 719, 723, 249 P.2d 1; People v. Evans, 39 Cal.2d 242, 251, 246 P.2d 636.

[28–30] The defendants complain of statements relating to the prosecution's theory of the manner in which the homicides were committed. To the extent that these theories were based on reasonable interpretations of evidence properly in the record no just criticism may be made. People v. Sieber, 201 Cal. 341, 356, 257 P. 64; People v. Kelly, 69 Cal.App. 558, 231 P. 767; People v. Bracklis, 54 Cal.App. 40, 200 P. 1052. Thus the defendants object, but improperly so, to the district attorney's conclusions that the purpose for which various weapons were collected by the defendants was to commit a planned assault; that the killing of Officer Wiget was brought about by decoying him into a position in which he was attacked in the same manner as Officers Dascombe and Stewart were attacked; that the wounds received by Officers Wiget and Burwell occurred in a particular manner after Officer Wiget was attacked; that the defendants tightened Officer Wiget's tie about his neck while he was still alive; that the homicides were planned, and that they constituted murders of the first degree. The prosecutor has a wide range in which to state his views as to what the evidence shows and as to conclusions to be drawn therefrom. People v. Sieber, supra, 201 Cal. 341, 356, 257 P. 64. The foregoing does not show an overstepping of the bounds.

[31] Descriptive references to the defendants made by the prosecutors are claimed to have been prejudicial. In his argument to the jury the chief deputy district attorney stated as follows: "To me the greatest compliment that has ever been paid to the personnel of San Quentin prison is that these men, those 10 or 12 guards who came to the projection room and saw their fellow officer there with his head bashed in, and in a pool of blood and with these two characters standing over him with their blood drenched clothing—the miracle is they didn't beat them to a pulp. That is what they deserved and that is what you would have expected to happen." Upon objection and before any admonition from the court, the remark was withdrawn by the chief deputy district attorney and the jury asked by him to disregard it. He went on to explain to the jury that he was attempting to help them to better understand the emotional conditions under which the defendants were apprehended.

The same prosecutor, in commenting on a letter in which the defendant Rogers

stated that he was filled with hate for the human race, directed the attention of the jury to Rogers and stated: "If you will look at him now and imagine him with two horns sticking out of his head—you couldn't picture a more malignant person or a person more filled with malice and hatred for everything he comes into contact with." At another point he stated: "There are a few who are so vicious and so depraved and so far beyond rehabilitation, so incorrigible it scares the mind of an ordinary person to ever appreciate such people can exist and be called human beings." And, "* * * either Wiget or Rogers got hold of the small knife and shoved it into Burwell's back. Sometimes I hope it was Mr. Wiget who did it, as his last act." Other remarks assigned as unduly prejudicial referred to the defendants as "depraved," "criminal," "murderers," and expressed the opinion that society's only solution of the problem they create was to impose the death penalty.

It must be realized that the defendants, by their own admissions, had embarked upon a particularly vicious and brutal series of attacks resulting in the two homicides and two other uncalled for deadly assaults. They were incarcerated in prison at that time for crimes of violence. The true character of the defendants was, from the evidence, so overwhelming that it is reasonable to assume that the jurors did not have to be informed of it. While the argument of the prosecutor now condemned by counsel for the defendants was intemperate and improper, it cannot be said that when made in the exigencies of trial and in contest with able opposing counsel a miscarriage of justice has resulted. Statements of a similar nature have been held not to constitute grounds for reversal in other cases. See People v. Kromphold, 172 Cal. 512, 522, 157 P. 599; People v. Glaze, 139 Cal. 154, 159, 72 P. 965; People v. Wheeler, 65 Cal. 77, 2 P. 892; People v. Amaya, 40 Cal.2d 70, 79, 251 P.2d 324; People v. Billings, 34 Cal.App. 549, 558, 168 P. 396; People v. Stein, 23 Cal.App. 108, 118, 137 P. 271.

[32] Finally it is contended by the defendant Burwell, a negro, that members of his race were systematically and purposefully excluded from the grand jury which indicted him, and that he was therefore deprived of his constitutional right to a fair trial. A motion to quash the indictment on that ground was made in advance of trial and a hearing was held at which evidence was taken. The motion was denied.

It appears that prior to 1942 the negro population in Marin County was negligible but had increased during the war years. In 1930 it represented less than seven-tenths of one percent. In 1940 it was almost one percent, and in 1950 it was between two and three percent. The county clerk testified that he knew of one negro who had been on the grand jury list but had exercised a personal privilege and had declined to serve. It is conceded that many negroes had served on Marin County petit juries and Burwell makes no attack on the ground that members of his race were improperly excluded from the jury that convicted him. In opposition to the motion to quash, the People called as a witness the Honorable Edward I. Butler, a retired judge of the Superior Court of Marin County, who had impaneled the grand juries during the years in question. (1942–1952.) He testified that he selected members of the grand jury "as well as I could and to get as nearly as possible a cross-section of the county." He stated that he was not prejudiced against negroes and cited James v. Marinship Corp., 1944, 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900, as indicative thereof. In that case as trial judge he rendered judgment in favor of a negro who sought to compel a labor union in Marin County to grant him equal rights.

The defendant relied on cases arising generally in the south to the effect that purposeful and systematic exclusion of negroes from a grand jury constitutes a violation of constitutional rights, and that the indictment cannot stand when sufficiently challenged. Hill v. State of Texas, 1942, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559; Smith v. State of Texas, 1940, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84; Norris v. State of Alabama, 1935, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; Patton v. State of Mississippi, 1947, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76.

In Hill v. Texas, supra, approximately fifteen percent of the population were negroes. In sixteen years no negro had been called to serve on a grand jury, and the jury commissioners who selected grand juries indicated that they affirmatively refrained from selecting citizens of the negro race. In Norris v. State of Alabama, supra, thirteen percent of the population eligible to vote were of the negro race. Within the memory of witnesses no negro had ever served on a grand or petit jury. A jury commissioner testified that jury panels were selected from lists of names on which those of the negro race were indicated by the notation "Col." In Patton v. State of Mississippi, supra, thirty-five percent of the population were negroes and no negro had been on a grand or petit jury venire for more than 30 years. In Smith v. State of Texas, supra, negroes constituted twenty percent of the population but only five had served on grand juries in an eight year period, and the jury commissioner's testimony indicated that negroes had been systematically excluded. In People v. Hines, 12 Cal.2d 535, 86 P.2d 92, it was stipulated that there had been a systematic exclusion of negroes from venires and from juries for a long period of years, and that seven percent of the entire population of the county were qualified negro voters.

There is no question as to the rule of law applicable. The only question in the present case is whether there was in fact an unlawful exclusion of the members of Burwell's race from grand jury service in Marin County. The testimony of Judge Butler was in support of the conclusion of the trial court that there had been no purposeful and systematic exclusion of members of the defendant Burwell's race from grand jury panels in Marin County prior to and at the time of the indictment. Other evidence that during a period of ten years prior to the trial negroes had been placed on both petit and grand jury panels was in further support of the trial court's conclusion.

A diligent examination of the voluminous record reveals without exception that the court acted fairly and impartially throughout the trial and at no time abused its discretion in conducting the protracted judicial proceeding. The evidence is overwhelming in support of the verdicts. No error on the part of the trial court has been shown and misconduct on the part of the prosecutors, although subject to criticism, has not resulted in a miscarriage of justice.

The judgments and the orders denying motions for a new trial are affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



130 Cal.App.2d 785

Marjorie Lee KENNEDY, Plaintiff and Appellant,

v.

Donald G. KENNEDY, Defendant and Respondent.

Civ. 20653.

District Court of Appeal, Second District, Division 3, California.

Feb. 15, 1955.

Suit by wife for annulment and for divorce. The Superior Court, Los Angeles County, Clyde C. Triplett, J., entered judgment denying annulment and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that appeal was premature and would be denied, where it had been taken before entry of final judgment on plea for divorce.

Appeal dismissed.

1. Judgment ⇐203

There can be but one final judgment in a case.

2. Judgment ⇐210

Final judgment rendered while action is still pending and undetermined is void.

3. Appeal and Error ⇐337(2)

Appeal from judgment denying annulment in suit by wife for annulment and for divorce was premature and would be dismissed, where such appeal had been taken before entry of final judgment on plea for divorce.

Michael J. Yelovich, San Pedro, for appellant.

No appearance for respondent.

SHINN, Presiding Justice.

The appeal of Marjorie Lee Kennedy, which we have submitted on the opening brief, is from a judgment denying annulment of her marriage to Donald G. Kennedy.

The complaint was in two causes of action. The first was for annulment of the marriage upon the ground of fraud consisting of the allegedly secret intention of the defendant not to consummate the marriage and not to cohabit with plaintiff as a husband. The second cause of action was for divorce upon the ground of extreme cruelty. Defendant having failed to appear his default was entered. At the trial plaintiff testified that she was 19 years of age, the defendant, 20; they drove to Yuma with friends, were married in the afternoon, returned to San Pedro the same evening, plaintiff to the home of her mother, defendant to the home of his parents; three days later defendant saw plaintiff and declared that he did not want to be married, would not live with plaintiff and requested her to get an annulment of the marriage. There was no consummation of the marriage. At the conclusion of plaintiff's testimony the court ruled that there was insufficient evidence of fraud and stated that a decree of annulment was denied. Plaintiff's attorney did not state that the case was submitted or that he had no further evidence, but this point is not urged here. After ruling the evidence of fraud was insufficient the court stated to plaintiff's attorney that he could proceed on the cause of action for divorce. The attorney replied that he was not prepared for that; the clerk asked: "Do you want to continue it on the divorce action, on the second cause of action?" Without any reply from counsel the court stated: "Off calendar." Judgment denying an annulment was entered and the appeal followed.

It is insisted by appellant that since her testimony was ample to have sustained a finding of fraud, was uncontradicted and not improbable, it was the duty of the court to accord it full credit and to find the facts in her favor. The defendant evidently has the same desires with respect to the relief which the court was expected to grant. He did not appear in the trial court and has filed no brief on the appeal. Unfortunately for their desires, they cannot be given the relief they hope for on the appeal.

[1, 2] Plaintiff's second cause of action was not dismissed or abandoned. The action is still pending. Entry of judgment on the first cause of action was premature. There can be but one final judgment in a case. A final judgment rendered while the action is still pending and undetermined is void.

[3] The appeal, having been taken before entry of final judgment, is premature. De Vally v. Kendall de Vally O. Co., 220 Cal. 742, 32 P.2d 638; Provident Land Corp. v. Bartlett, 53 Cal.App.2d 383, 127 P.2d 928.

The appeal is dismissed.

PARKER, WOOD and VALLÉE, JJ., concur.



130 Cal.App.2d 699

In the Matter of the ESTATE of William E. TUCKER, Deceased.

Florence Medcalf, Petitioner to Try Title, In her individual capacity,

James Appleyard, Petitioner for Assistance, Appellants,

David Moses, Zelda Moses, Betty Moses Deichler, and Paul Swafford, Objectors and Respondents.

Civ. 8545.

District Court of Appeal, Third District, California.

Feb. 11, 1955.

Rehearing Denied March 7, 1955.

Hearing Denied April 6, 1955.

Probate proceeding. The Superior Court, Alameda County, Cecil Mosbacher,

J., entered decree settling final account, and petitioner to try title and petitioner for assistance appealed. The District Court of Appeal, Peek, J., held, inter alia, that where, in printed letter of transmittal, request that new stock certificates be issued in name of the "undersigned" and be delivered "as follows" was followed by box containing names of testator and his executrix separated by word "or", and request was also made in letter that stock be delivered upon signing of receipt for new certificates and that dividends be sent to testator as formerly, extrinsic evidence should have been admitted to determine whether letter was an instrument creating joint tenancy or tenancy in common between testator and executrix or merely instrument giving mailing instructions.

One order affirmed and other reversed.

1. Wills ⇐672(3)

To make executor a trustee, it must appear that testator intended to impose an imperative obligation upon executor and, for such purpose, has used words which exclude exercise of direction or option in reference to the act.

2. Wills ⇐675

To create a valid and enforceable testamentary provision for one's benefit, it must clearly appear that testator intended to govern and control conduct of party to whom the language of will is addressed and that testator did not design it as an expression or indication of that which he thought would be a reasonable exercise of the discretion which he intended to repose in one to whom it was addressed.

3. Wills ⇐672(1)

Where testator provided in will that he relied upon named friend to render another named friend any assistance that other friend might need, such provision did not constitute a valid and enforceable testamentary provision for benefit of other friend.

4. Evidence ⇐426

Where, in printed letter of transmittal, request to issue new stock certificates in name of the "undersigned" and to deliver them "as follows" was followed by box containing names of testator and his executrix separated by word "or", and request was also made in letter that stock be delivered upon signing of receipt for new certificates and that dividends be sent to testator as formerly, extrinsic evidence should have been admitted to determine whether letter was an instrument creating joint tenancy or tenancy in common between testator and executrix or merely instrument giving mailing instructions.

5. Evidence ⇐461(1)

Where language is fairly susceptible of one of two constructions, extrinsic evidence may be considered, not to vary or modify terms of agreement, but to aid court in ascertaining true intent of parties by showing what parties meant by what they said, not that they meant something other than that which they said.

6. Evidence ⇐448

Where extrinsic evidence is offered to explain inconsistent provisions of contract, court should not strain to find a clear meaning in an ambiguous document and, having done so, exclude the extrinsic evidence on ground that, as so construed, no ambiguity existed.

7. Evidence ⇐451, 455

Parol evidence is not only admissible to explain ambiguity appearing on face of a document but also to show that, what appears to be a perfectly clear agreement means in fact, something entirely different to the parties.

Fitzgerald, Abbott & Beardsley, Oakland, for appellant Medcalf.

S. C. Wright & Robert W. Scott, San Francisco, for appellant Appleyard.

Cornish & Cornish, Berkeley, for respondent Swafford.

Stanley D. Whitney, Alameda, for respondents Moses and Deichler.

PEEK, Justice.

Two appeals are involved in this proceeding. The first is that of James Apple-

yard who appeals from that portion of the decree settling the final account and ordering final distribution, wherein it was determined that decedent's will made no provision for appellant's assistance or for his use and benefit. The second is an appeal by the executrix, Florence Medcalf, in her individual capacity, from portions of the same order which decreed she had no right, title or interest in certain personal property.

The only provision of the will here in issue is as follows:

"6. I rely upon my friend Florence Medcalf, to render to my friend James Appleyard, any assistance that he may need."

Appeal of James Appleyard

It is the contention of this appellant that by the terms of the above paragraph of the will, a valid and enforceable testamentary provision was made for his benefit; that the language of said paragraph is directed to Florence Medcalf as executrix, and not to her as an individual.

[1, 2] It is well established that in order to make an executor a trustee "* * * it must appear that the testator intended to impose an imperative obligation upon him, and for that purpose has used words which exclude the exercise of direction or option in reference to the act in question." In re Estate of Mitchell, 160 Cal. 618, 621, 117 P. 774, 775. Thus to create a valid and enforceable testamentary provision for one's benefit, it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is addressed, and that he did not design it as an expression or indication of that which he thought would be a reasonable exercise of the discretion which he intended to repose in the one to whom it was addressed. Following this rule the court in the Mitchell case held that the words "'I rely upon my daughter * * * to make further and suitable necessary provision'" for a granddaughter, and "'I rely upon my daughter to make at all times suitable and adequate provision for my said granddaughter, believing that my daughter * * * will * * * amply and carefully make provision for her'" did not create a trust for the benefit of the granddaughter, nor was it a limitation upon the estate or interest given to the daughter.

Likewise in the present case the testator also *relied* upon Florence Medcalf, not as the executrix of his estate, but as an individual "to render * * * any assistance" that his "friend James Appleyard" might need. Such provisions are utterly inconsistent with an intent to qualify that which the testator gave to Florence Medcalf as an individual, or to impose any charge in the nature of a trust. Nor do any of the circumstances disclosed from the record as a whole call for any different conclusion. This is particularly true in view of the fact that the testator executed three earlier wills —two in 1938 and one in 1948—in which bequests were made to this appellant in the sums of $1,000 and $3,000 respectively.

In the Mitchell estate the court held that so far as such facts have any bearing "* * they would seem to point to a design not to establish a trust * * * since the testatrix must have been familiar with the proper form of words to create a trust, and could easily have done so if she had so desired." Such knowledge is likewise present here in that the testator was an attorney, had served as reporter for the District Court of Appeal for many years, and hence was well qualified to have provided for appellant by way of specific bequest, trust or otherwise, but he did not choose to do so.

[3] Gauged by the yardstick of the Mitchell case, it appears (1) that there can be found no direction, request or recommendation directed to the executrix as such either to pay to Appleyard or hold in trust for him any specific amount, and (2) by reason of the learning and background of the testator, had he so desired in his final will as he did in the two previous wills, made specific provision for this appellant. We conclude that the most which can be said for the provision here in question was that the testator merely adopted it as a means of bringing to the attention of Florence Medcalf as a friend,

that he relied upon her discretion to care for and give whatever assistance was necessary to another old friend, James Appleyard. The words so used merely express confidence that Florence Medcalf would so act if and when the need arose; hence the portion of the order attacked by this appellant must be sustained.

Appeal of Florence Medcalf

This appeal concerns certain shares of common stock of the Signal Oil and Gas Company standing in the name of decedent. It is this appellant's contention that a document entitled "Letter of Transmittal" was intended by the testator as an instrument transferring to himself and to her in joint tenancy title in said shares of stock; that since the court could not with sureness, from a mere reading of the document, determine its correct interpretation, it was therefore ambiguous, and hence the court erred in denying her the right to introduce extrinsic evidence to show that decedent had thereby made a gift in joint tenancy to her, or that in any event the instrument was sufficient to have shown at least that a tenancy in common resulted.

The face of the document in question is as follows:

LETTER OF TRANSMITTAL

, 194..

Security-First National Bank of Los Angeles
Corporate Trust Department
215 West Sixth Street
Los Angeles 54, California

Gentlemen:

I (We) hand you herewith for exchange in accordance with the letter of Signal Oil and Gas Company dated December 17, 1948, certificate(s) for said Company's Class A and or Class B Capital stock without nominal or par value, as listed below:

CLASS A STOCK

Certificate Number(s)	Aggregate Number of Shares
LA 6295	50
LA 40326	100

CLASS B STOCK

Certificate Number(s)	Aggregate Number of Shares

Please issue the new certificate(s) in the name of the undersigned and deliver as follows:

☐ Against counter receipt ☐ By mail as indicated in the following form

(Please type or print)

Name

Address

City Zone and State

William B. Tucker,

California.

Signature of Stockholder

NOTE. If you wish to give special instructions with respect to the denominations of the new certificates, please do so on the reverse hereof.

On the reverse side of the document there appears the following typewritten notation: "Please issue in units of 100 shares. W.E.T."

Counsel for this appellant called three witnesses, each from a different bank, and by them introduced for identification and subsequently into evidence, certain joint tenancy signature cards to checking accounts and to safe deposit boxes. The first referred to a joint account in the name of "Mr. W. E. Tucker or Miss Florence Medcalf". The second referred to an individual lease agreement covering a safe deposit box in the name of "William E. Tucker" which thereafter was changed to a "several lease agreement" and appeared in the following form:

"Tucker, Mr. William E.
Medcalf, Miss Florence."

Thereafter appellant, as a witness in her own behalf, testified that for approximately 18 years she had served as a secretary for the First District Court of Appeal, during which period she had become acquainted and worked with the decedent who was the official reporter for that court; that following his retirement in 1938, she saw decedent on numerous occasions each week; that she accompanied by her mother and sister, visited with him in his home and at his ranch in the mountains over weekends; and that on Tuesdays, Thursdays and Sundays, and Monday if it was a holiday, the decedent would have dinner at her home. At this point in her examination a discussion developed between counsel and the court concerning whether or not the document in question was sufficiently clear and unambiguous on its face as to preclude extrinsic evidence. Following an extensive argument off the record, the court declared a short recess, and upon reconvening the court stated: "I am inclined to believe that the state of the record at this time, from the evidence that was adduced by Mr. Kelly on behalf of Miss Medcalf that the decedent was an attorney who had practiced law, we can conclude he was somewhat familiar with ordinary letters of transmittal and the wording of the document itself * * * and after reading the cases submitted, I am of the opinion that there is no ambiguity, and the Court should not permit any intrinsic evidence to explain or vary a written document. I think that would be the correct interpretation." Counsel for appellant then asked as to the "weight" which the court attached to the fact that decedent was a lawyer, to which question the court replied, "I think it has some weight * * * Now had it been possible to show that the man who executed the letter of transmittal was a person who was unfamiliar with the English language or had never handled a document which in any way had to do with transferring stock or changing the mailing address to which the stock is to be sent, it may have shown some ambiguity; but certainly where you show the man handling these documents day by day or similarly had occasion to be familiar with them, there could be no ambiguity. I don't see how there can be any other ruling."

Following further discussion between counsel it was stipulated that an offer of proof in narrative form could be made by counsel for this appellant, and that objections to such questions were made and sustained. Counsel then offered to prove that Mr. Tucker was approximately 80 years old at the time of his death; that he had not, for a period of probably 8 or 10 years practiced law to any extent except for possibly an occasional probate matter for friends; that prior to December, 1948, he was suffering from cancer and that on January 4, 1949, he went to the hospital in Alameda, where he stayed until the time of his death on or about January 28, 1949; that on or about January 9, 1949, Mr. Tucker told Miss Medcalf at the hospital in Alameda that the document with regard to a split-up of the Signal Oil and Gas Company stock had been received at his house in December prior to his removal to the hospital. He asked her to get that document and spoke to her at the same time about her going through his safe deposit box in the American Trust Company and getting his certificates of stock evidencing shares in the Signal Oil and Gas Company. Appellant went to the American Trust Company in San Francisco and secured from that bank an authorization permitting access to the safe deposit box, fol-

lowing which she went to the bank and removed from the box the two certificates which have the same numbers as those in the so-called letter of transmittal. On or about January 12, 1949, appellant, at Mr. Tucker's directive, went to his home in Alameda and got the transmittal letter which at that time was solely in its printed form, without the typing now set forth thereon. She filled it out in her office in the State Building to the extent that in the box captioned "Please print or type", she typed the following: "William E. Tucker c/o Florence Medcalf, 432 State Building, San Francisco". She also typed on the reverse side, "Please issue in units of 100 shares. W.E.T."

Counsel's narrative further related that appellant took the certificates to Mr. Tucker's home and filled in the numbers which appear under Class A Stock. When she took the instrument to the hospital and handed it to Mr. Tucker with the two certificates, he told her that that was not what he wanted; that he wanted her to add right on the same line as his name the words "or Florence Medcalf" and said, "This is a joint tenancy. There will be no probate—the stock is yours." Appellant returned on January 15, 1949, typed in the words, "or Florence Medcalf" and added below, "Dividend checks to be sent as formerly to William E. Tucker, 1500 Alameda Avenue, Alameda, California." On January 15, 1949, she brought the two certificates back to Mr. Tucker and also handed him the letter of transmittal in the form in which it now stands with the exceptions of the signature of Mr. Tucker and the pencilled notations on the right-hand side of the page, "Mailing instructions only—issue same as old stock". Mr. Tucker read the instrument over and said, "This is as I want it. This is a joint tenancy. There will be no probate. The Stock is yours." He gave the letter of transmittal to appellant, together with the two certificates which she did not mail to the transfer agent until January 23, 1949. On January 22, 1949, she returned to Alameda Hospital with one Arline Matheron, Supreme Court librarian for a number of years, at which time Mr. Tucker asked Miss Medcalf if she had mailed the stock, to which she replied, "Not yet," and he said, "Do it promptly, I want that attended to." On January 23, 1949, she mailed, in San Francisco, the so-called transmittal letter in the form in which it presently appears except that the writing on the right-hand side and the lines "Mailing instructions only—issue same as old stock" with some letters at the bottom that look like "DJD" did not appear thereon, nor did the figures and the initial "B–56823" in the right-hand corner appear thereon when she mailed it. She also mailed the two stock certificates. Counsel for the opponents stipulated that the letter was mailed and that there was no signature on the reverse side of the stock certificates.

After counsel's offer of proof which was denied, counsel for respondents, on cross-examination, asked this appellant to identify a form letter addressed by Signal Oil and Gas Company to the holders of certain classes of stock, and to state where she had found the same. She answered she had found it among decedent's effects. Her attorney objected on the ground that the court had already ruled against its submission. The court then asked if respondents' counsel was offering it in evidence, regardless of the adverse ruling at the time of its original offer, to which he replied, "The purpose is to show Mr. Tucker knew, at the time he gave instructions, that in order to make a transfer of any interest in the stock that it was necessary to endorse the certificates of stock." After further discussion the court received the document into evidence.

[4] It thus appears from the record so summarized that although the trial court asserted that the document in question was unambiguous on its face, nevertheless in reaching that decision the court took into consideration some evidence, but foreclosed the admission of the extrinsic evidence offered by this appellant. To sustain the order, therefore, this court must hold as a matter of law, that from a mere reading of the instrument it appears so clear, distinct and unambiguous that a correct inter-

pretation could be reached without resort to extrinsic evidence. MacIntyre v. Angel, 109 Cal.App.2d 425, 240 P.2d 1047. We cannot so hold.

First, the request to "Please issue the new certificate(s) in the name of the undersigned and deliver as follows" raises such questions as: (1) Does "the undersigned" mean the name or names to be inserted in the "box" immediately following, or can it only mean the name which is written on the line above "Signature of Stockholder"? (2) Is the name which appears on the line immediately above the words "Signature of Stockholder" and the name of the party to whom the stock is to be delivered always and of necessity one and the same person? Secondly, in reference to the alternative given by the two small boxes above the larger "box", it is to be observed that the choice "Against counter receipt" is checked off while "By mail" is not checked off. Since the stock was to be delivered "Against counter receipt," i. e., upon the signing of a receipt for the new certificates, could it not follow that Mr. Tucker was not using, and did not intend to use, the larger "box" as mere mailing instructions? Or, if the typewritten matter in the larger "box" did constitute bare mailing instructions, is it likely that Mr. Tucker would give Signal Oil Company or the bank the choice of selecting who, as between "William E. Tucker or Florence Medcalf," should be the addressee? Finally, would not the direction that "Dividend checks to be sent as formerly to Willian E. Tucker, 1500 Alameda Avenue, Alameda, California," if it is not to be ignored, indicate that the typewritten matter in the larger "box" had some significance beyond the giving of mailing instructions?

[5] "When the language used is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties [Citation], not to show that 'the parties meant something other *than* what they said' but to show 'what they meant by what they said.'" Barham v. Barham, 33 Cal.2d 416, 422, 202 P.2d 289, 293. In the case of Sperry v. Tammany, 106 Cal.App.2d 694, 235 P.2d 847, 848, a question was raised concerning the use of the words "and/or" in a certificate of registration of an automobile. The court tersely held, "The term 'and/or' in this case is ambiguous and uncertain." The court then went on to say that although the registration certificate may not be construed to be an instrument in writing by which a person acquires title to an automobile, nevertheless such fact together with other evidence was sufficient to indicate the intention of the parties as to their title to the automobile. A similar situation is presented here. The letter of transmittal was not an instrument of title, but in accordance with this appellant's contention, when considered with the other typewritten matter, could have been adopted and intended to be used as an instrument transferring title and creating a joint tenancy.

[6, 7] It has also been said that "* * * where extrinsic evidence is offered to explain inconsistent provisions in a contract courts should not strain to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists." Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 147 P.2d 84, 88. Furthermore, in the case of Wells v. Wells, 74 Cal.App.2d 449, 169 P.2d 23, 27, the court quite properly noted that "Much can be said in support of the rule that parol evidence is not only admissible to explain an ambiguity appearing on the face of the document but is also admissible to show that what appears to be a perfectly clear agreement, in fact meant something entirely different to the parties."

The order appealed from by James Appleyard is affirmed. The order appealed from by Florence Medcalf is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

130 Cal.App.2d 736

Cleo McMAHAN, Plaintiff and Appellant,

v.

Richard Hughes McMAHAN, McMahan Bros. Desk Co., Inc., a California corporation; Bank of America National Trust & Savings Association, a Corporation; John Doe Corporation No. 1 to John Doe Corporation No. 5; John Doe Partnership No. 1 to John Doe Partnership No. 5; and John Doe No. 1 to John Doe No. 10; and Jane Doe No. 1 to Jane Doe No. 10, Defendants.

Richard Hughes McMahan, Respondent.

Civ. 20442.

District Court of Appeal, Second District, Division 3, California.

Feb. 14, 1955.

Proceeding on divorced wife's petition for increased allowance for support and maintenance of minor children. The divorced husband made application for modification of final divorce decree praying for custody of three minor children. The Superior Court, Los Angeles County, Elmer D. Doyle, J., denied the applications and the wife appealed. The District Court of Appeal, Vallée, J., held that the court did not abuse his discretion in denying increase in support allowance, but that wife was entitled to attorney's fees in resisting husband's application for change of custody of children.

Order affirmed in part and reversed in part with directions.

1. Divorce ⇐296

Amount to be awarded in divorce proceeding for care, support, education and maintenance of children awarded to custody of wife is within discretion of trial court.

2. Divorce ⇐309

In proceeding on application to modify final divorce decree with respect to support and maintenance of children, trial court did not abuse his discretion in denying increase.

3. Divorce ⇐286

In absence of showing of clear abuse of discretion, determination of trial court in denying allowance of attorney's fees for initiating and prosecuting proceedings for increase in support and maintenance awarded in final divorce decree would not be disturbed on appeal. West's Ann.Civ.Code, § 137.3.

4. Divorce ⇐223

Where trial court found that proceeding for increase in support and maintenance had not been founded on any justifiable ground, it was not an abuse of discretion to deny an allowance of attorney's fees for initiating and prosecuting the proceeding. West's Ann.Civ.Code, § 137.3.

5. Divorce ⇐222

Where divorced wife had been compelled to employ attorney to defend against husband's application for custody of children and wife had been successful in her defense and where husband had necessary funds to pay attorney's fees and wife was without funds, the court erred in denying wife's application for attorney fees. West's Ann.Civ.Code, § 137.3.

Benjamin Elconin, Los Angeles, for appellant.

Robert H. Sanders, Edward Flam, and Sidney R. Rose, Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiff appeals from an order denying her application for an increased allowance for the support and maintenance of three minor children of the parties and for attorney's fees in the proceeding for the increased allowance, and denying her application for attorney's fees in a proceeding brought by defendant to obtain custody of the minor children.

On September 14, 1953, plaintiff was granted a final decree of divorce from defendant. Custody of four minor children was awarded to plaintiff. Pursuant to a property settlement agreement, defendant was ordered to pay to plaintiff $650 a month in lieu of her share of the community property and to pay to her $150 a month for the support of each child. The oldest child has since married.

On December 10, 1953, defendant applied for modification of the decree praying for custody of the three younger children on the asserted ground that plaintiff was not a fit or proper person to have their custody. On December 16, 1953, plaintiff, by affidavit, answered the application, denying its allegations and alleging she was without means to compensate her attorney in resisting the application. She prayed for reasonable attorney's fees.

On December 15, 1953, plaintiff applied for an order modifying the final decree with respect to the allowance for support and maintenance of the three children and for reasonable attorney's fees in instituting and prosecuting the proceeding. In her affidavit in support of the application, plaintiff stated she was spending about $300 a month to support each child in the standard of living to which defendant had accustomed them. She asked for an increase to $300 a month for each child.

The applications were heard together and were all denied. Plaintiff appeals, contending the court abused its discretion in denying her applications. She argues that the uncontroverted evidence disclosed that defendant has a net income of $35,000 a year plus extensive holdings of real property and stocks; that he has acquired a new wife with three children; that he was able to take the new wife on an expensive honeymoon trip to South America. She also argues that the evidence is uncontradicted that the minimum amount required to maintain the three children in the same standard of living to which defendant had accustomed them is $813 a month.

Defendant testified that his income is about $35,000 a year. The record is not clear as to whether the amount is net or gross income. Plaintiff testified that from December 1952 to December 1953 she needed $813 a month for the support and maintenance of the three children. There was evidence from which the court could infer that from December 1952 to December 1953 plaintiff received $14,850 from defendant; that during this period her expenses were $11,569.43, which were all the expenses of herself and the four children; that her figures as to the amount spent for the children were largely estimates; that some of the expenditures were extravagances; and that the children were living on a proper basis without an increase in the amount being paid by defendant.

[1, 2] The amount to be awarded for the care, support, education, and maintenance of children awarded to the custody of the wife is within the discretion of the trial court. 16 Cal.Jur.2d 574, § 279. We find no abuse of discretion in the denial of an increase in the amount ordered to be paid for the support of the children by the final decree.

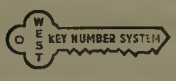
[3, 4] "In respect to services rendered after the entry of judgment, upon application by an order to show cause or motion, the court may award such costs and attorney's fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein, and may thereafter upon application as aforesaid augment or modify any award so made." Civil Code, § 137.3; Dexter v. Dexter, 42 Cal.2d 36, 44, 265 P. 2d 873. In the absence of a showing of a clear abuse of discretion, the determination of the trial court in denying an allowance of attorney's fees for initiating and prosecuting a proceeding for an increase in the amount previously ordered for the support of the children will not be disturbed on review. There is no showing that the trial court abused its discretion in this respect since it found that the proceeding for an increase was not founded on any justifiable ground. Cesena v. Cesena, 103 Cal.App.2d 212, 213–214, 229 P.2d 453.

[5] The order denying plaintiff attorney's fees in resisting defendant's application for change of custody of the children stands on different ground. The court erred in denying plaintiff's application. She was compelled to employ an attorney to defend against defendant's application for custody. Her defense was meritorious and successful. The evidence on the hearing showed that plaintiff did not have the funds necessary to pay attorney's fees and that defendant was in a position financially to pay a reasonable sum therefor. It is patent that

the refusal to award plaintiff a reasonable allowance for attorney's fees in resisting defendant's application for custody was an abuse of discretion. See Sorrels v. Sorrels, 105 Cal.App.2d 465, 474, 234 P.2d 103, and cases there cited.

That part of the order denying plaintiff's application for an increased allowance for the support and maintenance of the children and denying plaintiff an allowance of attorney's fees in initiating and prosecuting that application is affirmed. That part of the order denying plaintiff's application for an allowance of attorney's fees in resisting defendant's application for change of custody of the children is reversed with directions to the superior court to allow plaintiff a reasonable sum therefor.

SHINN, P. J., and PARKER WOOD, J., concur.



130 Cal.App.2d 725

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Edmund Norman LEETE, Defendant and Appellant.

Cr. 5140.

District Court of Appeal, Second District, Division 2, California.

Feb. 14, 1955.

Defendant was convicted of exciting lust of child under age of 14. The Superior Court, Los Angeles County, Mildred Lillie, J., entered judgment, and defendant appealed. The District Court of Appeal, McComb, J., held that evidence was sufficient to sustain conviction.

Judgment and order affirmed.

1. Criminal Law ⇐1144(13)

Upon appeal in criminal proceeding, evidence would be viewed in light most favorable to support jury's findings.

2. Criminal Law ⇐741(1), 742(1)

In criminal proceeding, credibility of witnesses and weight which should be accorded their testimony are matters left solely to discretion of trier of fact.

3. Infants ⇐20

Evidence was sufficient to sustain conviction for exciting lust of child under age of 14. Pen.Code, § 288.

4. Criminal Law ⇐618, 1148

Trial court has discretion to order different counts in an information to be tried separately, and trial court's ruling thereon will not be reversed on appeal in absence of showing of abuse of such discretion. Pen. Code, § 954.

5. Criminal Law ⇐1148

In prosecution for exciting lust of child under age of 14, refusal of trial court to order different counts of information tried separately did not constitute reversible error in absence of showing of abuse of discretion. Pen.Code, §§ 288, 954.

Wallace E. Wolfe and Percy V. Hammon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Theodore S. Tabah, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violating section 288 of the Penal Code, after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

[1, 2] *Facts:** The evidence is viewed in the light most favorable to supporting the findings of the jury and where there is a conflict in the evidence, the evidence in support of such findings is accepted. Also the credibility of the witnesses and the weight which should be accorded their tes-

* The evidence is viewed in the light most favorable to the People (respondent) pursuant to the rule set forth in People v. Pianezzi, 42 Cal.App.2d 265, 269 [2], 108 P.2d 732, hearing denied by the Supreme Court.

timony are matters left solely to the discretion of the trier of fact. (See cases cited in 16 West's Cal. Digest, 1951, Crim. Law, ⇐741(1), page 212.)

Defendant was charged in an information in four counts with four violations of section 288 of the Penal Code. Upon motion of the district attorney one count was dismissed for failure of evidence to sustain it, and the jury found defendant not guilty on two counts and guilty on one count.

Defendant contends:

First: *That the evidence is insufficient to sustain the verdict of guilty as to one count of having violated section 288 of the Penal Code.*

[3] This contention is untenable. The prosecuting witness testified she was eleven years old and lived with her mother and brother, and that defendant lived near her home; during the Easter vacation period in company with two other children she went to defendant's residence, which was in a trailer; she went inside of the trailer with him and the two other girls; he greased her skates and told her that a blister which she had upon her heel could result in blood poisoning; the two other girls left the trailer and defendant locked the door; he thereafter took down her pants and told her to lie upon her stomach upon the bed; he then placed his private parts into her private parts; he gave the complaining witness $.75 and told her not to tell anyone what had happened because it would get around the courts; whereupon he unlocked the door and she went home. Clearly this evidence sustains the finding of the trial jury that defendant violated section 288 of the Penal Code.

Second: *That the trial court erred in denying defendant's motion that the different counts in the information be tried separately.*

This contention is devoid of merit. Section 954 of the Penal Code provides:

"The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the findings of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately."

[4] It is to be noted that it is in the discretion of the trial court to order the different counts in an information to be tried separately and in the absence of a showing of an abuse of such discretion the trial court's ruling will not be reversed on appeal.

[5] In the present case there is a total absence of any showing of an abuse of discretion by the trial court. An examination of the record reveals that defendant had a full, fair, complete and impartial hearing on the charges against him.

The judgment and order are, and each is, affirmed.

MOORE, P. J., and FOX, J., concur.



130 Cal.App.2d 727

Calvin PIPER, Plaintiff, Cross-defendant and Respondent,

v.

Shirley Susan PIPER, Defendant, Cross-complainant and Appellant.

Civ. 20312.

District Court of Appeal, Second District, Division 3, California.

Feb. 14, 1955.

Divorce action brought by husband on ground of extreme cruelty with cross-complaint by wife on same ground. The Superior Court, Los Angeles County, Ingall W. Bull, J., entered interlocutory judgment of divorce for plaintiff and defendant appeal-

ed from judgment and from order denying her motion for new trial. The District Court of Appeal, Parker Wood, J., held that evidence supported finding that wife, who had been on several occasions intoxicated, and who, on one occasion, had thrown five-pound brick at husband, was guilty of extreme cruelty.

Judgment affirmed, purported appeal from order dismissed

1. Divorce ⇐27(1)

Acts of cruelty committed subsequent to separation of husband and wife may afford proper grounds for divorce.

2. Divorce ⇐109, 116

In divorce action, throwing of brick by defendant wife at husband was material evidence, even though it occurred approximately year after separation, as to wife's cruelty, and it was not necessary for husband to produce additional evidence as to effect that brick throwing episode had upon him.

3. Divorce ⇐130

In divorce action, evidence supported finding that defendant wife, who had been, on several occasions, intoxicated, and who, on one occasion, had thrown five-pound brick at husband, was guilty of extreme cruelty.

Fizzolio & Fizzolio, No. Hollywood, for appellant.

Moidel, Moidel, Moidel & Smith, and Mitchel Moidel, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action for divorce on the ground of extreme cruelty. Defendant (wife) answered the complaint and filed a cross-complaint for divorce on the ground of extreme cruelty. Interlocutory judgment of divorce was granted to plaintiff. Defendant appeals from the judgment and from the order denying her motion for a new trial.

Appellant contends that the evidence was insufficient to support the finding that she was guilty of extreme cruelty.

According to the testimony of plaintiff, he and defendant separated on November 4, 1951; during the last two years that they lived together the defendant was intoxicated four or five times a month; on November 1, 1952 (four days before the complaint was filed, defendant came to the bakery where plaintiff was employed and threw a five-pound brick at him, which struck plaintiff in the rear; and on another occasion when she came to the bakery she was intoxicated.

A witness, who was employed at the bakery where plaintiff was employed, testified that he saw defendant at the bakery several times; and on all of those occasions, except one, she was under the influence of intoxicating liquor.

One of the findings was that on November 1, 1952, defendant hit plaintiff with a five-pound weight.

[1–3] According to testimony of defendant and a witness called on her behalf, there were acts of cruelty on the part of plaintiff but, in view of defendant's contention on appeal that she was not guilty of cruelty, it is not necessary to relate that testimony. Defendant does not deny that she threw a brick at plaintiff, but she asserts that the incident occurred approximately one year after their separation, and that the record is silent as to whether the throwing of the brick "had such effect on him as to constitute cruelty." She also argues that "every slight violence" is not a ground for divorce, and that the testimony of plaintiff that defendant's conduct caused him mental anguish and physical pain is a conclusion. The throwing of the brick was material evidence even though it occurred after the separation. "Acts of cruelty committed subsequent to the separation of a husband and wife may afford proper grounds for divorce." Palmanteer v. Palmanteer, 11 Cal.2d 570, 571, 81 P.2d 910. Of course, it was not necessary for plaintiff to produce additional evidence as to the effect that the brick throwing episode had upon him. The evidence supports the findings.

The judgment is affirmed. The purported appeal from the order denying the motion for a new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

130 Cal.App.2d 672

B. Allan SUMNER and Joe Farber, Plaintiffs-Appellants,

v.

G. E. FLOWERS, also known as Gertrude MacKenzie, Richard D. Furnish, Parkview Hospital, Inc., a corporation, Doe One, Doe Two, Doe Three and Doe Four, Defendants,

G. E. Flowers, also known as Gertrude MacKenzie and Richard D. Furnish, Respondents.

Civ. 20178.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1955.

Action by stockholders for judgment declaring rights of parties, including defendant's right to issuance of a stock certificate in his own name. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that where party to formation of corporation, with knowledge of other incorporators, had his stock taken in name of his secretary, party was entitled to issuance of stock certificate in his own name notwithstanding that contract among incorporators, which secretary signed for party, provided that stock should be nonassignable and that surviving signatories should be entitled to purchase stock of a deceased signatory.

Judgment affirmed.

1. Appeal and Error ⇐1010(1)

District Court of Appeal will not interfere with a factual finding of trial court that is clearly supported by substantial evidence.

2. Evidence ⇐418

Principal and Agent ⇐143(1)

A principal may sue or be sued on his agent's contract, though not named therein, and may show that agent who made contract in agent's name was acting for principal, since such proof does not contradict the writing but explains the transaction.

3. Corporations ⇐95

Where party to formation of corporation, with knowledge of other incorporators, had his stock taken in name of his secretary, party was entitled to issuance of stock certificate in his own name notwithstanding that contract among incorporators, which secretary signed for party, provided that stock should be nonassignable and that surviving signatories should be entitled to purchase stock of a deceased signatory. Corporations Code, §§ 3011–3016.

4. Appeal and Error ⇐169

A contention which was not pleaded or otherwise presented to trial court, and on which no findings were made, would not be considered by reviewing court.

Charles J. Katz, William B. Murrish, Los Angeles, for appellants.

Charles H. Carr, Harold M. Williams, Los Angeles, for respondents.

MOORE, Presiding Justice.

The question posed is whether parol evidence may be received to show that a signatory to a contract was in fact the agent of a fully disclosed principal.

Appellants Sumner and Farber and respondent Furnish, prior to August 11, 1941, were associated on the staff of Madison Hospital, Los Angeles. Sumner was a business administrator, Farber an osteopathic doctor, and Furnish, a medical physician. After lengthy consultation, the three men on August 11, 1941, purchased the Pioneer Hospital of Los Angeles and took title in the name of defendant Flowers, as nominee of the purchasers. Thereafter, they caused the Parkview Hospital Inc. to be organized and its 300 shares to be issued as follows: 100 shares to Farber; 100 to Sumner; 100 to Furnish. For personal reasons, Dr. Furnish requested that his shares remain temporarily in the name of Miss Flowers, his confidential secretary. His associates acceded to Dr. Furnish's request and on September 14, 1941, they executed a writing whereby it was agreed that no party could alienate his shares with-

out the permission of his fellow stockholders. The shares representing the Furnish interest were factually issued to Miss Flowers although they were then and continued to be the property of Dr. Furnish. After issuance of the shares, they were delivered by the owners to Nathan Kates to be by him held in escrow until September 23, 1944. On that date, Kates released certificate number 4 for 100 shares in the name of Flowers who on October 3, 1944, endorsed the certificate to Dr. Furnish. At that time and continuously to a date in 1945, Miss Flowers was the employee and confidential secretary to Dr. Furnish. Immediately upon the incorporation of the Parkview Hospital, Dr. Furnish became its medical director and remained in that position until December 31, 1951. Prior to that date, dividends were paid to Furnish and he was credited with accounts payable equally with Sumner and Farber. On several occasions after 1944, Furnish requested the corporation to issue a stock certificate in his name as owner of the shares standing in the name of Miss Flowers. These requests were refused.

On August 17, 1951, Furnish served a notice on the corporation for a full accounting and for the issuance of a new stock certificate in his name. This notice was pursuant to sections 3011 through 3016 of the Corporations Code. These sections enumerate the penalties for a corporation's failure not to issue the proper stock certificate to a shareholder and the penalties for not furnishing a financial statement every six months to stockholders who own more than 10 per cent of the outstanding stock. On September 6, 1951, appellants sued for declaratory relief asking that the exact rights of all parties concerned be clarified by the court and demanded specific enforcement of the written contract. Appellants pleaded that Flowers had forfeited all rights in the corporation by assigning stock certificate number 4 to Furnish, contrary to the stock agreement. That instrument provided that no party other than those named in the stock agreement could purchase the corporate shares; also, that because of the assignment by Flowers of the 100 shares contrary to the terms of the stock agreement, they are entitled to buy such stock immediately at a price set by arbitration, if their offer of $25,000 is refused.

Appellants contend that a principal cannot sue where terms of the contract exclude him or where the contract is drawn with the agent; and the rule that undisclosed principals in contracts may sue and be sued is subject to the rule of evidence that parol testimony is not admissible to vary the terms of a written contract. Ample authorities are cited for these propositions, but such are not applicable to the case at bar.

Substantial, direct evidence was introduced to prove that the principal was not only known and disclosed, but at the time the contract was drawn, there was no question that Furnish was the legal, factual and equitable owner of stock certificate number 4. Furnish put up the money, was paid the dividends, was medical chief of staff and exercised an active voice in the actual decisions pertaining to corporate affairs. Miss Flowers' position as confidential secretary and agent to Furnish was known and recognized as such. Sumner had never encountered Miss Flowers until the actual negotiations were launched and it may hardly be presumed that Sumner, an attorney and a business administrator, would enter upon such a venture as this with an unknown secretary who was not likely to be in such position as to be able financially to uphold her third of the burden of the corporation. The lower court decided that Furnish was a disclosed principal and that all dealings with Miss Flowers were subject to the approval of Furnish. As a matter of record, there were no dealings with Miss Flowers after her participation as the common agent during the original negotiations.

[1] This court will not interfere with a factual finding of the trial court that is clearly supported by substantial evidence. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

The question at bar then turns on whether a disclosed and known principal may substitute himself for his agent when

the terms of the contract specifically forbid additional parties to the instrument.

Unfortunately, in the past, the law in this field was for a time obscured by doubtful language. Because of this uncertainty, appellants rely primarily upon the decisions of Ferguson v. McBean, 91 Cal. 63, 27 P. 518, 14 L.R.A. 65, and Bloom v. Coates, 190 Cal. 458, 213 P. 260. These decisions hold that where the disclosed principal is present, but his agent signs the instrument for him, he can have no interest or liability under the contract.

Such doctrine was effectually overruled by Pacific Ready-Cut Homes, Inc., v. Seeber, 205 Cal. 690, 272 P. 579, and Marshall v. Bernheim, 64 Cal.App. 283, 221 P. 401. In the latter case, a hearing was denied by the Supreme Court, the decision having clarified the law as declared in Geary St. P. & O. R. Co. v. Rolph, 189 Cal. 59, 207 P. 539. After interpreting language of the Geary decision, the court concluded that where the other party makes known his intent at the time the contract is signed to bind the agent exclusively, the principal can have no interest in the contract; but where the trial court upon substantial evidence *finds* that the other party accepted "both the agent and the principal, there was no election at the time the contract was made, and of course we are bound by that finding." The trial court so found in the case at bar.

[2] This position is established by the United States Supreme Court in Ford v. Williams, 21 How. 287, 289, 16 L.Ed. 36, 38, wherein the Supreme Court stated, "The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein, and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction." This declares the universal law.

[3] Appellants contend that the contingent remainder provisions [1] of the contract cannot be ignored. They argue that the provision for two of the signatories to be entitled to purchase the shares of the third in the event of his decease or of his decision to sell, means that Furnish cannot be substituted for Miss Flowers. Such contention would lead to error. His position can best be illustrated by harking back to the era of stockholder's liability for corporate debts. Had Furnish attempted to escape liability by asserting that the contract was not in his name, the court would have been obliged to rule against him. Since he was the equitable owner of one third of the outstanding shares, he would have been obligated to that extent of a loss. Unquestionably, the life tenancy [2] involved is dependent upon the longevity of Furnish and no one else.

Likewise, there is no merit in the contention that the nonassignability clause in the contract prevents the substitution of the principal. There has been no substitution in fact, the lower court having found that Miss Flowers was merely the alter ego of the principal.

[4] The contention of appellants that the oral agency agreement was illegal as a device to defraud creditors will not be considered. It was not pleaded or otherwise presented to the trial court; no findings were made on this issue and no error as to it is involved.

The foregoing disposes of all other contentions of appellants.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

1. Paragraph XXXIX of Stock Agreement.

2. In the event of the death of either or any of Flowers, Farber, or Sumner during the period of this Agreement, without having disposed of his or their stock in the Corporation, the survivor or survivors, providing they and each of them have not disposed of their stock in the Corporation, shall have the right to purchase the stock interests of the deceased party in the Corporation, in equal shares, or the stock interests of the deceased parties, as the case may be.

130 Cal.App.2d 720

Winnie Wafford QUINN et al., etc., Plaintiffs and Respondents,

v.

OIL FIELDS TRUCKING COMPANY, a corporation, Edelmiro Martinez Gomez, et al., Defendants and Appellants.

Bertha ACERO, Carmen Corral, Aldine Olmeda, et al., etc., Plaintiffs and Respondents,

v.

OIL FIELDS TRUCKING COMPANY, a corporation, Edelmiro Martinez Gomez, et al., Defendants and Appellants.

Civ. 20590, 20589.

District Court of Appeal, Second District, Division 2, California.

Feb. 14, 1955.

Hearing Denied April 13, 1955.

Actions arising out of intersectional collision between automobile and defendants' truck. The Superior Court, Los Angeles County, Eugene P. Fay, J., entered orders granting new trials after verdicts for defendants, and defendants appealed. The District Court of Appeal, McComb, J., held that substantial evidence warranted award of new trial on ground that verdict for defendants was contrary to weight of evidence which disclosed that truck driver was negligent in respect to lookout.

Affirmed.

1. Appeal and Error ⇐977(3)
New Trial ⇐6

The granting of motion for new trial is within trial judge's discretion, the exercise of which will not be interfered with by an appellate court, unless abuse of discretion clearly appears.

2. Appeal and Error ⇐854(6), 933(1)

All presumptions are in favor of order granting new trial, which will be affirmed if sustainable on any ground.

3. New Trial ⇐71

A trial court, in considering motion for new trial, is not bound by conflict in evidence, and does not abuse his discretion when there is any evidence which would support moving parties' contention.

4. New Trial ⇐70

Even though evidence is not conflicting and all presumptions seem to be in favor of one or other parties, question of probative force, or evidentiary value, of testimony is, nevertheless, within determination of trial court, in proceeding on motion for new trial.

5. New Trial ⇐72

Trial judge must exercise sound discretion to set aside verdict if he believes that verdict is contrary to weight of evidence.

6. New Trial ⇐72

In action arising out of collision of automobile with defendants' truck, substantial evidence warranted award of new trial on ground that verdict for defendants was contrary to weight of evidence which disclosed that truck driver was negligent in respect to lookout.

John R. Allport, Los Angeles, for appellants.

Arnerich, del Valle & Sinatra; Vincent G. Arnerich, August J. O'Connor and George J. Hider, Los Angeles, for respondents.

McCOMB, Justice.

On January 8, 1953, two complaints were filed in the superior court of Los Angeles County. Action No. 608,112 was brought by the heirs of Gladys Irene Quinn, deceased, for wrongful death, by John Stanley Quinn, a minor, by his guardian ad litem, Winnie Wafford Quinn, for personal injuries, and by Winnie Wafford Quinn for property damage. The complaint in action No. 608,113 was brought by the heirs of Maria Olmeda, deceased, for wrongful death. Thereafter the cases were consolidated for trial and a verdict returned in favor of defendants in each case.

On May 21, 1954, orders were made granting new trials in the two actions on all the issues upon the grounds of the insufficiency of the evidence. Defendants have appealed from the orders granting the motions for new trials. By stipulation

of the respective parties the appeals are submitted in this court on one set of briefs.

Question: *Was there substantial evidence to support the trial court's finding of the insufficiency of the evidence to sustain the jury's verdicts?*

Yes. These rules are here pertinent:

[1] (1) The granting of a motion for a new trial rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears. (Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358[1], 170 P.2d 465.)

[2] (2) On appeal from an order granting a new trial all presumptions are in favor of the order and it will be affirmed if sustained on any ground. (Ballard v. Pacific Greyhound Lines, supra, 28 Cal.2d 358[2], 170 P.2d 465.)

[3] (3) A trial court in considering a motion for a new trial is not bound by a conflict in the evidence and does not abuse its discretion in granting a new trial where there is any evidence which would support the moving parties' contention. (Ballard v. Pacific Greyhound Lines, supra, 28 Cal.2d 358[3], 170 P.2d 465.)

[4] (4) Even where the evidence is not conflicting and all the presumptions seem to be in favor of one or the other of the parties litigant, the question of the probative force or the evidentiary value of the testimony is nevertheless within the determination of the trial court in a proceeding on a motion for a new trial. (Malloway v. Hughes, 125 Cal.App. 573, 580[2], 13 P.2d 1062, hearing denied by the Supreme Court.)

[5] (5) It is the duty of the trial judge to set aside a verdict in the exercise of sound discretion if he is of the opinion that the verdict is contrary to the weight of the evidence. (Petroff v. Nunes, 136 Cal.App. 416, 419[2], 29 P.2d 293.)

Viewing the evidence in the light of the foregoing rules, the record discloses that defendant Gomez came to work for his employer, defendant Oil Fields Trucking Company, at 9:00 a. m. on October 10, 1952. He testified that he had tested the equipment of his 55 foot truck and trailer which weighed 28,500 pounds, and found everything in good condition. He left San Pedro at 12:00 noon, going north on Hawthorne Boulevard. He stopped for about 15 minutes for lunch, and then again proceeded northerly on said Hawthorne Boulevard. He was familiar with the intersection of Hawthorne and Sepulveda, and the surrounding area was open country. He drove to the east of the center line of Hawthorne Boulevard and as he reached a point approximately 200 feet south of its intersection with Sepulveda Boulevard, he looked to his left and saw nothing, looked to his right and saw nothing, in fact, he saw no traffic going east or west on Sepulveda Boulevard across his path, and there was no traffic coming south towards him from the opposite direction.

After this one "look" he did not look again until suddenly he saw the right side of the Chevrolet which was being driven by Gladys Irene Quinn in front of him. He estimated its speed to be about 40 to 45 miles per hour. He applied his foot brake at the point of collision but did not apply the emergency hand brake. His truck hit the Chevrolet broadside, pushing it 63 feet beyond the point of impact into a sand pile.

The evidence further disclosed that the front brakes on the truck were not adjusted because they were full of grease and that it was safer not to adjust them, and that the speedometer on the truck was not working on the day of the accident.

From the foregoing evidence it is apparent that defendant Gomez, the driver of the truck, testified that he was familiar with the intersection of Hawthorne and Sepulveda and knew the surrounding area was open country; that as far as 500 feet south of the intersection he could see, had he looked, if there was any traffic going east or west on Sepulveda, but that at a point 200 feet south of Sepulveda he looked to his right and to his left and saw nothing,

and at the same time he saw no cars approaching the intersection, and that he *never looked again* until he found himself suddenly in the intersection with the Chevrolet right in front of him which meant that the Chevrolet had almost crossed the entire intersection when the truck hit it broadside pushing it a distance of 63 feet.

[6] From the evidence it is apparent that the trial judge was of the opinion that if defendant Gomez had been looking he would have seen the Chevrolet negotiating the intersection and could have easily avoided the accident, particularly if he had been driving only 25 miles per hour which would have afforded him ample time to apply his brakes. This he said he did not do until the moment of impact. The trial judge therefore, sitting as a thirteenth juror, properly weighed the evidence and considered the conduct of defendant Gomez as being negligent in that he failed to look and to continue looking when approaching a dangerous intersection, or if he had looked he did not see an object which should have been plainly visible to him. Further the trial judge could have concluded from the factual evidence that defendant Gomez's testimony that he was traveling only 25 miles per hour was inconsistent with the physical facts, and that he must have been traveling at an excessive speed because the broadside impact with the Chevrolet was so great that the front end of the truck superimposed itself on the frame of the Chevrolet and pushed it sidewise for 63 feet and was thereby stopped only by a sand pile, the force being so great as to catapult two of the occupants of the Chevrolet from the front seat out of the left side of the car.

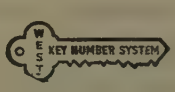
Clearly we cannot say that there was an abuse of discretion of the trial court in granting the motion for a new trial.

Henderson v. Braden, 35 Cal.App.2d 88, 94 P.2d 625, relied on by defendants, is not here in point for the reason that in such case it was held that the evidence was insufficient to support a verdict in favor of the party making the motion for a new trial, and the plaintiff in such case was guilty of contributory negligence as a matter of law. This situation does not obtain in the instant case.

Taking the view of the evidence which the trial judge undoubtedly took, it cannot be said that the driver of the Chevrolet was guilty of contributory negligence as a matter of law.

Affirmed.

MOORE, P. J., and FOX, J., concur.



130 Cal.App.2d 793

Ruby L. McDONALD, Herman Henry and Louis Grossi, Herman Henry, Ambrose Connolly and Cornelia M. Connolly, Ellis Dresback and Lola Dresback, Plaintiffs and Appellants,

v.

STATE of California, acting by and through the Department of Public Works, the Highway Commission and the Division of Highways: C. H. Purcell, as Director of Department of Public Works and as ex-officio officer and chairman of the California Highway Commission: Harrison R. Baker, Homer B. Brown, James A. Guthrie, Walter Sandelin, C. Arnholt Smith and Chester H. Warlow, as members of and constituting the California Highway Commission; George T. McCoy, as State Highway Engineer; P. O. Harding, Assistant State Highway Engineer, and John G. Meyer, as District Engineer, Defendants and Respondents.

Civ. 8506.

District Court of Appeal, Third District, California.

Feb. 16, 1955.

Landowners brought action against the state and others to recover damages for alleged destruction of right of landowners to direct access to state highway. The Superior Court of Solano County, Joseph M. Raines, J., entered judgment adverse to the

landowners, and they appealed. The District Court of Appeal, Van Dyke, P. J., held that where the state constructed a state highway parallel to an adjoining city street, and about five years later the state erected a reinforced concrete wall four feet high in city street, so that landowners, whose land abutted on city street, were deprived of right of direct access to state highway, landowners were not entitled to recover damages on ground of inverse condemnation or on ground of nuisance.

Judgment affirmed.

1. Pleading ⇐252(1)

Where amendment of prior pleading consists merely of omitting, without explanation, substantive allegations, which rendered prior pleading fatally defective, prior pleading may be referred to.

2. Pleading ⇐254

In action, which sounded in inverse condemnation, by landowners against the state to recover damages for destruction of landowners' right of direct access to state highway, first amended complaint, to which demurrer was sustained because it appeared that landowners' land abutted on certain street rather than on highway, could be considered by court in ruling on demurrer to second amended complaint, which, without explanation, omitted allegation that landowners' land abutted on street.

3. Eminent Domain ⇐106

Where the state constructed a state highway parallel to an adjoining city street, and about five years later the state erected reinforced concrete wall in city street, so that landowners, whose land abutted on city street, were deprived of right of direct access to state highway, landowners were not entitled to recover damages, on ground of inverse condemnation, though for all practical purposes the highway and street had constituted a single avenue for public travel until wall was erected.

4. Highways ⇐87

Where the state constructed a state highway parallel to an adjoining city street, and about five years later the state erected a reinforced concrete wall four feet high in city street, so that landowners, whose land abutted on city street were deprived of right of direct access to state highway, erection of the wall was not the creation or maintenance of a nuisance, which would entitle landowners to damages.

Desmond, Miller & Artz, H. D. Jerrett, Sacramento, for appellants.

Robert E. Reed, Norris J. Burke, Harry S. Fenton, Russell S. Munro and Robert F. Carlson, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment of dismissal entered upon an order sustaining a demurrer to a second amended complaint without leave to amend in an action against the State and certain of its officers and employees for their alleged destruction of appellants' right of direct access to a State highway in Solano County.

Appellants are the owners and lessees of certain parcels of real property abutting upon the western boundary of a public road known as Plumas Street which was originally a county road 40 feet in width. Sometime prior to 1943 the State constructed a major highway known as State Highway Road X, Solano 7–G and U. S. 40, which adjoined and paralleled said Plumas Street on its eastern boundary. No physical barrier was then erected on the common boundary of the two thoroughfares so that there existed free and direct access between said state highway and appellants' respective properties by crossing over Plumas Street at any point thereon. However, in 1948 the State constructed a reinforced concrete wall in Plumas Street four feet high and extending for its length from Solano Street to Alabama Street, between which two intersections appellants' properties lie. The wall was built approximately 11 feet in from the easterly boundary of Plumas Street, thereby reducing its width in front of appellants' properties from 40 to 29 feet and preventing passage between said properties and the state highway except by traveling on Plumas Street to the next intersection in either direction. Appellants maintain that, as a result, their properties have been damaged, as all direct access

therefrom to the state highway between Solano and Alabama Streets has been destroyed, thereby making it more difficult to reach their properties.

The first amended complaint alleged that appellants' properties abutted on Plumas Street, a county road, and that prior to respondents' construction of the wall in that street, appellants were "accustomed to and did enjoy, the open, free, and unobstructed light, view, and direct access to and from said Plumas Street and directly across the same to and from the major public highway known as State Highway Road X, Solano 7–G and U. S. 40, which state highway immediately adjoined and paralled said Plumas Street for the entire length of said Plumas Street between Solano and Alabama Streets in said county." Substantially identical allegations were contained in the original complaint as filed. A demurrer to the first amended complaint was sustained on the ground that it appeared from the allegations thereof that appellants' properties abutted on Plumas Street, and not on the state highway, and, therefore, appellants had no abutters' rights thereto. Appellants thereupon amended their complaint by omitting any reference to Plumas Street and alleging that their properties "abutted upon a certain public road known as California State Highway X, Solano 7–G, U. S. 40", that respondents erected the concrete wall "on the right of way of said highway", and that as a result thereof appellants lost their former, free and unobstructed view and direct access to and from all portions of said state highway. Contrary to the allegations of the second amended complaint, the trial court held that appellants were not owners of property abutting on the state highway because the original and first amended complaints showed that Plumas Street lay between appellants' properties and the state highway. Therefore, respondents' demurrer to the second amended complaint was sustained without leave to amend.

Upon this appeal from said judgment, appellants tacitly concede that their causes of action sounding in inverse condemnation are dependent upon their being owners of properties which abut on the state highway to which they claim the right of direct access. They claim that, as a matter of law, they are such owners. They contend that not only did they so allege in the second amended complaint but that they are such in fact.

[1] Appellants first argue that the trial court, in ruling on the demurrer to the second amended complaint, could not consider the allegations that their properties fronted on Plumas Street, which were contained in the superseded, prior pleadings. They rely upon cases such as Collins v. Scott, 100 Cal. 446, 453–454, 34 P. 1085; Sheehy v. Roman Catholic Archbishop, 49 Cal.App.2d 537, 541–542, 122 P.2d 60, and Meyer v. State Board of Equalization, 42 Cal.2d 376, 384–385, 267 P.2d 257, holding that a pleading is suspended by an amended pleading. Therefore, they maintain that the trial court was bound by the allegation of the second amended complaint that their properties abutted on the state highway. With this contention we do not agree.

[2] A prior pleading may be referred to where an amendment thereof consists of merely omitting, without explanation, substantive allegations which rendered the prior pleading fatally defective. Slavin v. City of Glendale, 97 Cal.App.2d 407, 410–411, 217 P.2d 984; Wennerholm v. Stanford University School of Medicine, 20 Cal. 2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358. As already noted, the location of appellants' properties in relation to the state highway is determinative of their alleged status as owners of property abutting thereon. If the allegation in the original and first amended complaint that appellants' properties fronted on Plumas Street was destructive of the causes of action predicated on such properties abutting on the state highway, the defect could not be remedied by the simple device of omitting such allegation in the second amended complaint without adequate explanation. Owens v. Traverso, 125 Cal.App.2d 803, 808, 271 P.2d 164. No explanation for such omission was pleaded. Therefore, the trial court properly considered all the pleadings in determining whether or not the appellants could state a cause of action based on their own-

ing properties which abut on the state highway to which they demand direct access.

Appellants insist that Plumas Street was incorporated into the state highway by virtue of a resolution therefor which was passed by the State Highway Commission on September 24, 1945. Their position, as stated in their briefs, is that "prior to construction of Highway 40 their property abutted on Plumas Street only; that after Highway 40 was laid down parallel to and immediately adjacent to Plumas Street, their abutment was to one widened public way, and thus rights of access extended to every point on said way; that with the passage of a resolution in September of 1945 the entire widened public way became a freeway—and Plumas Street as such officially ceased to exist." That is, they insist that their rights as owners of property abutting on Plumas Street extend over and onto the state highway which was constructed immediately adjacent and parallel thereto and without any intervening barrier.

[3] The referred to resolution was general and authorized condemnation of needed lands. We must assume that any contemplated, formal condemnation of Plumas Street by the State was not completed, else appellants would not be here suing in inverse condemnation. Any rights of appellants must rest upon a finding that by the construction of the state highway it and Plumas Street merged into one public thoroughfare to the whole of which appellants' rights as owners of property abutting on the original county road attached. Despite separate ownership of Plumas Street and the state highway, in the limited sense of state and county ownerships of public ways, for all practical purposes, due to contiguity, they constituted a single avenue for public travel until 1948 when the state erected the complained of wall in Plumas Street. However, appellants do not complain of the fact that the wall was placed within the original surface area of the county road rather than upon its common boundary with the state highway. They claim only that their abutters' rights in the state highway have been damaged. Apparently, they would as strenuously object to the maintenance of the wall if it were upon the actual roadbed of the state highway as they do to the obstruction in its present location. Thus, the real issue presented is whether or not the appellants, upon the construction of the state highway, ipso facto acquired a right to have no barrier erected between said state highway and that portion of Plumas Street upon which their properties abutted. We have been cited no persuasive authority on this question, but have concluded that no such right arose. If the state highway had not been built, appellants' rights as abutting property owners would have been limited to the original 45-foot roadbed of Plumas Street, and any extension thereof made by the county. It could not be urged that if a private road had been built contiguous to Plumas Street, appellants' rights as abutting property owners would have extended thereto. So far as such rights are concerned, there seems no legal or logical reason for making a distinction because of the fact that the state, rather than an individual, constructed the highway adjoining Plumas Street, to which appellants' abutting property rights had theretofore been restricted. It is not, and cannot be, argued that the construction of the state highway in any manner damaged appellants' properties or impaired their abutting rights in Plumas Street. Nor do we believe that appellants could have raised any legal objection to the state's constructing the state highway in such manner that a natural barrier intervened between it and the eastern boundary of Plumas Street. Neither could complaint have been made if at the time of construction of the highway the state had erected a wall upon its common boundary with Plumas Street. At the time of the construction of the highway it was not incumbent upon the state to furnish appellants direct access thereto by placing no barrier between it and the boundary of Plumas Street. What the state could legally do in 1943 it could do with equal impugnity in 1948. Appellants do not claim the acquisition of any prescriptive rights. It is true that prior to 1948 they enjoyed the

gratuitous benefit of direct access to the state highway by way of crossing Plumas Street. However, the state was not obligated to afford them such access when it constructed the highway. Its failure to do so then would not have been compensable. It has not become so by the mere passage of time.

[4] Turning now to the nuisance counts, we will again use the pleading of Ruby McDonald for purposes of discussion. All these counts set forth the same facts. It is alleged that she owns the property described in the first count and that it abuts upon the state highway, and that she has enjoyed unobstructed light, view and access to all portions of that highway; that on March 1, 1948, the state constructed the wall described hereinbefore along the highway and 29 feet east of her property line, with the result that her previously enjoyed rights of light, view and access to and from the main-traveled portion of the state highway were destroyed, lessening the value of her property. We have already held that in so far as these allegations count upon abutters' rights in the state highway they count upon that which as a matter of law does not exist. But the question still remains whether or not the erecting of this wall in Plumas Street, thus cutting off all use of that street except as to the 29-foot portion west of the wall, constituted a nuisance of which she could complain without reliance upon abutter's rights in the highway. Examining her allegations with this narrowed scope in mind, we find that she alleges that the light and view which her property previously enjoyed was materially decreased by construction of the wall and that the wall has made it "extremely difficult for said plaintiff and her tenants, her prospective customers and guests to reach and leave or see her said real property and improvements erected thereon." It must be said that narrowing Plumas Street between Solano and Alameda Streets from 40 feet to 29 feet could not decrease either light or view, for it is not alleged, and we think could not be honestly alleged, that the 29-foot roadway is not ample to admit travel in both directions for those who desired to pass that way. Plaintiff has no special right in any particular flow of traffic and since there is ample room for traffic to move in both directions along the narrowed street we hold the pleading shows no compensable damage from the construction of the wall so far as light and view be concerned. The allegations that it is extremely difficult for herself and her tenants and guests to leave or reach her property is likewise inadequate to show damage to her for the same reasons we have discussed concerning the alleged interference with light and view. It is not alleged that traffic cannot move in both directions and the allegation that it is extremely difficult for persons to reach her property cannot stand as an allegation of fact in view of the allegation that she has an uninterrupted and unimpeded public way 29 feet wide in front of her property and extending from Solano to Alameda Streets, at which points traffic can enter the state highway. It is not every interference with the use of public ways that can constitute either a taking or a public nuisance. The state and the county in the proper exercise of their powers are permitted to do many things in the regulation of traffic. People v. Sayig, 101 Cal.App.2d 890, 226 P.2d 702—The erection of a permanent island in the middle of the highway was declared to be noncompensable as being within the police power of the state. See, also, Holman v. State of California, 97 Cal.App.2d 237, 217 P.2d 448—The construction of a dividing strip in a state highway within said power. See, also, Beckham v. City of Stockton, 64 Cal.App.2d 487, 149 P.2d 296—Where, by reason of grade separation, plaintiff was compelled to use a street narrowed to 31 feet and limited to one-way traffic, the court holding that such facts as a matter of law would not support a judgment for damages for unlawful interference with abutters' rights in the public way. We hold that as a matter of law the erection of the wall was not the creation or maintenance of a nuisance.

For the reasons herein given the judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

130 Cal.App.2d 775

Freddie RICH, Plaintiff and Appellant,

v.

PARAMOUNT PICTURES, Inc. et al., Defendants and Respondents.

Civ. 20256.

District Court of Appeal, Second District, Division 1, California.

Feb. 15, 1955.

Hearing Denied April 13, 1955.

Action by songwriter for alleged plagiarism. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., gave judgment for defendants. Plaintiff appealed. The District Court of Appeal, Doran, J., held that plaintiff had no protectible property in composition in question where basic pattern of composition came from public domain and was available to everybody.

Affirmed.

1. Evidence ⇐506

In action by songwriter for alleged plagiarism, limiting the owner of musical composition to testifying as an expert, and refusing to let him identify music as his property, was not error.

2. Literary Property ⇐9

In action by songwriter for plagiarism, it was not error for the trial court to permit evidence on the defense that music came from public domain and it was unnecessary to plead it as an affirmative defense.

3. Evidence ⇐506

In action by songwriter for alleged plagiarism, expert testimony which covered subject of music and melodies was admissible to show that music came from public domain, and did not invade province of jury.

4. Appeal and Error ⇐1048(2)

In action by songwriter for plagiarism, denial of right to examine expert on voir dire before testifying, was not prejudicial, where cross-examination by plaintiff of expert witness after close of his direct testimony did not develop any question as to witness' expert qualifications.

5. Literary Property ⇐5

Songwriter had no protectible property in composition where basic pattern of composition came from public domain and was generally available.

Morris Lavine, Los Angeles, for appellant.

O'Melveny & Myers, Homer I. Mitchell, Everett B. Clary, Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from the judgment following a verdict of the jury in favor of respondents, and from the order denying a motion for judgment notwithstanding the verdict.

Appellant composed certain music for a moving picture called the "Wildcat" produced by Paramount Pictures in 1942. Respondents Livingston and Evans wrote and composed the words and music of a song "Buttons and Bows" in 1947 which was used in the motion picture "The Paleface", also produced by Paramount Pictures. The action herein is for alleged plagiarism.

It is contended on appeal that,

"I.

"The trial court erred in limiting the owner of a musical composition to testifying *as an expert* and then instructing the jury that it may reject the testimony of *any expert*.

"II.

"The evidence shows that the music of Freddie Rich was plagiarized by the music of 'Buttons and Bows' as a matter of law. There is no conflict that the music is 'basically similar'. That Rich's music was written and produced first, and both were distributed by the same studio. The judgment should, therefore, be reversed as a matter of law and the motion for judgment notwithstanding the verdict granted.

"III.

"It was prejudicial error to allow the defense that the music of plaintiff and defendants came from the public domain where the defense failed to plead it affirmatively as required by Section 437 C.C.P. and Livingston and Evans did not contend

that 'Buttons and Bows' came from the public domain. This testimony was improper and misled the jury.

"IV.

"The Superior Court erred in overruling the objections to the manner of cross-examination of Freddie Rich by playing a number of melodies and asking Freddie Rich about them, which had no foundation in the evidence.

"V.

"The testimony of Sigmund Spaeth that the music came from the public domain, under the pleadings herein, was prejudicially erroneous and *entirely incompetent.* It invaded the province of the jury.

"VI.

"The trial court erred in instructing the jury:

"(A) After permitting the plaintiff to testify only as an 'expert' in identifying his own music as having been stolen, the trial court erred in instructing the jury that it could disregard the testimony of any expert.

"(B) The court gave a misleading instruction that the eight tone and five tone scales, the major and minor chords, the basic patterns of combinations of notes and basic rhythms are 'all a part of the public store house' of musical materials available to everyone.

"(C) The court erred in instructing the jury that there is no evidence of copyright by the plaintiff or that defendants copyrighted plaintiff's music.

"(D) The court erred in failing to give the jury several offered instructions by the defendant:

"(a) Instructions offered on the question of access;

"(b) Questions offered on the method of determining access;

"(c) On the elements which the jury itself was to determine the questions involved from plaintiff's proof.

"VII.

"The court erred in failing to direct the verdict and in failing to grant the motion for judgment notwithstanding the verdict."

[1] It is argued by appellant that the court erred in refusing to permit plaintiff to "identify the music as his property, but only permitted him to give an 'opinion' as an expert, and so told the jury". This was not error. Whether the time or music was plaintiff's "property" was the question of law before the court, which obviously was to be determined by the facts. Appellant makes much of the incident which actually was unimportant.

It is further argued by appellant that, "The unity and proportion of Rich's music in the picture 'Wildcat' and that of 'Buttons and Bows' is identical. The principal unit and the lesser units of 'Wildcat' are repeated over and over again in 'Buttons and Bows'. To hear the two numbers is to be convinced that one was taken from the other.

"The principal defense in this case was not that they were not identical, but a claim not pleaded affirmatively that they both came from the public domain." Respondent, on the other hand, argues that, "The only similarity between the accusing and the accused compositions lies in the 'sol-do-la-do' sequence of the notes. This sequence is basic material used in all sorts of music, particularly in folk music. In our Statement of the Case, we pointed out that this basic pattern had been used in at least 33 compositions which preceded both the accusing and the accused works. It has been used in works of the Old Masters and in modern popular songs, musical comedies, folk music, children's music and instrumental exercises (Exs. B to S and X–1 to X–17).

[2] "Actually, as will hereinafter be demonstrated, this basic pattern is not protectible property; it is a part of the public storehouse or common stock of basic materials used in the composition of music and is available to everybody. But assuming, for purposes of argument, that it constitutes protectible property, it is so commonplace and has been used so often that its appearance in both appellant's and respondents' compositions does not give rise to any inference that respondents copied it from appellant. If respondents copied it at all, it is

much more reasonable to infer that they copied it from, 'Turkey in the Straw' or 'I Love Coffee, I Love Tea', or some of the other earlier compositions familiar to everybody than to infer that they copied it from appellant's obscure composition." And that, "Appellant had no protectible property right in the musical pattern which he claims that respondents copied because that pattern is a part of the public storehouse of material available to everybody." In the light of the record it was not error for the trial court to permit respondent to offer evidence on this issue and it was unnecessary, as a matter of law, to plead it as an affirmative defense.

[3] Appellant argues, with reference to expert testimony, that "The trial court erred in permitting Sigmund Spaeth to give opinions as to the music in question, and as to whether Freddie Rich's music came from old Irish tunes (Public Domain). This testimony was highly prejudicial and invaded the province of the jury." There is no merit to the argument. The testimony of the expert covered the subject of music and melodies and was not only unprejudicial but, in the light of the questions involved was important and helpful.

[4] Appellant also assigns as error the fact that plaintiff was denied the right to examine the expert on *voir dire*. However no prejudice appears to have resulted from the ruling for as pointed out by respondent, "after the close of Dr. Spaeth's direct testimony, appellant was permitted to and did cross-examine him at length as to his qualifications. Appellant did not at the time, nor does he now, point to anything developed in that cross-examination which raises even the slightest question as to the witness's expert qualifications. Therefore, if the court had not made the ruling now complained of and had permitted appellant to cross-examine the witness on *voir dire* before he gave expert testimony, it is obvious that such cross-examination would have developed nothing to prevent the witness from giving the expert testimony he gave."

[5] As recited in respondent's brief, "The jury heard the accusing and accused compositions played on the piano and on phonograph records. It saw the motion pictures 'The Wildcat' and 'The Paleface' in which the compositions were used. It heard the other compositions which use this 'sol-do-la-do' passage played on the piano. It observed the witnesses and weighed their testimony. It returned a verdict for respondents upon which judgment was entered."

A careful reading of the instructions given as well as those offered and refused reveals no prejudicial errors relating thereto nor does it appear to have been error on the part of the trial judge in "failing to grant the motion for judgment notwithstanding the verdict."

The judgment and order are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER, J., dissenting.



130 Cal.App.2d 687

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Bruce R. HOOKER and Wayne E. Hooker, Defendants and Appellants.

Cr. 5238.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1955.

Defendants were convicted of assaults by force likely to produce great bodily injuries. The Superior Court, Los Angeles County, Joe Raycraft, J., rendered judgment remanding defendants to the state Youth Authority's custody, and they appealed. The District Court of Appeal, Moore, P. J., held that the evidence was sufficient to support the convictions.

Judgment affirmed.

1. Assault and Battery ⇐71

Each of two youths using their fists and a lethal instrument in beating two citizens, causing them serious bodily in-

juries, was a principal in each battery. Pen.Code, § 245.

2. Assault and Battery ⇐92

Evidence was sufficient to support convictions of two youths for assault by force likely to produce great bodily injuries. Pen.Code, § 245.

3. Criminal Law ⇐1159(2)

Where substantial evidence was submitted to trial court that a crime was committed by persons accused thereof, reviewing court will not reweigh evidence, but its sole function is to decide whether, on face of evidence, sufficient facts could not have been found by jury to warrant inference of accuseds' guilt, and convictions will not be reversed, unless it clearly appears that there was no sufficient substantial evidence to support conclusion in court below.

4. Criminal Law ⇐1169(1)

In prosecution for assaults by force likely to produce great bodily injuries, admission in evidence of a spring shaft, found by police officer in one defendant's automobile after flight and shown to have been used in striking victim on head, was not error prejudicial to defendants. Pen. Code, § 245.

5. Criminal Law ⇐404(3)

Generally, in prosecution for crime committed by use of deadly instrument in hands of accused arrested soon thereafter, device taken from him or from among his possessions is relevant evidence, if victim's wounds might reasonably have been caused thereby, and positive identification of weapon is not required.

6. Criminal Law ⇐1114(1)

Absence of record of occurrence assigned by appellant as prejudicial to him is no excuse for his failure to supply record thereof. Rules on Appeal, rule 36(b).

7. Criminal Law ⇐351(9)

In prosecution for assaults by force likely to produce great bodily injuries, police officer's testimony that one of defendants, after their arrest and cuffing of their hands behind them, got his hands in front of him and began working window of police automobile and yelling at people about, was admissible as proof of such defendant's intended flight. Pen.Code, § 245.

8. Criminal Law ⇐351(9)

An accused's flight being proof of his consciousness of guilt, evidence of his behavior, indicating intended flight, after his arrest, is proper subject of inquiry.

9. Criminal Law ⇐1119(4)

It was defendants' duty to have included in record, on appeal from convictions, prosecutor's claimed improper language referring to defendants in argument to jury. Rules on Appeal, rules 33(a), 36(b).

10. Criminal Law ⇐1037(1, 2)

A prosecutor's claimed misconduct in referring to defendants as "rat-packers" and "hoodlums" in argument to jury would not, if proved, warrant reversal of convictions for assaults by force likely to produce great bodily injuries, in absence of assignment of such misconduct or request for instruction of jury to disregard remarks.

11. Criminal Law ⇐448(12)

In prosecution for assaults by force likely to produce great bodily injuries, a prosecuting witness' testimony that one of defendants attacked witness was admissible as statement of fact, not a conclusion, and correctly describing such defendant's behavior toward witness. Pen.Code, § 245.

12. Criminal Law ⇐1171(1)

In prosecution of two youths as principals in assaults by force likely to produce great bodily injuries, prosecuting attorney's use of term "conspiracy" in argument to jury was not prejudicial to defendants, though not exactly appropriate, where trial court believed evidence of defendants' commissions of batteries on complaining witnesses and agreed that there was no showing of conspiracy, thereby impliedly finding that each defendant was a principal. Pen.Code, § 245.

13. Criminal Law ⇐1171(1)

A prosecutor's use of improper terms in questions asked witnesses solely to develop true facts cannot be held prejudicial

to defendant, if prosecutor behaved without venom against defendant, used no terms designed solely to create prejudice against him, and persisted in orderly procedure with view of presenting only facts against defendant.

14. Criminal Law ⇐1171(1)

In prosecution of two youths for assaults by force likely to produce great bodily injuries, prosecutor's use of term "unprinted dictionary" and questions whether one of defendants lied to police officer, whether alcohol caused such defendant to be angry and fight, and whether certain witness saw something he did not wish to get involved in at scene of assaults, in examining witnesses, were not grounds for reversal of convictions, in absence of showing of prejudice to defendants. Pen. Code, § 245.

Minsky & Garber, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellants were convicted of having committed assault (under two counts) by means of force likely to produce great bodily injury. Penal Code, § 245. Their motion for a new trial was, by order, duly denied and judgment was entered, remanding them to the custody of the California Youth Authority. They appeal from both the order and the judgment on the grounds of the insufficiency of the evidence and errors of law.

Evidence Sufficient

[1,2] While the proof consisted of the testimony of many witnesses, the ultimate facts impliedly found from the total evidence is substantially as follows: Appellants, accompanied by two friends, Lois and Nick, drove westerly along Carson Boulevard in Los Angeles County in Wayne Hooker's maroon automobile near the intersection of Halldale Avenue. At that point they side-swiped a blue and gray sedan. Behind Wayne's car came his brother Jack in a gray car with one Hengler. From his home nearby, a Mr. Dunham and his guest, Mr. Coons, came out on hearing the collision and inspected the blue and gray sedan. Then Wayne spoke to Mr. Dunham, explained that something went wrong with his clutch and he could not stop. At that moment Bruce came up and was immediately joined by Jack. Dunham returned home. Jack asked Coons what he thought about it. Coons replied that he thought the three brothers were drunk. Jack swung at Coons who avoided the blow and Jack fell at a return thrust by Coons. Then, as appellants came at Coons, Jack struck him on the back of the head with a spring shaft about 14 inches long, bearing a series of cylinders, washers and small metal bits. The injury started from the base of his skull and extended six inches toward the front of his head. The cut was jagged and about two and a half inches long. At the blow, Coons fell forward onto appellants. He was then struck on the head, hands, body, side and groin. Wayne held him against a wall while Jack kicked him in the groin which "doubled him up." He received a bruise on the base of his back, an area 3½ by 2 inches; his left eye was black; his right ear torn and bruised and miscellaneous bruises on his body. When he returned to Dunham's house they saw that a group had gathered and that appellants were beating Roy Patton and pulling on the sleeves of his coat as the victim tried to escape. As Jack neared his brothers, Dunham attempted to prevent his joining in the fight whereupon Jack pursued Dunham but was intercepted by one Thomas; as Coons attempted to stop the beating of Patton, the police arrived.

When Patton arrived at the scene, all three brothers were beating on Coons. He pulled appellants off in an effort to prevent further injury, whereupon Wayne viciously attacked him, and again struck Patton in the face. Jack then took Patton by the shoulders, bent him over in a crouched position, and beat him on the back and stomach. As Wayne held him, Patton was kicked ten times in the back and three times in the groin and lost his shoe. His body

was made sore and his lower lip cut, requiring five stitches. He was of the opinion that all three brothers beat him. His wrist watch was broken into fragments. He saw the spring shaft in the hand of an officer who had arrived.

Mrs. Patton witnessed the beating of Coons by appellants and saw them hold Mr. Patton while Jack kicked him in the stomach and groin several times. They continued to beat him over her protest. She testified that when the officers arrived, appellants fled and were forced to return to the scene.

Officer Rice testified that when Coons told Jack he was pretty drunk to kick a man in the groin, Jack replied he would do it again if he had the chance; that thereupon Wayne threatened use of further force; that when he asked Wayne about the details, Wayne reproved the officers for not getting the other vehicle which had left instead of talking to him. When asked about the fight, Wayne declared his ignorance of a fight. He refused to explain the cut over his own eye. After the occupants of Wayne's car had been removed, the officer found the spring shaft on the rear seat where Jack had been sitting.

Not one of the brothers offered any information about the fight. Moreover, after they had their hands cuffed behind them and seated in the police car, they got the hand cuffs in front of them and lowered the window of the car. That movement was repeated until Officers Sanders and Rice so seated themselves as to avoid a repetition of appellants' maneuver.

In the police car on the way to jail, neither appellant was cooperative. When Bruce was asked his position in the fight, he disclaimed all knowledge of any fight. When Wayne was asked whither he had been going, he told of his collision and of seeing Jack in a fight, but did not see why police were bringing him to the station when they should be in pursuit of the person who had escaped. Bruce said he had followed Wayne's car; they stopped when he saw Jack in a fight, he went to help his brother; he could see no reason for his arrest; he thought the officers were prejudiced.

Several witnesses testified for the defense. They offered nothing substantially at variance with the facts established by the People's witnesses. The trial court rejected whatever was said on behalf of appellants and determined that they had beaten two citizens who, with peaceful intent, had attempted to prevent unlawful batteries on a public street, and appellants had caused serious bodily injuries to their victims. They had used not only their fists with deadly effect, but had made use of a lethal instrument which scarified a victim. Each of the appellants was a principal in each battery. People v. Carson, 155 Cal. 164, 174, 99 P. 970; People v. Sanders, 73 Cal.App. 330, 332, 238 P. 372. From the testimony of witnesses, the court must have found that the force applied did cause "great bodily injury" yet the judgment is justified if the proof was such that the force applied was *likely to effect such a result.* People v. McCaffrey, 118 Cal. App.2d 611, 616, 258 P.2d 557, 562. If blows of a fist to the face warrant a verdict under section 245, People v. Score, 48 Cal. App.2d 495, 498, 120 P.2d 62, surely kicks in the stomach, back, groin and body, and a blow with a steel instrument 14 inches long on the head would be " 'means of force likely to produce great bodily injury.' " To cause such injury, the explosion of a hydrogen bomb or a fusillade is not essential. Many a person has gone into decline and early demise as a result of a fall or of a blow to the back.

People v. Fuentes, 74 Cal.App.2d 737, 169 P.2d 391, is not support for appellants' contention. That judgment was reduced from one for a felony to one for simple assault by reason of the facts. Fuentes struck one blow with his fist. The only scratch on his victim's body was not caused by the accused.

[3] Where substantial evidence has been submitted to a court that a crime has been committed and that the persons accused were the actors, the reviewing court will not reweigh the evidence. Its sole function in such a situation is "to decide only whether upon the face of the evidence * * * sufficient facts could not have

been found by the jury to warrant the inference of guilt * * * it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779.

The Spring Shaft

[4–6] Contention is made that the receipt in evidence of the spring shaft was prejudicial; that there was no evidence of its presence at any time during the altercation. Far from it. That object was found by Officer Rice on the rear seat of Wayne's car where Jack sat after the brothers had been removed following the fight. He replaced it and soon thereafter it was taken from the pocket of Jack who had sat on the same seat. Their citations do not support their thesis. In People v. Orloff, 65 Cal.App.2d 614, 621, 151 P.2d 288, three men demanded money of their victim who was struck one blow and his money was seized. He saw no weapon then, nor was there a witness who saw a weapon near the scene. When the defendants were arrested at their respective homes, weapons were there found. But it was error to receive them against any defendant except him at whose home they were found. In People v. Richardson, 74 Cal.App.2d 528, 533, 540, 169 P.2d 44, after it was proved that the defendant was armed at the time of his crime, further proof was attempted by showing that a .45 automatic was found in his suitcase and that it was similar to the pistol used at the robbery several days prior to the finding of the automatic in the suitcase. To make the exhibit admissible under such circumstances, it was necessary to prove that it was the same gun that had been used or, at least, was of the same type, to make it relevant.

In People v. Quinn, 111 Cal.App. 614, 619, 295 P. 1042, the prosecution erred in introducing a gun found in the defendant's automobile several weeks after the robbery of which he was accused. No connection was proved between the robbery and his gun or between the robbery and his carrying concealed weapons for which he had been arrested.

In People v. Milburn, 89 Cal.App. 526, 528, 265 P. 285, although proof had been made that the robbery had been committed with a gun, proof was made that the accused was armed with a dagger when arrested.

No Prejudicial Errors At Trial

There is no problem about the admission of the spring shaft. To Mr. Coons, the blow felt like one administered with a hard object; it left a jagged cut such as the spring shaft would have made; the blow was from behind and Jack Hooker was the only person behind Coons at the very time appellants were fighting Coons in front; the shaft was taken from defendants immediately following the fight and at the same place.

It is the general rule that where a crime has been committed by use of a deadly instrument and the accused is arrested soon thereafter, if the wounds inflicted might reasonably have been caused by the device taken from the defendant or from among his possessions, it is relevant evidence. People v. McDowell, 64 Cal. 467, 3 P. 124. Positive identification of a weapon is not required. People v. Ferdinand, 194 Cal. 555, 563, 229 P. 341. In the case at bar, the introduction of the spring shaft was proper in view of its presence as a part of the circumstances surrounding the arrest. People v. Beltowski, 71 Cal.App.2d 18, 23, 162 P.2d 59; People v. Mason, 65 Cal.App. 2d 5, 10, 149 P.2d 742. Because the facts above recited tend to connect the spring shaft with the beating of the witness Coons, it was properly received in evidence. Appellant's statement that every witness denied that "such an instrument" as the spring shaft was present during the altercation does not square with the record. It was taken by the police from appellants at the scene; and some instrument of its type scarified Mr. Coons' head. If counsel for the prosecution referred to it as a "sep," no record before this court proves that an objection to such term was made or that any motion was made to exclude it; or that

an "application was made for additional record." See Rule 36(b), Rules on Appeal. Where assignment has been made of any occurrence as prejudicial, the absence of a record is no excuse for appellant's failure to supply the record. People v. Chessman, 38 Cal.2d 166, 238 P.2d 1001.

[7, 8] Assignment is made of the receipt of testimony "about Wayne Hooker's conduct after arrest," contending it was immaterial. Officer Sanders testified that they hand-cuffed the hands of Bruce and Wayne behind them and that they brought their hands up in front of them; that they were recuffed in the same manner. Officer Rice testified that Wayne immediately got his hands in front of him, began working the window and yelling at the people. From such facts, it was not an unreasonable inference that Wayne was attempting to flee. Such evidence is admissible as proof of intended flight. Inasmuch as flight is proof of consciousness of guilt, the evidence of the behavior of the accused is always "the proper subject of inquiry." People v. Flannelly, 128 Cal. 83, 87, 60 P. 670, 672; People v. Dabb, 32 Cal.2d 491, 500, 197 P.2d 1; People v. Gryszkiewicz, 88 Cal.App.2d 230, 235, 198 P.2d 585.

No Prejudice Caused by Prosecutor

[9, 10] Assignment is made of the prosecutor's "misconduct in his examination of the witnesses and deprived appellants of a fair and impartial trial." It is then argued that the prosecutor referred to appellants as "rat-packers" and "hoodlums" and indicated the danger of allowing such persons on the street. There is no evidence in the record that such terms were used by the prosecutor. At any rate, it was appellants' duty to have such language included in the record. Rules 33(a), 36(b), Rules on Appeal. Appellants contend that in their argument for a new trial, such misconduct was charged and not denied. Such occurrence would not warrant a reversal is proved. No assignment of misconduct was made; nor request for the jury to be instructed to disregard the remarks. Even more vicious terms were applied to the accused in People v. Brancato, 83 Cal.App.2d 734, 740, 189 P.2d 504, and in People v. Glaze, 139 Cal. 154, 159, 72 P. 965. The contentions of the appellants in those cases were rejected; no request had been made for the jury to be instructed to disregard the language complained of.

[11] Complaint is made that when Patton was asked about the altercation, his reply was: "He jumped me * * * he attacked." It is asserted that the latter term is a conclusion and should have been stricken. It is a statement of a fact and correctly describes the behavior of Wayne toward Mr. Patton who was attempting to terminate the beating of Mr. Coons by pulling Wayne and Bruce off him. Instead of a hostile thrust to the face and kicking him in back and stomach, Wayne should have thanked Mr. Patton.

The return of the brothers to their automobile and their attempt to depart when the police arrived might very reasonably be found to have been "flight."

[12] The use of the term "conspiracy" by the prosecuting attorney was not exactly appropriate but it was not prejudicial. Both appellants were charged as principals; evidence was introduced against them as having committed batteries on the two complaining witnesses. Such evidence was believed by the court which agreed that there "was no showing of a conspiracy." Therefore, the implied finding was that each participant was a principal.

[13, 14] Assignment is made of the prosecutor's use of the terms (1) unprinted dictionary; (2) whether Bruce lied to Officer Thornberry; (3) whether alcohol caused him to be angry and fight; (4) whether the witness Hengler saw something there (at the scene) he did not wish to get involved in. As to certain of the above items, the objections were sustained and the terms stricken. In those instances where no objection was made or where the court did not strike the allegedly offensive word, no motion was made for the jury to be instructed to disregard the language used. All questions propounded by the deputy and all terms used by him appear to have been used solely to develop the true facts. Not every lawyer retained by the state can frame his questions like a

Webster. If his behavior at the bar is free from venom against the accused, if he uses no terms designed solely to create prejudice against the accused; if he persists in an orderly procedure with the view of presenting only the facts against the prisoner, it cannot be said that his conduct was prejudicial. People v. Horowitz, 70 Cal.App.2d 675, 693, 161 P.2d 833. Since no prejudice appears to have been suffered by virtue of the prosecutor's conduct, it was not reversible error. People v. Estrella, 116 Cal.App.2d 713, 718, 254 P.2d 182.

The order remanding appellants to the Sheriff of Los Angeles County to be held under the jurisdiction of the Youth Authority is affirmed.

McCOMB and FOX, JJ., concur.



130 Cal.App.2d 680

Fred F. DEHN, Plaintiff and Respondent,

v.

Albert C. WARD, Defendant and Appellant.

Civ. 20606.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1955.

Action for declaration that partnership existed between parties. The Superior Court, Los Angeles County, David Coleman, J., held that partnership had existed and ordered an accounting. One year later, court resubmitted matter, vacated order for accounting, and gave money judgment for plaintiff. Defendant appealed. The District Court of Appeal, Moore, P. J., held that where defendant had books of business under his control when court made order for accounting but had not acted to have an accounting made, he could not complain of court's order of vacating the accounting.

Judgment affirmed.

1. Partnership ⇐330

Where trial court determined that partnership existed between parties, and ordered an accounting, and defendant, who had books of business under his control, did not act to have an accounting made, and court, one year after order, made order vacating accounting, defendant could not complain of order vacating accounting.

2. Money Lent ⇐7(3)

In action for declaratory judgment that a partnership existed and to recover money lent, where plaintiff advanced money for a share in business, and a partnership was created, and later advanced other money for partner's own use, court's finding that defendant was indebted to plaintiff apart from the partnership accounts, was supported by evidence.

3. Interest ⇐31, 39(1)

In declaratory judgment action for determination that partnership existed and for judgment for alleged personal loan, where court determined that defendant owed plaintiff money, apart from partnership, computation of interest on loan from date of loan to day of findings at 7% per annum was correct. West's Ann.Const. art. 20, § 22.

4. Partnership ⇐345

Where court had determined that partnership existed between plaintiff and defendant, and ordered an accounting, but vacated order for accounting one year later, where accounting would obviously require defendant to pay employee large sum of money, court would not reverse order vacating accounting at defendants' appeal.

Milton William Gordon, Los Angeles, for appellant.

David Lynn, Inglewood, for respondent.

MOORE, Presiding Justice.

The progress of this action through the courts has been marked by unusual vicissitudes. Respondent sued for declaratory relief. At the conclusion of the trial, January 13, 1953, the court announced that a partnership of the parties had been effected

in January 1952 and ordered an accounting to be had. In January 1954, no accounting having been made, the court resubmitted the matter and thereupon made and filed its findings which in substance appear on the margin hereof.[1]

[1] After finding a partnership and ordering an accounting, a year elapsed without action by appellant. If he had had any wish to abide by such finding and order, he could have done so readily for he had the business and the books under his control

1. Findings

II. July 23, 1951, defendant operated an automatic venetian blind laundry on West Imperial Highway in Los Angeles County. On that day he executed a written agreement with plaintiff to the effect that plaintiff would advance $3,500 to defendant as a loan, without interest for eight months from date; that defendant concurrently executed his note for such amount payable within eight months to plaintiff; the proceeds to be used for the liquidation of certain outstanding debts of the business, the balance to be used for the advancement of the business, except the sum of $500 which sum should be used by defendant as he deemed fit and proper, and plaintiff should have an option for six months from July 23, 1951, to purchase 25 per cent interest as a copartner, said option to be exercised by plaintiff by his surrender of the note to defendant and by his giving defendant notice of plaintiff's intent to assume the relationship of a copartner with defendant in said business at any time within said six months; that in the event plaintiff did not exercise said option within said period, defendant would pay said note in accordance with its terms; that no further liability would attach to either party; that plaintiff could engage in daily activity in the operation of said business during said six months' period as an employee of defendant and receive a weekly salary to be mutually agreed upon; that upon the exercise of said option by plaintiff, formal articles of copartnership would be drawn and executed embodying all the terms and conditions of the partnership agreeable to said parties.

III. Pursuant to said agreement, plaintiff advanced $3,000 to defendant, July 23, 1951; appellant accepted it and delivered his note for $3,500 to plaintiff; a portion of said $3,000 was used by defendant to liquidate certain debts of the business; plaintiff continued to be actively engaged in the operation of said business as defendant's employee until January 23, 1952 and was paid a salary of $75 a week, except $225 which remains unpaid.

IV. Within the period of six months provided in said agreement, plaintiff served written notice upon defendant who was thereby advised that in accordance with their July agreement plaintiff desired to exercise said option and become a partner with 25 per cent interest in the business; that said notice was a notice of intent until formal written articles could be executed; that said note for $3,500 was thereupon returned to defendant with said notice.

V. June 23, 1952, plaintiff, at defendant's request, advanced $2,000 as a loan to defendant for use in the business; said sum was used by defendant in payment of certain debts of the business.

VI. No written articles were ever executed or drawn, as provided in the agreement of July 1951 and in the notice of January 23, 1952.

VII. Plaintiff continued to engage in daily activity in the operation of said business and devoted all his time thereto from July 23, 1951 to August 27, 1952; plaintiff has performed the terms and provisions of said agreement of July 1951 on his part to be performed except the sum of $3,000 was paid thereunder instead of $3,500 and defendant accepted the $3,000 in performance of the July contract.

VIII. April 24, 1950, defendant filed his certificate of business as required by section 2466 and 2468 of the Civil Code, whereby he represented himself as an individual doing business under the name and style of Automatic Venetian Blind Laundry; said business has at all times since the filing of said certificate been operated under said name and style and no other certificate of business has ever been published or filed.

IX. A partnership was established between plaintiff and defendant January 23, 1952 wherein plaintiff received a 25 per cent interest and defendant 75 per cent interest; said partnership was wrongfully terminated by defendant August 26, 1952; plaintiff was an employee of defendant from July 23, 1951 to January 23, 1952; plaintiff received $75 a week for his services as such employee from July 23, 1951 to January 23, 1952, except the sum of $225 which remains unpaid.

X. About August 27, 1952, defendant threatened plaintiff with great bodily harm and excluded plaintiff from the business and took exclusive possession of its premises.

XI. During the existence of said part-

during that year and at all times prior thereto. The finding that the accounting had been abandoned is justified by events that passed before the eyes of the judge. But appellant has raised no question as to such abandonment of the accounting. He seeks refuge behind the facts that there was a partnership and no accounting has been had.

[2] From abundant evidence, it was found that at appellant's request respondent loaned him $2,000 June 23, 1952. That

nership, defendant was guilty of such conduct as tended to affect prejudicially the conduct of the business; he so conducted himself in matters relating to said business that it was not reasonably practicable to carry on the business with him; said business could only be carried on at a loss in that defendant drew funds from said business for his own personal use that were required for the payment of the debts of the business; such drawings were in excess of defendant's interest and decreased and impaired the capital assets; said drawings were in excess of the profits of said business and their withdrawal threatened the financial worth and structure of the business and caused it to operate at a loss; defendant repeatedly on many occasions refused to accept the business suggestions of plaintiff in the operation of the business; he persistently insisted upon his own way and refused to consult with plaintiff concerning the business; defendant discontinued to advertise the business and refused to advertise it and drew all business funds from the bank; took the books of the business into his exclusive possession and control and refused plaintiff permission to examine same; that said business was operated at a loss by reason of such conduct of defendant; that the capital of the business was impaired and threatened with complete loss and dissolution by reason thereof; August 26, 1952, defendant took exclusive possession of the business and all the funds and records thereof and excluded plaintiff from access to same.

XII. An actual controversy has arisen between plaintiff and defendant concerning the agreement of January 1951 and the notice of January 1952 and concerning said business and relationship existing between the parties in regard thereto and the rights and duties toward one another as follows:

(a) Plaintiff contends that a partnership never came into existence; plaintiff has been an employee of defendant and is entitled to $75 a week for services to the business; defendant contends that plaintiff is a partner, is entitled to no salary and is entitled to 25 per cent of the net profits regardless of his services;

(b) Plaintiff contends that a partnership never arose or came into existence; that he is entitled to $3,500 from defendant for moneys advanced on said note and to $2,000 advanced as a loan to the business plus $75 a week for services to said business; defendant contends that plaintiff is a partner in said business and is entitled to no salary for his said services and to 25 per cent of the assets of the business and is liable for 25 per cent of its debts; the $75 a week paid plaintiff is a draw by plaintiff against 25 per cent of the net profits.

XIII. Defendant is indebted to the plaintiff in the sum of $2,000 with interest from June 23, 1952 at 7 per cent per annum for the loan of that day and is indebted to plaintiff in the sum of $225 as salary earned and unpaid.

XIV. Prior to the filing of this action, plaintiff demanded from defendant said $2,000 plus the unpaid salary, which sums defendant refused to pay.

XV. An accounting cannot be had and has been abandoned as between the parties.

XVI. All the allegations in the pleadings consistent with the foregoing findings are true and all allegations inconsistent with the above findings are untrue.

XVII. Plaintiff is entitled to a dissolution of said partnership effective as of August 26, 1952; said partnership was dissolved and wholly terminated on said date.

The court concluded:

I. That a justiciable controversy has arisen concerning the agreement of January 1951 and the notice dated January 23, 1952 and concerning the business known as Automatic Venetian Blind Laundry and the relationship of the parties in regard thereto and their rights and duties toward one another.

II. Plaintiff was the employee of defendant from July 23, 1951 to January 23, 1952.

III. A partnership was established by the parties January 23, 1952 and was wrongfully terminated by defendant August 26, 1952.

IV. Plaintiff is entitled to a dissolution of the partnership and same was dissolved August 26, 1952.

V. and VI. Plaintiff is entitled to recov-

sum was to be repaid by appellant when able to do so. He gave no security. He deposited it to the account of himself and wife. Respondent had no control over it. That was purely a loan and was not related to the previous payment by respondent in July 1951. By the agreement of the latter date, respondent was to have a 25 per cent interest in the partnership and business. Appellant never intimated that respondent owned more than the twenty-five per cent. That fact established that the $2,000 was not a gift or advance to the partnership. When the latter sum was paid, appellant promised to proceed with the incorporation of the business. Later he refused to do so. Not only did respondent loan the $2,000 to appellant, but, despite the finding of a partnership for a period, respondent made it clear to the court that at the time of such loan he believed himself to be an employee of appellant and the latter encouraged that conclusion by his failure to incorporate the partnership after having received the $2,000.

[3] To avoid a multiplicity of lawsuits, the court determined all issues presented by the pleadings. Appellant's indebtedness is one clear-cut issue so determined. Also, the amount of interest on the loan was fairly computed from the date of the loan June 23, 1952, to the day of the findings, January 26, 1954, at seven per cent per annum. Cal. Const. Art. XX, sec. 22.

[4] While appellant contends error in the court's failure to make an accounting, he has not explained *his* failure to render an accounting during the year following the court's order for an accounting; or that such latter failure is due solely to his neglect or to his preference that all the facts be suppressed. At any rate, the necessity for the action was due to appellant's refusal to deal fairly with respondent in their private transactions and the court's failure to enter a judgment on an accounting is to be charged solely to the behavior of appellant. The court found that during the term of the partnership, appellant "drew funds from said business for his own personal use that were required for the payment of the obligations of said business * * * and that said drawings decreased the capital and assets of said business and impaired said capital and assets; and * * * were in excess of the net profits of said business; and * * * that the capital of said business was impaired and threatened with complete loss and destruction by reason thereof." From such finding it requires no Einstein to compute that any sort of an accounting would impose upon appellant the burden of paying to respondent large sums of money in addition to the amount of the personal debt arising from the loan and from respondent's services. If appellant could not benefit by a reversal, it would be sheer folly to remand this action at his behest. The findings are in no respect unfair or arbitrary. They are justified by abundant evidence. The conclusions follow logically from legal reasoning. Crawford v. Southern Pacific Company, 3 Cal.2d 427, 429, 45 P.2d 183.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

er from defendant $2,000 with 7 per cent interest per annum from June 23, 1952 to the date of judgment in the sum of $209.50. Plaintiff is entitled to recover $225 as salary.

VII. An accounting ordered January 13, 1952, not having been made and same having been abandoned, said order and accounting are and each is hereby vacated.

VIII. The preliminary injunction is hereby dissolved.

IX. Each party to bear own costs of suit.

130 Cal.App.2d 710

Milton C. WADE, Plaintiff and Appellant,

v.

The CITY COUNCIL OF THE CITY OF EL SEGUNDO, COUNTY OF LOS ANGELES, State of California, and William R. Selby, Wilburn E. Baker, George E. Gordon, Jr., Dave W. Peterson, and Walter W. Swanson, Constituting the Members of said City Council, Defendants and Respondents.

Civ. 20453.

District Court of Appeal, Second District, Division 2, California.

Feb. 14, 1955.

Mandate proceeding seeking to annul an order of the City Council revoking the plaintiff's permit to operate a dog kennel. From a judgment of the Superior Court of Los Angeles County, Arnold Praeger, J., denying relief plaintiff appealed. The District Court of Appeal, Fox, J., held that substantial evidence supported the findings of the council revoking the plaintiff's kennel license.

Judgment affirmed.

1. Licenses ⇐38

Substantial evidence justified findings of city council ordering revocation of plaintiff's license for a dog kennel on ground of maintenance in kennel in unsanitary condition keeping of sick and diseased dogs without sufficient attendants and keeping some dogs in a state of malnutrition.

2. Evidence ⇐537, 542

In revoking license of plaintiff to operate dog kennel, members of the city council properly considered the opinion of a veterinarian who was an expert in the field and had for his foundation, factual background which he had observed as to the conditions of the kennels and of the dogs.

3. Evidence ⇐537, 542

Admitting opinion of expert in veterinary medicine as to the conditions of the kennel and dogs of plaintiff whose kennel license the city council sought to revoke was not error where veterinarian simply applied his professional training and long experience to a factual situation which he personally observed.

4. Evidence ⇐571(1)

Weight of opinion of an expert as to condition of dogs and kennels of plaintiff whose kennel permit the city council sought to revoke, was a matter for the determination of the council.

5. Licenses ⇐38

In proceeding by city council to revoke the kennel license of plaintiff on the ground of unsanitary conditions and diseased condition of dogs, where evidence on behalf of the city was credible and was unmistakably accepted as such by the members of the council and reasonably supported the findings and determination of that body, it was "substantial" in character as required by law.

See publication Words and Phrases, for other judicial constructions and definitions of "Substantial Evidence".

6. Evidence ⇐589

Where plaintiff was an interested party, such fact could properly be taken into consideration by members of city council in weighing and evaluating his testimony where the city council sought to revoke his kennel license.

Finch, Bell, Duitsman & Jekel, Inglewood, for appellant.

Clyde Woodworth, City Atty. for City of El Segundo, El Segundo, Dunlap, Holmes, Ross & Woodson, Special Counsel, Pasadena, for respondents.

FOX, Justice.

In this mandate proceeding plaintiff seeks to annul the order of the City Council of the City of El Segundo, revoking his permit to operate a dog kennel. He appeals from the judgment denying him relief.

In June, 1948, plaintiff was granted a license to operate a dog kennel within the city limits of El Segundo until March 31, 1949. Upon renewal of the license in 1949 the City Council attached certain condi-

tions thereto, among them being the following:

"First: That the said kennel must at all times be kept and maintained in a clean, presentable and sanitary condition and so as not to constitute a nuisance in any sense * * *

"Third: That the permittee shall * * * have in attendance at said premises a person of proper age, capable of handling, and if necessary, of subduing the dogs * * *"

Plaintiff was familiar with the terms and conditions upon which the permit was granted and accepted the same upon said terms and conditions and agreed to be bound thereby. After the issuance of the original license, plaintiff spent a substantial amount of money in the acquisition of property upon which to operate his kennel and in making certain improvements thereon. The license was renewed from year to year until the City Council gave notice to plaintiff ordering him to show cause before said council on June 17, 1953, why his license should not be revoked. A hearing was held on that date before the City Council. That body thereafter made findings to the effect that: (1) the plaintiff failed to keep and maintain said kennel in a clean, presentable and sanitary condition; (2) that plaintiff kept sick and diseased dogs without sufficient attendants to properly and adequately perform the work of feeding, serving, nursing, treating, cleaning, ministering to and caring for the needs of such sick and diseased and other animals requiring attention in said kennel; (3) plaintiff kept some dogs in a state of malnutrition; and (4) plaintiff failed to adequately control the breeding of flies and the accumulation of manure in and at said kennel premises. Based on these findings the council ordered the revocation of plaintiff's license.

Upon review of the proceedings before the City Council the trial court found as a conclusion of law that "substantial evidence was offered and received which, if believed, would substantiate the findings that the plaintiff's kennel was not at all times kept and maintained in a clean, presentable and sanitary condition; that said kennel as operated by the plaintiff constituted a nuisance; that sick and diseased dogs were kept at said kennel without sufficient attendants capable of handling or caring for said dogs; that a substantial number of the dogs kept at said kennel were kept in a state of malnutrition." The court further concluded that plaintiff's permit had been validly revoked.

Counsel for both parties agreed that the only question involved is, Were the findings of the City Council, upon which the order of revocation of plaintiff's license was based, supported by substantial evidence? It therefore becomes necessary to summarize the evidence which tends to support such questioned findings.

The first witness to testify before the City Council was Dr. Wesley A. Young, a veterinarian. He graduated from Ohio State College in 1919 and was licensed to practice his profession in Iowa, Massachusetts, Illinois and California; in addition to private practice in Des Moines, he was State Inspector of livestock for the State of Iowa; he was Chief Veterinarian of the Animal Rescue League of Boston from 1925 to 1936, and Manager-Director of the Anti-Cruelty Society in Chicago from 1936 to 1952, and from the latter date to the date of the hearing Dr. Young was Western Regional Director of the American Humane Association. He is familiar with diseases of dogs and has been in charge of the operation of animal clinics where 10,000 to 15,000 animals were treated annually. He inspected the premises of plaintiff's kennel on April 16, 1953, in company with Mr. Theodore E. Brownlee, Chief Investigator of the Southern California Humane Society; there were 87 dogs in charge of one attendant. Dr. Young's testimony may be summarized as follows: The earth runs at plaintiff's kennels were fouled with feces; there were masses and quantities of hair that had come off the dogs; the earth had been dug up and out by the dogs over a considerable period of time to various depths, from inches to more than a foot in depth; offensive odors were noticeable. One attendant cannot provide adequate care for 87 well dogs. There were numerous dogs who were sick and only three or four

of the sick dogs showed any evidence of treatment, and the only treatment observable was the presence of an oil-like substance on their skins. Admittedly, this material had been placed on the dogs that very day—April 16, 1953; these dogs, being two Boxers and one or two Collies, were almost completely devoid of hair. Their skins were scaly, scabby and irritated, and clinically typical of mange. Other dogs showed similar skin lesions, including quite a number of Chows, which showed loss of hair over a great deal of their bodies, particularly the tail, the rumps, down the hind quarters, their thighs and their ears. The ears of some dogs were sore, showing irritation from fly bites; others were dried, more or less hornified, and hardened skin over the dogs' ears, which could come only from a long standing condition. The general physical condition of these dogs showed improper or insufficient nutrition and chronic, long standing irritation of the skin from flies, fleas, insects, dirt and filth. A number of the Chows showed inverted eyelids, i. e., lids that turn in so that the eyelash scrapes against the eyeball irritating the eyeball. This is a chronic condition which only surgery can cure or ameliorate. The attendant stated that only one dog had been operated on, and Dr. Young observed that surgery did not completely correct the condition on that one. None of the Chows with this one exception showed treatment of any character. The general condition of the premises was filthy. They were neither presentable nor sanitary and about half of the dogs in the kennel were physically affected with some disease, varying from minor to major infections. Several of the animals were suffering. Two Collies and one Boxer could hardly walk. Eight or ten of the other dogs were extremely thin and one could count the dogs' ribs as far as the eye can see. There was evidence of cruelty in that there was lack of care and attention. A great many of the dogs showed evidence of malnutrition. The kennel was not being operated in a proper manner as kennels should be and this kennel could only be made to conform to acceptable standards by a complete renovation and rehabilitation, meaning cleaning out the filth and dirt, refilling with fresh, clean earth, and clean, sanitary maintenance thereafter. Proper operation would also necessitate treatment of the sick and diseased dogs and, as a matter of fact, it would be a hospital full of dogs. The ear conditions observed would take months to develop into such a chronic condition. The apparent malnutrition could only have developed after neglect for months, the cases of mange would take weeks and weeks to attain such a condition, probably even months.

Dogs in one run could come into physical contact through the wire mesh with dogs in adjacent runs. A group of four or five one-third grown Collie pups were subject to constant means of infection. The bulk of the dogs were fully grown, several of them being seven or eight and even ten years of age.

The witness had seen thousands of dogs both in and out of kennels and as patients in clinics. The unsanitary character of the kennels, the physical appearance of the dogs' skin, their apparent malnutrition, their loss of hair and the condition of their mange necessarily required time to develop.

Mr. Brownlee, who had some 20 years' experience in feeding and treating dogs and had been in humane society work for four years, inspected the kennel twice on April 16, 1953, once in company with his assistant, Clyde Miles, and once in company with Dr. Young; and again on May 6, 1953. His testimony may be summarized as follows:

He and his assistant, Miles, observed a number of dogs, particularly Chows, Collies and two Boxers, which were infected with skin disorders. Two Collies had hardly any hair on their bodies. Lesions appeared to completely cover the dogs' bodies. The Chows were infected, their ears were caked to the extent that in many instances there was dried blood on them. The hair was off their faces, off their necks, considerable off in spots on their backs, and some dogs had no hair whatsoever on their tails. A white Boxer and a seven or eight week old Boxer pup were completely covered with mange. Holes were dug in the ground showing that the place had not been cleaned or leveled off. About five dogs had matted hair which hung

in clumps, whereas silky hair is characteristic of that type of dog when healthy. As a result of this inspection in the morning, Dr. Young was called in and made the afternoon inspection concerning which he testified.

On May 6th Mr. Brownlee again inspected the premises but no improvement was observed in the condition of the grounds or of the animals though inspection showed that some medication had been applied to two Collies.

Mr. Miles, who had been a state officer of the Society for the Prevention of Cruelty to Animals since September, 1951, inspected the premises on April 6, 1953, and again on April 16, 1953, corroborated the testimony of Mr. Brownlee. A portion of his testimony, in response to questions by City Attorney Woodworth, is as follows:

"Mr. Woodworth: Mr. Miles, upon that occasion that you observed the kennels, were they in a clean condition?

"Mr. Miles: They were not.

"Mr. Woodworth: Were they in a sanitary condition?

"Mr. Miles: They were not.

"Mr. Woodworth: In your opinion, were there sufficient attendants in attendance to properly care for the number of animals in the kennels at the time you observed them?

"Mr. Miles: No, sir, there weren't.

"Mr. Woodworth: Were there evidences of any filth around?

"Mr. Miles: There was in the runways, under the platforms [where] the dogs slept there was balls of hair all under it, hair all mixed up in the earth runways, and it did stink.

"Mr. Woodworth: Did you observe any animal feces there at that time?

"Mr. Miles: Yes.

"Mr. Woodworth: Any considerable amount?

"Mr. Miles: A lot of it was messed in with the earth."

[1–5] It is conceded that there was no substantial evidence supporting the finding made by the City Council that plaintiff failed to adequately control the breeding of flies. There was, however, substantial evidence to sustain the other challenged findings of the City Council, and thus to justify the action of the City Council in revoking plaintiff's permit. The testimony of Dr. Young, Mr. Brownlee, and Officer Miles discloses the conditions they observed on their respective inspections of plaintiff's kennel. This testimony related to the unsanitary condition of the premises and the animals; it showed, in fact, that the premises were in a filthy condition, and that many of the dogs were afflicted with diseases, suffering from malnutrition and otherwise not properly cared for, and that adequate help had not been provided to take care of the kennel and the dogs. It is true that some of the testimony on which the City Council obviously relied consisted of the opinions of Dr. Young. It was proper, however, for the members of the City Council to take such opinions into consideration since he was admittedly an expert in the field and had for his foundation the factual background which he had observed as to the conditions of the kennel and the dogs. Plaintiff's argument that his opinions as an expert were erroneous or unfounded in fact is without substance. Dr. Young simply applied his professional training and long experience to a factual situation which he personally observed. This he was obviously qualified to do. The weight, of course, to be given to such opinions was a matter for the determination of the City Council. The observations of Dr. Young, Mr. Brownlee, and Officer Miles, plus the expert testimony of Dr. Young, provided substantial evidence to support the findings of the City Council which, in turn, justified the revocation of plaintiff's license. Such evidence was credible and was unmistakably accepted as such by the members of the City Council and reasonably supports the findings and determination of that body. It was, therefore, substantial in character. Fewel & Dawes, Inc., v. Pratt, 17 Cal.2d 85, 89, 109 P.2d 650; Oakley v. Oakley, 82 Cal.App.2d 188, 190, 185 P.2d 848; Hall v. Osell, 102 Cal.App.2d 849, 853, 228 P.2d 293.

[6] Plaintiff has fallen into the error of relying too heavily on his own testimony and his explanations and excuses for the

conditions that prevailed at his kennel. He was, of course, an interested party, and that fact could properly be and undoubtedly was taken into consideration by the members of the City Council in weighing and evaluating his testimony. Tedder v. Johnson, 105 Cal.App.2d 734, 739, 740, 234 P.2d 149.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



130 Cal.App.2d 676

John ECKLES and Reba Eckles, husband and wife, Plaintiffs and Appellants,

v.

E. D. DELANEY, Inc., a corporation, Estelle Proctor and James T. Hamilton, as Executrix and Executor, respectively of the Estate of Ernest W. Proctor, deceased, Defendants and Respondents.

Civ. 20519.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1955.

Suit to enjoin corporation and others from operation of planing mill and incinerator contrary to zoning ordinance. The Superior Court, Los Angeles County, Kenneth C. Newell, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that evidence supported findings that defendants were not maintaining public or private nuisance in operating their wholesale and retail sash and door business, a permissible use under ordinance, that no manufacturing was done outside building, and that manufacture and treatment of wood products was from previously prepared materials.

Judgment affirmed.

Nuisance ⇐33, 84

In suit to enjoin operation of planing mill and incinerator contrary to zoning ordinance, evidence supported findings that defendants were not maintaining public or private nuisance in operating their wholesale and retail sash and door business, a permissible use under ordinance, that no manufacturing was done outside building, and that manufacture and treatment of wood products was from previously prepared materials.

Hemm & Paonessa, Inglewood, by Arthur R. Hemm, Inglewood, for appellants.

Macfarlane, Schaefer & Haun, and William Gamble, Los Angeles, by William Gamble, Los Angeles, for respondents.

MOORE, Presiding Justice.

The sole question posed is: Does the evidence support the findings?

Appellants, John and Reba Eckles, sought injunctive relief against respondents alleging that the latter were conducting a business not permissible in a C-3 zone as defined by ordinance 925 of the City of Inglewood, to wit, operating a planing mill, a large incinerator causing to emit a great volume of thick, black smoke and charred saw-dust and soot which are carried by the wind into plaintiffs' dwelling. That appellants' property is zoned R-3; that while the general character of respondents' neighborhood is zoned R-3, most of respondents' property is zoned C-3; that a violation of such ordinance constituted a public and private nuisance which was detrimental to the public health and general welfare by reason of excessive noise, vibration and soot. Issue was joined by general denial.

Following the trial, the court found that the corporate defendant as tenant of its co-defendants occupies lots 9 and 13 and a portion of lot 12 of tract 896 in Inglewood; that appellants own portions of lots 6 and 7 of block 32 of Inglewood; that ordinance 925 is in full force and effect; that E. D. Delaney, Inc. is operating on said leased premises a wholesale and retail sash and door business all of which is a permissible use under said zoning ordinance; that all the operations of the corporate defendant are conducted in a reasonable and necessary

manner, usual and customary to the operation of its business.

The court concluded that respondents are not maintaining a public or private nuisance in operating the plant; that they are operating in a properly zoned area under ordinance 925.

Appellants contend that the uncontradicted evidence shows that the operations of the corporation have been carried on in an improper zone under ordinance 925, notwithstanding the city had in full force a comprehensive zoning ordinance, fixing zones and classifications of land uses; that the operations of Delaney, Inc. are not such as are permissible in a C-3 zone because (1) the treatment of wood products are not carried on wholly *within* a building; (2) the manufacture and treatment of wood products by respondents is not from previously prepared materials.

In support of such contention, appellants introduced many photographs. They do not support appellants' thesis. They show clearly that no manufacturing by Delaney was done outside of a building. That the structures shown in the photograph are buildings is established by Watchtower Bible & Tract Society, Inc., v. County of Los Angeles, 30 Cal.2d 426, 428, 182 P.2d 178, 180. They are edifices "'"composed of stone, brick, marble, wood, or other property substance connected together, and designed for use in the position in which it is so fixed."'" The court, pursuant to stipulation, made an inspection of the premises. Such observations are sufficient support for the finding. Summers v. Parker, 119 Cal. App.2d 214, 218, 259 P.2d 59; Conklin v. Goodson, 125 Cal.App.2d 823, 827, 271 P.2d 147.

But appellants assert that the wood used by Delaney, Inc. had not been previously prepared. The excerpt from the testimony of the witness Sporleder quoted by appellant is not support for such contention. It follows:

"Q. Mr. Sporleder, the operation of the plans such as the Delaney plant consists of the manufacturing of certain wood products, does it not? A. That is right.

"Q. Can you detail what products are manufactured? A. Window frames, door frames and interior trim or molding.

"Q. Now, can you state—A. And he does make a false louver once in awhile.

"Q. A what? A. A false louver.

"Q. What is that? A. Well, that is—you have see it; a blind that they hang outside of a house to decorate it. He does use some of his scrap for that. That is one thing—the only thing that I have ever seen him manufacture in there outside of frames and moldings.

"Q. Is the wood or lumber that comes to the plant entirely prepared wood? A. Oh, no. Nobody in that business could afford to do it, because *we have to take and use the lumber as it comes from the saw mill to gain the thickness of cuts in manufacturing.*

"Q. So, when the wood comes to the plant, then, it is not entirely prepared, but something further—A. No. It has to be remanufactured; yes, sir."

The court adopted the testimony of Mr. Delaney as follows:

"Q. The lumber that is used in the sticker, is that lumber previously prepared except with respect to the putting in of the detail or the reduction of the size of the lumber? Do you understand what I mean? A. Well, not in its entirety. Let me explain it this way: The lumber that I use is previously prepared lumber. In other words, it is previously manufactured lumber before I receive it into the plant. And that manufacturing is done at a sawmill. Then it is necessary for me to size the lumber for the purpose for which it is going to be used. By that I mean running it through a saw which gives it the dimension necessary for the feeding of it through this sticker or molding machine."

Also, the witness Libby testified as follows:

"Q. Mr. Libby, with respect to the materials used by E. D. Delaney, Inc.,

they are previously prepared, are they not, except as to size and shape, to go into the final product? A. They are previously prepared as lumber; that is correct.

"Q. And the operation of the E. D. Delaney, Inc., plant is to cut them to the proper size and shape and assemble them? A. That is correct."

Such evidence is substantial and reasonably supports the findings. It cannot, therefore, be said that the judgment was arbitrary. Hence it cannot be altered by a reviewing court. Crawford v. Southern Pacific Company, 3 Cal.2d 427, 429, 45 P.2d 183; Harris v. Lee, 123 Cal.App.2d 177, 179, 266 P.2d 534.

Judgment affirmed.

McCOMB and FOX, JJ., concur.



130 Cal.App.2d 696

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Amos Otho McNAIR, Defendant and Appellant.

Cr. 5242.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1955.

Prosecution under Pen.Code, § 647a (1). The Superior Court, Los Angeles County, Mildred L. Lillie, J., entered judgment of conviction and denied motion for new trial. Accused appealed. The District Court of Appeal, McComb, J., held that there was sufficient substantial evidence to sustain conviction.

Judgment and order affirmed.

1. Criminal Law ⇐1144(13)

On accused's appeal from conviction after trial by jury, evidence was viewed in light most favorable to people.

2. Vagrancy ⇐3

Evidence sustained conviction for violation of statute providing that every person who molests any child is a vagrant. Pen.Code, § 647a(1).

3. Vagrancy ⇐1

In statute providing that every person who annoys or molests any child is a vagrant, the word "molest" is generally synonymous with annoy. Pen.Code, § 647a (1).

See publication Words and Phrases, for other judicial constructions and definitions of "Molest".

4. Vagrancy ⇐1

The element of annoyance as provided in statute providing every person who annoys or molests any child is a vagrant, is not concerned with the state of mind of the child, but it is the objectionable acts of the accused which constitute the offense. Pen. Code, § 647a(1).

5. Vagrancy ⇐1

If the conduct of an accused is so lewd or obscene that the normal person would unhesitantly be irritated by it, such conduct would annoy or molest within statute providing that every person who annoys or molests any child is a vagrant. Pen.Code, § 647a(1).

6. Criminal Law ⇐409

In prosecution for vagrancy, testimony of child annoyed established a prima facie case independently of defendant's admissions. Pen.Code, § 647a(1).

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., F. G. Girard, Deputy Atty. Gen., for respondent.

Earl C. Broady, Los Angeles, for appellant.

McCOMB, Justice.

From a judgment of guilty of violating section 647a, subdivision (1), of the Penal Code, after trial before the court without a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

[1] *Facts:** On May 10, 1953, a seven year old girl was playing in the area which separated two apartment houses. While she was so playing she observed defendant half out the window of his apartment, naked, waving his hands outward. When anybody besides the little girl appeared defendant withdrew into his apartment. His penis was flush with the outside of the building and approximately one half foot from the lower part of the window sill. Defendant stated to a police officer "that he he was pretty hot and he was going to masturbate," and gave as a reason for exposing himself to the girl, "I guess I am just proud of myself," and "Well, when, a little girl wants to look at me when I am just proud I will let her look if she wants to."

Section 647a, subd. (1), of the Penal Code reads in part: "Every person who annoys or molests any child, under the age of 18 is a vagrant * * *."

[2] *Questions:* First: *Was there substantial evidence to sustain the judgment of conviction?*

Yes. The complaining witness and a police officer gave direct evidence of the facts as set forth above. Clearly such evidence sustains the finding of guilty of the offense charged.

[3] Defendant's contention that the facts would not support the finding that the child had been "annoyed or molested" by defendant is devoid of merit. The word "annoy" is defined as meaning, "to disturb or irritate, esp. by continued or repeated acts; to vex * * *." (Websters New Inter. Dictionary, 2d Ed. 1939, Vol. 1, page 108), or "a feeling of discomfort or vexation caused by affliction with something which one dislikes." (Websters New Inter. Dictionary, supra.) The word "molest" is generally synonymous with "annoy." (People v. Pallares, 112 Cal.App.2d Supp. 895, 901[11–12], 246 P.2d 173.)

[4, 5] It is also settled that the element of annoyance as provided in section 647a(1) of the Penal Code is not concerned with the state of mind of the child. It is the objectionable acts of defendant which constitute the offense. (People v. Pallares, supra, 112 Cal.App.2d Supp. 901, 902, 246 P.2d 173.) If the conduct of a defendant is so lewd or obscene that the normal person would unhesitantly be irritated by it, such conduct would "annoy or molest" within the purview of section 647a(1), Penal Code. (People v. Pallares, supra, 112 Cal.App.2d Supp. 902, 246 P.2d 173; State v. Chaplinsky, 91 N.H. 310, 18 A.2d 754, 762.)

Clearly, in the instant case, applying the above rules, the acts performed by defendant were lewd and obscene and would unhesitantly irritate a normal person. Therefore such conduct constituted a violation of section 647a(1) of the Penal Code. Further discussion of the evidence will serve no useful purpose. (Thatch v. Livingston, 13 Cal.App.2d 202, 203, 56 P.2d 549.)

[6] Second: *Was the corpus delicti of the offense established independently of defendant's admissions?*

Yes. The complaining witness testified as to the naked condition of defendant and that when any person other than the little girl appeared he withdrew from view. Clearly this was a prima facie case established independently of defendant's admissions of the crime involved.

An examination of the record discloses that defendant had a full, fair and impartial trial.

The judgment and order are, and each is, affirmed.

MOORE, P. J., and FOX, J., concur.

* The evidence is viewed in the light most favorable to the People (respondent) pursuant to the rule set forth in People v. Pianezzi, 42 Cal.App.2d 265, 269 [2], 108 P.2d 732, hearing denied by the Supreme Court.

130 Cal.App.2d 729

Isidor STENZOR, Individually, and as a member, manager, and representative of the Los Angeles Cloak Joint Board of the International Ladies' Garment Workers Union, a voluntary, unincorporated association, and for and on behalf of each and all of the members thereof, Petitioner and Appellant,

v.

Joseph LEON, doing business under the fictitious name of Mamselle Modes of California, Defendant and Respondent.

LOS ANGELES CLOAK JOINT BOARD, INTERNATIONAL LADIES' GARMENT WORKERS UNION, Appellant,

v.

Joseph LEON, doing business as Mamselle Modes of California, Respondent.

Arbitration between the Los Angeles Cloak Joint Board, of the International Ladies' Garment Workers Union,

and

Joseph LEON, doing business as Mamselle Modes of California.

Civ. 20429, 20466.

District Court of Appeal, Second District, Division 3, California.

Feb. 14, 1955.

Proceeding for confirmation of awards of arbitrator in favor of union. The Superior Court, Los Angeles County, Arnold Praeger and James G. Whyte, JJ., vacated awards and made order taxing costs. Union appealed from judgment vacating awards, and employer appealed from order denying him certain costs. The District Court of Appeal, Shinn, P. J., held that where contract between union and employers' association provided for cost of living wage increases for employees, and employer resigned from employers' association, but continued to be bound by contract until it expired, and by any agreements made by association modifying contract, and union and management then modified contract to provide for smaller wage increases such modification agreement also covered employer who resigned, and he was not required to grant cost of living increases required under provisions of unmodified contract.

Judgment and order affirmed.

1. Labor Relations ⇐454

Where contract between labor union and employers' association provided that if union and association failed to agree upon amount of cost of living wage increase, matter should be submitted to an impartial chairman, the only powers of the impartial chairman were those derived from agreement.

2. Labor Relations ⇐263

Where contract between union and employers' association provided for cost of living wage increases, and one employer resigned from association, but continued to be bound by contract and any agreements negotiated by association until expiration of contract, and union and employers' association then modified contract to provide for smaller increases than cost of living increases, such modification agreement also covered resigned employer, and he was not required to grant cost of living increases as provided for in unmodified contract.

3. Labor Relations ⇐454

Where employer who had resigned from employers' association agreed to be bound by agreements made by employers' association and union until expiration date of contract between employers' association and union, and made wage increases provided for in agreement which modified original contract between employers' association and union, no dispute existed between union and employer, and arbitrator had no power under terms of contract to make any award as to employer.

4. Labor Relations ⇐461

Where contract between union and employers' association contained no provision for enforcement of arbitrator's award, proceeding before arbitrator to enforce award and second award permitting union to strike was nullity.

5. Costs ⇐204

Affidavit made in memorandum of costs stating that to best of parties' knowledge

items in memorandum were correct and disbursements necessarily incurred, created an issue as to the reasonable necessity for the use of the items. West's Ann. Code Civ.Proc. § 1033.

6. Costs ⇐207

Where claim is made for a disbursement, the necessity of which is doubtful, and the item is properly challenged by motion to tax costs, the burden is on the claimant to establish necessity for the disbursement. West's Ann. Code Civ.Proc. § 1032a.

7. Appeal and Error ⇐984(1)
Costs ⇐12

The allowance of a disbursement which is properly challenged by motion to tax costs is within discretion of trial court, and if no abuse of discretion is shown, the action of the trial court will not be disturbed. West's Ann. Code Civ.Proc. §§ 1032 to 1033, 1280 to 1293.

8. Costs ⇐189

A party to an arbitration who has the proceedings reported for his exclusive use in court and who prevails there cannot claim reimbursement as of course. West's Ann. Code Civ.Proc. § 1032a.

9. Costs ⇐189

Where employer had transcript of proceedings before arbitrator made for his own use in court on hearing to confirm award, where he correctly contended that arbitrator had no jurisdiction over him, court did not abuse its discretion in denying employer costs for taking of transcript. West's Ann. Code Civ.Proc. §§ 1032 to 1033.

Basil Feinberg, Los Angeles, for appellant.

Phillip W. Silver, Los Angeles, for respondent.

SHINN, Presiding Justice.

Isidor Stenzor, on behalf of a certain labor union, appeals from a judgment of the superior court denying confirmation of two awards of an arbitrator. Joseph Leon, an employer, appeals from an order taxing costs which denied him certain claimed costs. The appeals have been consolidated.

Los Angeles Cloak Joint Board, International Ladies' Garment Workers Union, is a labor union and Isidor Stenzor is a member and manager thereof. Los Angeles Coat and Suit Manufacturers' Association is an organization of coat and suit manufacturers. Joseph Leon was a member of the association but resigned therefrom on or about October 16, 1953. January 19, 1951, an agreement was entered into by and between the association and the union which became immediately effective and remained operative until April 30, 1954. Although Leon had a right to resign from the association, the contract provided that he should continue to remain personally and individually liable "under and to the terms and provisions of the agreement," regardless of his resignation, for the full term of the contract, but only while he continued to be a manufacturer of coats and suits.[1] In his letter of resignation, Leon stated that his firm "does not authorize the association to negotiate any new agreements in its behalf that will extend beyond April 30, 1954. This firm wishes to remain within its controllability obligation with the Union until April 30, 1954 as the present contract stands."

The contract provided for increases of wages whenever there was a rise of 5% in the cost of living index of the United States Bureau of Labor Statistics above the level of February 15, 1948. The provision is set

1. "17 (c) In the event a member of the Association or his successors or assigns shall resign or be expelled from the Association, said expelled or resigned member of the Association or his successors or assigns shall be and continue to remain personally and individually liable under and to the terms and provisions of this Agreement, regardless of such resignation or expulsion from the Association, but only while he operates as a manufacturer, merchant, jobber, or wholesaler of coats and suits, as defined herein. Said expelled or resigned member shall thereafter be required by the Union in addition to conform to the requirements of Paragraph (b) of this Paragraph 17 relating to contracts with independent employers."

out below.[2] There were other provisions recognizing the union as the bargaining agent of all employees and the association as the bargaining agent of its members. They had acted in that capacity in the past and the agreement provided that they intended to continue bargaining in the future in the same capacity.

In April 1953, the union made request upon the association for a cost of living increase under section 12 of the agreement. As a result of negotiations the agreement was modified by increasing wages of craft workers $4 a week and floor workers $3 a week, effective November 2, 1953. There were certain other modifications which were deemed to be of value to employees.

Leon resigned October 16, 1953; October 22, the union made a written demand upon him that he increase wages 15%; October 30, Leon had a conference with a union representative in which the union repeated its demand for a 15% increase. Leon did further. October 27, the union communicated with Dan A. West, the Impartial Chairman, requesting that a hearing be arranged. The charge was that Leon had failed to increase wages by 15%. October 30, the Impartial Chairman set a hearing for November 6 and gave notice to Leon. The hearing was adjourned to November 10. Leon and his attorney appeared before the Impartial Chairman, denied that there was any controversy subject to arbitration and challenged the jurisdiction and authority of the Impartial Chairman to proceed in the matter. November 20, at the conclusion of the hearing, which was attended by Leon under protest, the Impartial Chairman rendered an award that Leon should pay employees in certain crafts $3.50 per week above their present wage and members of other crafts $4.50 per week above their present wage, said increases to be retroactive to July 1, 1953, and to be paid forthwith to all eligible workers. December 2, 1953, a supplemental award was made for the purpose of enforcing compliance with the November 20 award. The union petitioned the court for confirmation of the awards and Leon petitioned that they be vacated. The judgment of the court vacated the awards and the union has appealed.

One ground for vacating the first award was that the arbitrator had no jurisdiction to determine the amount of wages which Leon should pay. This is the only ground of the decision which we need consider.

[1, 2] The powers of the arbitrator were derived from the agreement, Bierlein v. Johnson, 73 Cal.App.2d 728, 166 P.2d 644; Drake v. Stein, 116 Cal.App.2d 779, 254 P.2d 613; 6 C.J.S., Arbitration and Award, § 80, P. 219, and we therefore look to the agreement. All members of the association agreed to be bound by agreements entered into by the association with the union. All

2. "The parties recognize that during the period of this Agreement, there may be a further inflationary trend resulting in an additional increase in the cost of living. The parties hereto agree that if the cost of living index of the United States Bureau of Labor Statistics shall rise 5% above its level as of February 15, 1948, the Union shall have the right to demand, upon notice in writing to the Association, that all of the members of the Association shall increase the wages of all of their workers in all of the crafts covered by this Agreement who are employed in their inside shops and in the shops of their contractors, to bring the same into line with such increase in the cost of living. The Union shall have the same right during the term of this Agreement with respect to any further 5% increase in the cost of living, as reflected by the index figures of the United States Bureau of Labor Statistics. The Union, however, agrees that if it demands an increase in wages pursuant to this paragraph for any subsequent time, such demands shall be made either on or before October 15 of the year (the increase granted to become effective for work performed beginning with the ensuing spring season), or on or before May 1 of the year (the increase granted to become effective for work performed beginning with the ensuing fall season). If the Union and the Association fail to agree upon the amount of wage increase to be granted, then the matter shall be submitted to the Impartial Chairman, hereinafter designated, for his final determination, and the parties agree to be bound by his decision. The provisions of this paragraph shall only be applicable for the period during which the emergency caused by the present inflationary trend shall continue."

disputes between the association and its members and the union and its members were to be adjusted in the manner provided in the agreement. The union insists that Leon was bound by the original agreement until April 30, 1954 and it therefore contends that he was bound by the provisions for the increase of wages to meet increased cost of living and for the submission of wage disputes to the Impartial Chairman. Leon does not deny that he was bound by the agreement until April 30, 1954. The Impartial Chairman specifically found that Leon remained bound by the original agreement but that when he resigned he "abrogated" the authority of the association to negotiate on his behalf for an increase of wages. The first finding was correct; the second was in direct conflict with the first and with the express provisions of the agreement. Moreover, in his letter of resignation while negotiations between the association and the union were under way, Leon recognized the authority of the association to negotiate terms which would be binding upon him until April 30, 1954. The union, while insisting that Leon was bound by the provisions for increase of wages and for submission of a dispute to the Impartial Chairman, denies that he was bound by the modifications agreed to by the association. Leon insists he was bound by the entire agreement and that the union was likewise bound. We think there can be no reasonable difference of opinion upon this point. The contract obligated Leon to abide by any modifications agreed to by the association with respect to a cost of living increase in wages during the life of the original contract. There was no evidence that he was unwilling to pay the increases in accordance with the modification. During the hearing he offered to prove that he had increased wages but the Impartial Chairman refused to receive the offered evidence. The modified agreement entered into by the association as the authorized representative of its members was just as binding as any other provision of the agreement. There was no basis in the agreement for the demand by the union that Leon pay a higher wage scale than the one agreed to by the association and the union. Since there was an existing, enforceable contract with respect to wages the union could not, through the Impartial Chairman or otherwise, create some new and different obligation with respect to the wages Leon should pay.

[3] Since the association was the exclusive bargaining representative of its members with respect to increases of wages, the Impartial Chairman would have authority only in case the association and the union failed to agree. Since they did not fail to agree on wage increases he had no authority in the matter.

[4] The Impartial Chairman held a second hearing December 1, 1953, following a charge by the union that Leon had not complied with the first award. December 2, after the second hearing, the Impartial Chairman issued another award ordering compliance with the award of increased wages retroactive to July 1, 1953. This purported second award provided that if the entire sum were not paid within three days "then the Union, in addition to any other remedies it may have under the collective bargaining agreement between the parties, shall have full freedom to act as it, in its judgment, deems meet and proper under the circumstances." There was a provision in the agreement that during the term thereof "there shall be no general lockout, general strike, individual shop lockout, individual shop strike, or shop stoppage for any reason or cause whatsoever" and this provision applied while any complaint or grievance was being adjusted. As stated in the briefs and in oral argument, the avowed purpose of the union in taking the matter to the Impartial Chairman a second time was to procure from him a declaration that Leon in some manner had breached the contract, had forfeited all rights under it, and had thus relieved the union of its duty not to call a strike. The Impartial Chairman did not determine that Leon had violated the agreement but only that he had failed to comply with the award of November 20. This second proceeding was one for which no authority was to be found in the agreement. The purported award of December 2 was a nullity. Both awards were properly vacated by the court.

Leon was awarded costs by the judgment. He filed a memorandum of costs and disbursements in a total amount of $607.10. Included was an item of $586.60 for reporter's transcript of the proceedings before the Impartial Chairman. Upon motion to tax costs this item was stricken, leaving costs assessed at $20.50. Leon has appealed.

[5–7] Sections of the Code of Civil Procedure treating of arbitration, §§ 1280–1293, contain no provisions respecting costs. However, the sections relating to arbitration are contained in Part 3, Title 9 of the Code of Civil Procedure, Part 3 being devoted to special proceedings. Section 1032 of the Code of Civil Procedure provides that costs may be awarded to a successful plaintiff in certain actions and also in special proceedings and in the same situation a defendant upon a judgment in his favor is entitled to costs as of course. Section 1032 does not specify the costs that are allowable. Section 1033 requires that a party claiming costs shall verify his memorandum of costs stating that to the best of his knowledge and belief the items are correct and that the disbursements have been necessarily incurred in the action or proceeding. The cost of depositions is allowed unless the court shall determine that their taking was unnecessary, § 1032a. The question was whether the cost of the reporter's transcript was necessarily incurred by Leon for the purpose of presenting to the court his grounds for seeking annulment of the awards. We note that the order taxing costs was made by a judge other than the one who rendered the judgment. It would seem that the latter was in a better position to know whether the cost of the reporter's transcript was necessarily incurred. However, the affidavits created an issue as to the reasonable necessity for the use of the reporter's transcript in the court proceeding and the implied finding of the court was that its use was not necessary. It may be that the trial court concluded, as we have concluded, that the Impartial Chairman had no authority to act in the matter at all and that it was unnecessary for Leon to produce any evidence as to the proceedings that took place during the hearings. We have not found it necessary to look beyond the contract in determining that the proceedings were unauthorized. On the other hand Leon contended in court that the Impartial Chairman was guilty of misconduct in the exclusion of evidence that was offered and of other arbitrary action. In asserting these grounds counsel for Leon no doubt in good faith believed that a reporter's transcript would be necessary. It is well settled that where a claim is made for a disbursement the necessity for which is doubtful, and the item is properly challenged by motion to tax costs, the burden is on the claimant to establish necessity for the disbursement; its allowance is within the discretion of the trial court and if no abuse of discretion is shown the action of the trial court will not be disturbed. Barnhart v. Kron, 88 Cal. 447, 26 P. 210; Miller v. Highland Ditch Co., 91 Cal. 103, 27 P. 536; Puppo v. Larosa, 194 Cal. 721, 230 P. 440; Blair v. Brownstone Oil & Refining Co., 20 Cal.App. 316, 128 P. 1022; Murphy v. F. D. Cornell Co., 110 Cal.App. 452, 455, 294 P. 490; City of Los Angeles v. Abbott, 129 Cal.App. 144, 153, 18 P.2d 785; In re Estate of Bauer, 59 Cal.App.2d 161, 138 P.2d 721.

[8, 9] There was no agreement that the proceedings should be reported at the joint expense of the parties. They were reported solely for Leon's use in court in the event the award was one which he would seek to have vacated. Since the item was disallowed we do not have the question whether the court could properly have determined that it was a necessary disbursement and chargeable as such. It is clear that a party to an arbitration who has the proceedings reported for his exclusive use in court, and prevails there, cannot claim reimbursement as of course. It follows that it was not an abuse of discretion to disallow the item.

The judgment and the order are affirmed; Leon to recover costs on the appeal from the judgment; Stenzor to recover costs on the appeal from the order.

PARKER, WOOD and VALLÉE, JJ., concur.

The CALIFORNIA OREGON POWER COMPANY, a corporation, Petitioner,

v.

The SUPERIOR COURT of the State of California, In and for the COUNTY OF SISKIYOU, Respondent,*

The People of the State of California, Real Party in Interest.

Civ. 8383.

District Court of Appeal, Third District, California.

Feb. 10, 1955.

Rehearing Denied March 11, 1955.

Hearing Granted April 6, 1955.

Prohibition proceeding by power company to prohibit the Superior Court, Siskiyou County, from trying action by State of California, against Power Company to abate public nuisance allegedly existing due to fact that power company did not maintain constant flow of water through turbines at peak load plants. The District Court of Appeal, Schottky, J., held that, where river involved was a navigable stream and, under federal power act, all power installations in or on such river were within exclusive jurisdiction of federal power commission, state of California was not entitled, until proceedings before federal power commission were concluded, to bring action against power company to abate public nuisance alleged to exist because power company, in operating peak load plants, maintained an irregular flow of water turbines on such river,

Writ issued.

1. States ⇐4.14

Exclusion of state action may be implied from nature of federal legislation and subject matter although expressed declaration of such result is wanting.

2. Administrative Law and Procedure ⇐229

Where Congress has created an administrative agency with jurisdiction to regulate some particular field, courts are without jurisdiction to grant relief for act done or omitted if act or omission was within agency's jurisdiction, until complainant has exhausted his remedies before the agency.

3. Administrative Law and Procedure ⇐229

Where administrative remedy is provided by statute, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.

4. Navigable Waters ⇐2

Where river involved was a navigable stream and, under federal power act, all power installations in or on such river were within exclusive jurisdiction of federal power commission, state of California was not entitled, until proceedings before federal power commission were concluded, to bring action against power company to abate public nuisance alleged to exist because power company, in operating peak-load plants, maintained an irregular flow of water through turbines on such river. Federal Power Act, § 1 et seq., 4, 6, 9(b), 10, 23(b), 26, 306, 314, 16 U.S.C.A. §§ 791a et seq., 797, 799, 802(b), 803, 817, 820, 825c, 825m.

Brobeck, Phleger & Harrison, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Ralph W. Scott, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Petitioner above named filed in this court a petition for a writ of prohibition to restrain and prohibit the Superior Court of the State of California in and for the County of Siskiyou from proceeding to try an action filed by the State of California against petitioner in the superior court of said county. We issued an alternative writ of prohibition and a return thereto was filed by the State of California on behalf of itself as the real party in interest and of the respondent superior court.

The facts, which appear from the petition and the return, and which are not in substantial dispute, are as follows:

Petitioner is a public utility electric company serving a part of northern California and a part of southern Oregon. Its principal business is in manufacturing, generating and selling electric energy to the public

* Opinion vacated 291 P.2d 455.

in intrastate and interstate commerce. It owns and maintains two hydroelectric generating plants along and across the Klamath River in the County of Siskiyou, State of California, Copco No. 1, erected prior to 1918, and Copco No. 2, erected prior to 1925. These plants are what are known as "peak-load plants," in that they are not designed or used to produce power continuously at a high output for meeting the basic, around-the-clock demand for power. While these plants never completely shut down, they operate much of the time at a low rate of output, conserving the water supply available for their operation behind a storage dam. When a "peak" demand for electrical energy exists on the system, the "load" on the lines actuates a mechanism which automatically causes water to be released from the reservoir behind the dam and to flow through the turbines, thus generating electricity to supply the load. When the peak demand decreases the water is automatically withheld behind the storage dam, where it will be available for meeting future peak loads.

Since variations in the peak load occur daily in the system, the result is a daily variation in the amount of water flowing through the plants. Thus, there occurs a periodic fluctuation in the level of the Klamath River below the Copco plants. Apparently these fluctuations are not unusual or extraordinary, and have been occurring in the Klamath River for about a third of a century in the normal course of the petitioner's operations.

In 1947 the Assembly of the State of California adopted the following resolution, House Resolution No. 162:

> "That a request be directed to the Public Utilities Commission of California, asking it to prepare and supply a report as to whether it would be more practical and economically feasible to require the California-Oregon Power Company [sic] to modify their operations or to construct a regulating dam to reduce the present average daily range of artificial fluctuations of the flow of the Klamath River by not less than 50 per cent, and that the Public Utilities Commission be requested to submit a report in response to the above request to the Assembly Interim Committee on Fish and Game not later than January 1, 1948."

In response to this request the Public Utilities Commission published its Study No. S-605, dated December 10, 1947. Petitioner summarizes this study thusly:

> "1. If the fluctuations were reduced at the Copco plants, the Power Company and its customers would be deprived of badly needed peaking capacity;
>
> "2. Construction of a regulating dam by the Power Company could be justified only if some public agency assumes liability for damages to downstream riparians;
>
> [This conclusion was based on the Supreme Court's decision in Moore v. California Oregon Power Co., 22 Cal. 2d 725, 140 P.2d 798. See report, page 55.]
>
> "3. Cost of a regulating dam must be borne in equitable part by those who believe they will benefit from it—which does not mean power-users."

This seems to be a fair summary of the report.

After the receipt of this report by the Assembly, by Resolution No. 98 the Senate of the State of California requested a report on the same subject from the Fish and Game Commission:

> "The feasibility of a regulatory dam at Iron Gate on the Klamath River and the advantages of such a dam are matters upon which this Senate needs to be informed in order that it may act advisedly in the premises."

The report submitted by the Fish and Game Commission largely quoted the prior report furnished the Assembly, and concluded by asking for further time to complete the investigation. The Senate, by Resolution No. 151, gave the Fish and Game Commission nearly two years more for further study. The Commission then prepared and submitted to the Senate a second report, dated December 14, 1950, but before it was

submitted the Attorney General of the State of California, at the request of the Commission filed suit against the petitioner, so the Commission refused to make any recommendations to the Senate when the time for its report arrived.

The suit above referred to was instituted in the Superior Court of the State of California, in and for the County of Siskiyou, against petitioner in the name of the state. The complaint was verified by an official of the Division of Fish and Game. The theory of the action was abatement of a public nuisance. The basis for this was that the fluctuations in the level of the Klamath River caused by petitioner's operations endangered and destroyed the life, health and property of the state by (1) killing each year large numbers of fish owned by the state, and (2) causing drownings and otherwise endangering the lives of persons on the river.

The relief sought by the state as pleaded was an injunction against the operation of the plants, and an injunction against interfering with the normal and continual flow of the Klamath River. The state suggested an alternative to this cessation or modification of the operations by the erection of the Iron Gate Dam, downstream from Copco No. 1 and Copco No. 2.

Petitioner interposed a demurrer to the complaint upon the ground, among others, that the court was without jurisdiction to hear or try the cause because (1) this was a matter subject to federal jurisdiction, to wit, the Federal Power Commission, and (2) that, apart from the question of federal jurisdiction, the issues were within the exclusive jurisdiction of the State Public Utilities Commission. The demurrer was overruled on all grounds, and the petitioner made answer on July 11, 1951, to the complaint, again raising the jurisdictional issue. In the answer petitioner also alleged the filing of an application for license to construct the Big End No. 2 Development on the Klamath River in Oregon, before the Federal Power Commission, which proceeding involved essentially the same issues as those before the Superior Court, County of Siskiyou.

On November 27, 1951, the Federal Power Commission initiated a proceeding before itself by issuing and serving upon petitioner an order to show cause why it should not be required to apply for licenses for its existing plants, Copco No. 1 and Copco No. 2, and thereafter consolidated the license application proceeding with the show cause proceeding.

On June 15, 1952, the State of California petitioned to intervene in the Federal Power Commission proceeding, in which petition the state incorporated all of the allegations of the complaint filed by it in the Superior Court, County of Siskiyou. In filing an answer to this petition the petitioner here incorporated into it all the allegations of its answer in the suit filed against it in the Superior Court, County of Siskiyou. A hearing was held before the Federal Power Commission from June 30 to July 3, 1952, wherein the State of California appeared and was, as a result of that hearing, granted the status of a tentative intervener. At the same hearing the State of California also introduced evidence and testimony for the purpose of proving the allegations contained in the complaint in the state court suit, which were incorporated by it into its petition for intervention. On July 3, 1952, the federal proceeding was closed, and the issues presented therein were left pending and undecided. On August 12, 1952, the Federal Power Commission entered its order granting intervention, and the state became a formal party to the proceeding.

On August 6, 1952, the petitioner here gave notice that it would move the Superior Court, County of Siskiyou, for leave to file its amendment to its answer and a supplemental answer, and would also move to dismiss the complaint in the state court suit; further providing that if the motion to dismiss were denied it would move to stay all proceedings in the state court suit until the conclusion of the federal proceeding. All of the motions were heard on September 12, 1952, in the Superior Court, County of Siskiyou, and were denied on September 16, 1952. The state subsequently filed in the Superior Court, County of Siskiyou, a motion to set the suit for trial, and petitioner

thereupon sought a writ of prohibition to have the superior court restrained and prohibited from proceeding to try the cause.

The grounds upon which petitioner relies in support of its petition for prohibition are:

1. The superior court is without jurisdiction;

2. The petitioner will be subjected to irreparable loss and damage and to oppression, harassment and vexatious litigation in that it will be compelled to proceed to trial in the state court suit of the same controversy and the same issues that are the subject of the federal proceeding.

The major contentions urged by petitioner are as follows:

1. Respondent court is without jurisdiction because Congress has occupied the field by a grant of exclusive primary jurisdiction to the Federal Commission and the State has failed to exhaust its remedy before the Commission.

2. Respondent court is without jurisdiction because the State Commission has exclusive state jurisdiction over the subject matter.

3. Respondent court is without jurisdiction in equity because there is an adequate remedy at law.

Petitioner first argues that the respondent court is without jurisdiction to try the action filed by the state because Congress has occupied the field by a grant of exclusive primary jurisdiction to the Federal Power Commission, and the state has failed to exhaust its remedy before the Commission. The state in reply states that none of the cases cited by petitioner which deal with the scope and purview of the Federal Power Act, 16 U.S.C.A. § 791a et seq., hold that a state court of equitable jurisdiction is precluded from abating a nuisance committed by a public utility corporation which is subject to the licensing provisions of the Federal Power Act.

As to the jurisdiction of the Federal Power Commission petitioner cites the following sections of the Federal Power Act:

Section 4. "The Commission is hereby authorized and empowered—* * *

"(e) To issue licenses to * * * any corporation organized under the laws of the United States or any State thereof, * * * for the purpose of constructing, operating, and maintaining dams * * * [and] power houses * * * for the development * * * of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce * * * among the several States * * *;

"(g) Upon its own motion to order an investigation of any occupancy of, * * * for the purpose of developing electric power, * * * streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce * * * among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region."

Section 23(b). "It shall be unlawful for any person * * * for the purpose of developing electric power, to construct, operate, or maintain any dam, * * * power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, * * * except under and in accordance with the terms of * * * a license granted pursuant to this Act. * * *"

Also, in respect to matters of life, health and property, a specific provision of the Federal Power Act is cited by petitioner:

Section 10. "All licenses issued under this Part shall be on the following conditions: * * * (c) That the licensee * * * shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. * * *"

In support of its contention that the field has been occupied by Congress through its grant of exclusive primary jurisdiction to

the Federal Power Commission, petitioner cites the case of First Iowa Hydro-Electric Coop. v. Federal Power Commission, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143, which case involved a writ of certiorari to review a judgment affirming a dismissal of an application for a license to construct a water power project by the Federal Power Commission. The Commission had dismissed the application because the applicant had not complied with section 9(b) of the Federal Power Act in submitting satisfactory evidence to the Commission that it had met all necessary requirements of the laws of the state in which it contemplated constructing the project. In reversing the affirmance of the dismissal the Supreme Court said, 328 U.S. at pages 167–168, 66 S.Ct. at page 913:

"In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of Government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. In fact a contrary policy is indicated in §§ 4(e), 10(a) (b) and (c), and 23(b). In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. 'Compliance with the requirements' of such a duplicated system of licensing would be nearly as bad. Conformity to both standards would be impossible in some cases and probably difficult in most of them."

And 328 U.S. at page 181, 66 S.Ct. at page 920:

"The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls."

At page 182 of 328 U.S., at page 920 of 66 S.Ct. the court also quoted from the case of United States v. Appalachian Electric Power Co., 311 U.S. 377, 405 and 426, 61 S.Ct. 291, 85 L.Ed. 243, which case had to do with the general problem before us and the one before the Supreme Court in the Iowa case:

" 'The states possess control of the waters within their borders, "subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers." It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters.

* * * * * *

" 'The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that "its exercise is attended by the same incidents which attend the exer-

cise of the police power of the states." The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment.'"

Subsequent to the issuance of the alternative writ of prohibition by this court, after a hearing in which the State of California participated as an intervener, the Federal Power Commission determined that "the Klamath River in Oregon and California is a navigable stream of the United States" and that "By reason of the occupancy of navigable waters of the United States and use of surplus waters from a government dam, each and all of the five hydroelectric developments of the California Oregon Power Company, on the Klamath or Link River [including Copco No. 1 and Copco No. 2], are subject to the licensing authority of the Commission, as set forth in Section 4(e) of the Federal Power Act." The Federal Power Commission ordered that petitioner herein file applications for license for the existing plants of Copco No. 1 and Copco No. 2, and the Commission also reserved the right to determine at a later date whether all of the power developments constructed, operated and maintained by petitioner on the Klamath River shall be encompassed by a single license, and also "Whether or not such single license, if required, should contain a provision reserving the Commission's authority in the interests of protection of life, health, and property, to require the installation of reregulating facilities at or near the Iron Gate site on the lower Klamath River, in California, after notice and opportunity for hearing."

It is therefore clear not only that the Klamath River is a navigable stream and that all power installations in or on said river are within the exclusive jurisdiction and control of the Federal Power Commission under the Federal Power Act but it is also clear that the Federal Power Commission has assumed jurisdiction over all power installations in said river. The State of California, in the action filed in the Superior Court in Siskiyou County, is seeking to interfere with, regulate, alter or control the power installations of petitioner. To be sure the state asserts that it is only seeking to abate a nuisance and prevent destruction of life and property, but the indisputable fact remains that what the state asserts is a nuisance can only be abated by the cessation of the operations by petitioner of plants Copco No. 1 and Copco No. 2 or the installation of a regulating dam at Iron Canyon. Under the Federal Power Act it appears that in no event could petitioner erect this dam without a license from the Federal Power Commission so to do. If, pursuant to a state court decree the petitioner did undertake to construct the Iron Gate Dam, it could be enjoined from so doing without a license, or a determination by the Commission that one is not needed. United States v. Appalachian Electric Power Co., supra; 16 U.S.C.A. §§ 820, 825m. Of course, the state suggested an alternative to erecting Iron Gate Dam, namely, that petitioner could modify or cease its operations in order to stop the fluctuation in the level of the Klamath River. We are convinced that the subject matter of the action filed by the state against petitioner is one within the exclusive jurisdiction of the Federal Power Commission and that no duality of control exists. The Federal Power Act gives the Commission broad power to prescribe the operations of plants licensed by it. See 16 U.S.C.A. § 799. The Commission has taken under consideration Copco's entire operation. If it licenses petitioner and directs the manner of operation to continue as it now is, and a state court enjoins petitioner from operating as it now is so as to stop the fluctuation in the level of the Klamath River, the petitioner in obeying that mandate would be acting in violation of the terms of its license. Again it would be subject to action by the Commission for this violation, causing a possible suspension or revocation of its license, or an injunction ordering petitioner to resume operations pursuant to the terms of the license. 16 U.S.C.A. §§ 820, 825m.

[1] We are therefore of the opinion that the state court is not entitled to proceed with the action filed by the state in the Superior Court when the Federal Power Commission has already taken the matter under submission and will conceivably grant

a license with conditions of operation therein that may nullify the force of the state court decree, even if the court had jurisdiction to grant it. Viewing the comprehensive nature of the Federal Power Act, and considering that the Act and orders of the Commission are the supreme law of the land, we entertain no doubt that the matter is solely within the jurisdiction of the Commission. As stated in Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767, 772, 67 S.Ct. 1026, 1029, 91 L.Ed. 1234:

> "It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting."

[2] As stated in Adler v. Chicago & Southern Air Lines, Inc., D.C., 41 F.Supp. 366:

> "* * * when Congress has created an administrative commission, board or other agency with jurdisdiction over and power to regulate some particular field of endeavor, the courts, both state and federal, are without jurisdiction or power to grant relief to any person complaining of any act done or omitted to have been done, if the act or omission is of such a nature as to be within the sphere of regulation of the administrative agency involved, until such time as the person complaining has exhausted his remedies before such administrative body."

[3] We agree with the contention of petitioner that before the state would be entitled to proceed with any action such as the instant action it must first exhaust its administrative remedy before the Federal Power Commission. As stated by Chief Justice Gibson in Abelleira v. District Court of Appeal, 17 Cal.2d 280, at page 292, 109 P.2d 942, at page 949, 132 A.L.R. 715:

> "In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. The authorities to this effect are so numerous that only the more important ones need be cited here as illustrations. [Citing numerous cases.]"

And as stated in United States v. Superior Court, 19 Cal.2d 189, at page 194, 120 P.2d 26, at page 29:

> "It is now firmly established in this state that a litigant must invoke and exhaust an administrative remedy provided by statute before he may resort to the courts. Jurisdiction to entertain an action for judicial relief is conditioned upon a completion of the administrative procedure. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715."

The Federal Power Act gives a broad remedy in matters such as those in issue. See 16 U.S.C.A. § 825e, to the effect that "Any person, State, municipality, or State Commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this chapter may apply to the commission * * *." The Act goes on to provide for investigation and hearings. Thus it is clear that the state is given a remedy before the Commission, and it also appears that the state has appeared and intervened in the proceedings before the Commission. We cannot assume that the state will not obtain, from the Federal Power Commission and the federal courts, any relief to which it is entitled.

[4] We therefore conclude that because the Klamath River is a navigable stream and by reason of the provisions of the Federal Power Act all power installations in or on said river are within the exclusive jurisdiction of the Federal Power Commission, and that until the proceedings before the Federal Power Commission are concluded the State of California is not entitled to bring to trial in the Superior Court the action which it has filed in Siskiyou County.

It is unnecessary to discuss the other contentions urged in the briefs.

Let the writ of prohibition issue.

VAN DYKE, P. J., and PEEK, J., concur.

130 Cal.App.2d 740

Mary MEDEIROS, Plaintiff, Cross-Defendant and Appellant,

v.

Mamie P. COTTA, Individually and as Special Administratrix of the Estate of Manuel Medeiros, Deceased, and John F. Medeiros, Defendants, Cross-Complainants and Respondents.

Civ. 8488.

District Court of Appeal, Third District, California.

Feb. 14, 1955.

Action by decedent's widow against representative of decedent's estate and another, to recover an interest in realty which decedent had granted to representative. The Superior Court, Stanislaus County, Sherill Halbert, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Schottky, J., held that where realty in question was not included in inventory in probate of estate or otherwise accounted for, and claim of decedent's widow that the realty, which decedent had granted to representative, was community property in which widow had an interest, was not tried in probate proceeding, the decree of distribution was not res judicata in respect to present action.

Judgment reversed.

1. Husband and Wife ⇐273(12)

Surviving wife had right to sue grantee under deed whereby husband had purportedly made gift of community property and to have it decreed that wife was owner of one half of realty. West's Ann.Civ. Code, §§ 161a, 172a.

2. Executors and Administrators ⇐315(6)

Superior court, acting in exercise of probate jurisdiction, did not have exclusive jurisdiction of question whether decedent's surviving wife was entitled to recover a share of community property previously granted by husband, and decree of distribution in probate proceeding, wherein the contested property was not listed and wherein wife made no appearance, was not res judicata of wife's right to recover the property.

3. Courts ⇐37(2)

Estate representative's contention, made 16 months after institution of action by decedent's widow to recover from representative an interest in real estate which decedent had purportedly granted under deed, and six months after decree of distribution, that widow's action should be tried in probate, was untimely.

4. Executors and Administrators ⇐85(9)

An action against an estate representative to recover property wrongfully claimed by representative and to have property included in assets of estate, should, if brought within general jurisdiction of superior court, be there tried as a matter in probate, even if representative makes timely objection that issue should be tried in probate.

5. Executors and Administrators ⇐315(6)

Where realty in question was not included in inventory in probate of estate or otherwise accounted for, and claim of decedent's widow that the realty, which decedent had granted to representative, was community property in which widow had an interest, was not tried in probate proceeding, the decree of distribution was not res judicata in respect to widow's action against representative to recover an interest in the realty.

John H. Machado, San Jose, Nathan B. McVay, Modesto, for appellant.

Zeff & Halley, Modesto, for respondents.

SCHOTTKY, Justice.

Manuel Medeiros died on March 20, 1949, leaving surviving as heirs at law his wife, Mary Medeiros, and four children by a former marriage, Manuel Medeiros, Jr., Mamie P. Cotta, John F. Medeiros and Annie Silva. On March 21, 1949, a deed of gift executed by Manuel Medeiros on February 16, 1942, was recorded, said deed naming Mamie P. Cotta as grantee and describing approximately 36 acres of land in Stanislaus County.

On April 9, 1949, John F. Medeiros filed a petition for the probate of decedent's will, said will having been executed on March

2, 1949. Said will contained a bequest to the wife, Mary Medeiros, of money in bank and certain personal property, but with the following provision:

"* * * It is expressly specified herein that the foregoing bequest to my wife shall be in lieu of any rights that my said wife, Mary, shall have in my possessions and to my property by way of homestead rights, by way of community property rights, as my widow or otherwise, or by way of any other claim whatsoever upon my estate, and in case any such rights are claimed by my said wife, all property bequeathed to her herein shall become part of the residue of my estate and shall go to my said children, John F. Medeiros, Annie Silva and Mamie P. Cotta, share and share alike."

Said will also provided:

"I give and devise all real property, together with any personal property not otherwise disposed of herein, which I may own or possess at the date of my death to my son, John F. Medeiros; my daughter, Annie Silva, and my daughter, Mamie P. Cotta, in equal shares of one-third to each of said children."

On April 29, 1949, a contest of said will was filed by the surviving wife, Mary Medeiros, and Manuel Medeiros, Jr., and thereafter, on May 9, 1949, Mamie P. Cotta was appointed special administratrix with general powers.

On November 12, 1949, plaintiff, Mary Medeiros, filed the instant action against Mamie P. Cotta, individually and as special administratrix of the estate of Manuel Medeiros, deceased, and John F. Medeiros, as defendants, to set aside the said deed of February 16, 1942, and to have it adjudged that she was the owner of the real property described therein, alleging that said real property was the community property of deceased and plaintiff; that said deceased had executed said deed without her knowledge and consent; and that there was no consideration for said deed.

On March 11, 1950, an answer and cross-complaint was filed by Mamie P. Cotta, individually and as special administratrix of the estate of decedent, and John F. Medeiros, denying the material allegations of the complaint and alleging that on February 16, 1942, the real property in controversy was conveyed to Mamie P. Cotta and that she has ever since been the owner thereof.

On August 4, 1950, Mary Medeiros and Manuel Medeiros, Jr., filed a dismissal of the will contest theretofore filed by them. On August 8, 1950, Mamie P. Cotta, as special administratrix, filed an inventory and appraisement of the property of the estate of said decedent, which inventory did not include as property of the estate the real property described in said deed. On August 15, 1950, the will of decedent was admitted to probate and letters testamentary were issued to John F. Mederios. On August 25, 1950, John F. Medeiros, as executor, filed his first and final account and report and petition for distribution, and on September 6, 1950, a decree of distribution was made in the matter of the estate of Manuel Medeiros, deceased. By the terms of the decree appellant is to receive certain personal property, the children are to receive certain other minor items, and the decree states that any and all real property owned by the deceased at the time of his death, whether now known or hereafter discovered, shall be distributed in equal shares to John F. Medeiros, Annie Silva and Mamie P. Cotta.

On October 1, 1951, respondents Mamie P. Cotta and John F. Medeiros were by order of court permitted to file an amended answer and cross-complaint which, in addition to the denials and allegations of their original answer and cross-complaint, alleged as additional defenses:

First: That said widow, appellant herein, never at any time made an election of any kind claiming a community interest instead of the bequest made to her under the provisions of the will; that she never at any time appeared in the proceedings of the estate claiming that any part of the property belonged to her as community property and that the same should not be disposed of by decree of distribution in accordance with the terms of the will of the deceased; and that the decree had become final and was

res adjudicata on the issues raised in the pleadings in the action; and

Second: That all the issues involved in plaintiff's complaint had been previously adjudicated in the matter of the estate of Manuel Medeiros, deceased, and that the decree of distribution therein conclusively adjudicated all issues in appellant's complaint.

Plaintiff's demurrer to said special defenses was overruled and an answer to the amended cross-complaint was filed. Thereafter a trial was had solely on the special defenses and the court made the following findings of fact, among others:

First: That appellant, Mary Medeiros, never at any time in the proceedings of the said estate made an election of any kind claiming a community interest instead of the bequest made to her under the provisions of the will of the deceased, and that she never in the estate proceedings claimed that any of the property of said deceased belonged to her as community property and that the same should not be disposed of by decree of distribution in accordance with the terms of the will of the deceased.

Second: That the decree of distribution in the matter of the estate of Manuel Medeiros is res adjudicata on the pleadings in the action of appellant, Mary Medeiros, against respondents, Mamie P. Cotta and John F. Medeiros, and could not be raised in any collateral proceedings.

Third: That the decree of distribution conclusively adjudicated the rights of the parties in the property belonging to Manuel Medeiros, deceased.

Fourth: That decedent, Manuel Medeiros, transferred the property described in plaintiff's complaint and in said deed to respondent, Mamie P. Cotta, and that said Mamie P. Cotta was the owner in fee simple of the real property therein described.

Fifth: That appellant, Mary Medeiros, had no interest in the real property described in said deed and in said complaint.

The court then concluded that the superior court sitting in probate had exclusive jurisdiction to determine the title described in plaintiff's complaint and in said deed; that Mary Medeiros had elected to take her distributive share of the estate under the terms of the will under the decree of distribution in said estate; that the decree of distribution of the estate of Manuel Medeiros was conclusive upon the rights of the parties to the action; that appellant had by her election under the will of the decedent relinquished any community rights which she might have in the real property described in her complaint; that appellant, Mary Medeiros, had no right, title, or interest in and to the real property described in the deed; and that the title to said real property is vested in respondent, Mamie P. Cotta, individually, free and clear of any claim of the appellant, Mary Medeiros.

Judgment was entered in accordance with said findings and conclusions and plaintiff has appealed from said judgment.

Appellant contends that the court erred in its determination that the superior court, sitting in probate, had exclusive jurisdiction to determine the title to the real property and in holding that the decree of distribution in the estate of Manuel Medeiros is res adjudicata as to the rights of appellant in said real property.

As has been hereinbefore pointed out, there was no trial on the merits of the action filed in the superior court by appellant, but the trial was limited solely to the special defenses set forth in the amended answer and cross-complaint of respondents. This being so, it is conceded by respondents here, as it was at the trial, that the real property in question must be considered to have been the community property of appellant and decedent at the time it was conveyed by decedent to respondent Mamie Cotta and that it was conveyed by gift without consideration.

Section 161a of the Civil Code provides:

> "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as de-

fining the respective interests and rights of husband and wife in community property."

Section 172a of the Civil Code, so far as pertinent here, provides:

"The husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; * * *. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate * * *."

In the case of Trimble v. Trimble, 219 Cal. 340, at pages 345, 346, 347, 26 P.2d 477, at page 480, the court said:

"The rights of the spouses in community real property, as we have seen, is controlled by section 172a of the Civil Code already referred to. The authorities we have cited, as previously shown, hold that by this section of the Code the husband may, without the consent of his wife, dispose of by deed his half of the community property, and such conveyance is binding upon his wife after his death. This right was in no way dependent upon nor limited nor affected by the provisions of section 1401, Civil Code [now section 201 of the Probate Code], either before or after its amendment in 1923.

* * * * * *

"From the foregoing authorities we are of the opinion that the deeds executed by the deceased without consideration and without the consent of his wife are valid conveyances as to one-half of the property sought to be conveyed, but may be avoided by his wife as to her half of said community property. This action was instituted for that purpose, and it must, therefore, be held that subject to her life estate, she is the owner of one-half of said two parcels of land and the defendants are the owners of the other half."

And in Britton v. Hammell, 4 Cal.2d 690, at page 691, 52 P.2d 221, at page 222, it is stated:

"The merits of this appeal are concluded by our first decision already referred to, and only one point raised by appellant requires discussion. He contends that, assuming the invalidity of the deeds of gift, nevertheless under our decision in Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477, the wife may set them aside only as to one-half thereof. The above decision, however, was concerned with an action by the wife after her husband's death, and proceeded on the theory that at his death he had a right to dispose of that part of the property, and her right was therefore limited to recovery of one-half. In the instant case the action was commenced by the wife during the husband's lifetime to restore the property to the community. There appears to be no case in this state which determines the extent of the rights of the wife who, during the marriage, attacks a gift of community property made by the husband to a third party. See 1 So.Cal.Law Rev. 467. The decisions, reviewed in Trimble v. Trimble, supra, all involve actions brought by the wife after the husband's death.

"There is, in our opinion, a sound reason why the wife, suing during the marriage, should be permitted to set aside the gift of community property in its entirety. If she were only permitted to recover a one-half interest, and that one-half interest recovered were to remain community property, it would still be subject to the husband's control with the result that the protection given the wife by the statute would be substantially nullified. If, on the other hand, the one-half interest recovered were regarded as her separate property, there would be a resulting divi-

sion or partition of the community property during the marriage by the husband's arbitrary act, without consent of the wife. Our law does not contemplate this means of dividing the community property. It provides only for division after dissolution of the community by death or divorce or by transfer by the husband with the wife's consent to a third person or to the wife.

"It is true that there is also no express provision in our statutes to cover the situation where the wife sues after the husband's death. The case of Trimble v. Trimble, supra, and other decisions holding that recovery in such case is limited to one-half the property, must rest, ultimately, upon the theory that the husband had the right, at his death, to give away one-half by will; and that his gift before death, if limited in effect to one-half the property transferred, could be viewed as the equivalent of a provision by will."

And in Ballinger v. Ballinger, 9 Cal.2d 330, at page 334, 70 P.2d 629, at page 631, it is said:

"The *gift* of community property by the husband without the consent of the wife may be set aside in its entirety by the wife during the lifetime of her husband, Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221, and after his death may be set as to one-half thereof, Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477." (Emphasis added.)

See also Odone v. Marzocchi, 34 Cal.2d 431, 438, 439, 211 P.2d 297, 212 P.2d 233, 17 A.L.R.2d 1109.

[1] It would seem quite clear from the foregoing authorities that appellant had the right to file an action against respondent Mamie P. Cotta to set aside the conveyance of community real property made by decedent as to one-half thereof and to have it decreed that she was the owner of one-half thereof.

Respondents make an able and earnest argument in support of their contention that the superior court sitting in probate had exclusive jurisdiction of the instant action, and cite a number of California decisions in support of their position. However, since the trial of this case our Supreme Court, in the very recent case of Schlyen v. Schlyen, 43 Cal.2d 361, 273 P.2d 897, has reviewed most of the decisions relied upon by respondent.

In the Schlyen case the children of the decedent brought an action against decedent's widow, who was also executrix under the will of decedent, for cancellation of deeds which had been executed by decedent, and under which the widow claimed, on the ground of alleged fraud and undue influence by the widow. The superior court granted a motion to dismiss the action upon the ground that the court was wholly without jurisdiction to entertain the subject matter and that the "probate court" had exclusive jurisdiction thereof. Upon appeal the Supreme Court reversed the judgment and, in a very exhaustive and learned opinion by Mr. Justice Shenk, analyzed some of the former decisions and cleared up much of the confusion that has existed because of some statements in earlier decisions. The opinion first pointed out that since the adoption of the Constitution of 1879 there has been no "probate court" in this state in the sense that it is a court separate and distinct from the superior court and that the use of such term is to be considered no more than a convenient way of expressing the idea of the superior court sitting in the exercise of its probate jurisdiction, and further that probate matters are civil in their nature and the superior court in exercising its jurisdiction in such matters does so as a superior court and as such it has the right to exercise its inherent equitable functions.

In the course of its opinion the court said, 43 Cal.2d at page 365, 273 P.2d at pages 898, 903:

"The controversy therefore resolved itself into a contest between heirs of the estate and the personal representative thereof claiming title to the property of the estate in her individual capacity.

* * * * * *

"It is established by the case law of this state that the superior court acting in the exercise of its probate jurisdiction is without power to try title to

property asserted by a stranger to the estate as against the estate. In re Estate of Dabney, 1951, 37 Cal.2d 672, 234 P.2d 962, and cases there cited. Such actions are triable by the court in the exercise of its general jurisdiction. It is likewise established that when title to property of an estate is claimed by heirs or other beneficiaries of the estate to belong to the estate and is also claimed by the representative of the estate to belong to him in his individual capacity the superior court, sitting in probate, has jurisdiction over the controversy. In re Estate of Roach, 1929, 208 Cal. 394, 281 P. 607; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; In re Estate of Fulton, 188 Cal. 489, 205 P. 681; Stevens v. Superior Court, 155 Cal. 148, 99 P. 512; see Prob.Code, § 581."

The court then quotes some language in the Bauer case which respondent heavily relies upon and states in 43 Cal.2d at page 375, 273 P.2d 904:

"The decision in the Bauer case did not hold that the court in probate had 'exclusive' jurisdiction in cases such as this. As noted, the statement in the syllabus in that case was taken from the recited grounds of the demurrer. It was not an adjudication to that effect and should be disregarded. To the extent that the broad language referred to in the Roach case is inconsistent with our holding in the present case, it is overruled."

And at page 377 of 43 Cal.2d, at page 905 of 273 P.2d:

"* * * here we have a case where the superior court in which the action is pending had jurisdiction of the subject matter of the action either as a case to be disposed of in the exercise of its equity jurisdiction or to be adjudicated in the probate proceeding pending in the same court, depending on the circumstances existing at the time the motion to dismiss was made. Where the superior court has jurisdiction over the particular class of cases in question it is the established rule that if no objection on the ground of another action pending or other appropriate objection be timely made it is deemed to be waived. [Citing cases.]"

And at page 378 of 43 Cal.2d, at page 906 of 273 P.2d the court said in conclusion:

"From the foregoing it is concluded: (1) that the superior court has general jurisdiction in equity cases such as the present one; (2) that in the absence of a demurrer, answer, motion or other timely objection on the ground that the issues involved should be tried in probate, the superior court may adjudicate those issues with the same force and effect as if the objection had not been made; (3) that when as here the issues pertain only to the rights of parties in privity with the estate and do not involve the rights of third parties or strangers to the estate the superior court sitting in probate has jurisdiction and should adjudicate them, but that such jurisdiction is not exclusive, depending on the facts of the particular case and may be waived; (4) that under the undisputed facts of this case the defendant did not timely interpose her objection to the trial of the issues by the superior court sitting in the exercise of its general equity jurisdiction and therefore waived the objection, and (5) that when such objection is timely made the trial court should not dismiss the action but should try it as a matter in probate to the end that property wrongfully claimed by the representative of the estate be included in the assets of the estate."

[2] We are convinced that Schlyen v. Schlyen is determinative of this appeal and that if it had been decided prior to the trial of the instant case the learned trial judge would not have held that the probate court had exclusive jurisdiction or that the decree of distribution in the probate proceeding was res adjudicata of the rights asserted by appellant in the instant case.

[3, 4] The instant action was filed on November 12, 1949; on December 15, 1949, defendants demurred on the ground that the complaint did not state facts sufficient to

constitute a cause of action; on December 27, 1949, the demurrer was overruled; on March 11, 1950, defendants filed an answer and cross-complaint; on April 12, 1950, appellant filed her answer to the cross-complaint; on September 6, 1950, the decree of distribution was entered in the estate of Manuel Medeiros, and it was not until March 6, 1951, that the respondents made the motion to dismiss on the ground that the issues involved should have been litigated in the probate proceeding. This was almost 16 months after the action had been filed and 6 months after the decree of distribution had been filed. So even assuming that the action filed by respondent was to recover property wrongfully claimed by the representative of the estate and to have it included in the assets of the estate, it is clear from the opinion in Schlyen v. Schlyen that respondents failed to make a timely objection that the issues involved should be tried in probate. And it is likewise clear from the opinion that even if such an objection had been timely made "the trial court should not dismiss the action but should try it as a matter in probate to the end that property wrongfully claimed by the representative of the estate be included in the assets of the estate."

[5] The record shows that respondent Mamie P. Cotta, individually and as special administratrix, filed an answer to appellant's complaint alleging that the real property in controversy had been conveyed to her by decedent and that she was the owner thereof. The record also shows that said real property was not included in the inventory of the property of the estate and was not accounted for or described in any account or decree of distribution, and that no steps were taken at any time to have the issues involved in the action filed by appellant determined in the probate proceeding. Respondents, by concluding the probate proceedings without appellant having had a trial as to the issues involved in her action, could not thereby deprive appellant of the right to such a trial. While it may be that the issues involved in appellant's action might by appropriate steps and pleadings have been tried in the probate proceedings, a matter which it is not necessary for us to decide, for assuming that they were so triable it is clear that they were not so tried and determined and in view of the fact that the trial court erroneously determined that the court sitting in probate had exclusive jurisdiction, there is no basis for the court's further conclusion that the decree of distribution in the probate proceedings was res adjudicata as to the rights asserted by appellant in her action.

In view of the foregoing we deem it unnecessary to discuss the other points discussed in the briefs.

The judgment is reversed.

We concur: VAN DYKE, P. J., and PEEK, J.



130 Cal.App.2d 708

Application of A. A. McCAUSLAND for a Writ of Habeas Corpus.

Cr. 3102.

District Court of Appeal, First District, Division 1, California.

Feb. 14, 1955.

Proceeding in the matter of the application of petitioner for writ of habeas corpus to obtain petitioner's discharge from custody. The District Court of Appeal, Fred B. Wood, J., held that where Superior Court's order of commitment of petitioner to jail for "wilfully violating" judgment directing him to pay certain sum of money to referee and receiver, contained no finding that petitioner had at any time ability to pay, order was void.

Petitioner discharged from custody.

Contempt ⇐63(3)

Where superior court's order of commitment of petitioner to jail for "wilfully violating" judgment directing him to pay certain sum of money to referee and receiver contained no finding that petitioner had at any time ability to pay, order was void.

Ferrari & Ferrari, San Francisco, for petitioner.

Raymond D. Williamson, San Francisco, for Dan Gallagher, Sheriff of City and County of San Francisco.

FRED B. WOOD, Justice.

The sheriff's return shows that petitioner was committed to custody by virtue of an order of the superior court which adjudged him guilty of "wilfully violating" a judgment of that court which directed him to pay $4,800 to a referee and receiver theretofore appointed by the court, and ordered that he be "forthwith arrested and committed to the county jail there to be confined and remain until he obeys the order of this Court."

The order of commitment contains no finding that petitioner has or at any time had the ability to pay. There is nothing in the record before us indicating that any inquiry was at any time had or showing made concerning petitioner's ability to comply with the judgment. In addition, petitioner has filed in the instant proceeding his affidavit that neither at the time the judgment was rendered nor at any time since has he had the sum of $4,800.

This case is upon all fours with In re Cowden, 139 Cal. 244, 73 P. 156. In holding invalid the order of commitment there involved, the Supreme Court said: "There is no recital in the order that the petitioner has the ability to comply with the order of the court referred to therein; nor is there any finding to that effect; nor is the want of this recital in the order helped out by any affidavit, for no affidavit was made on or subsequent to March 13, 1903, the date of the order requiring the payment; or other showing of his ability so to do. It is not a contempt of court for a party to fail to pay a sum, however small, when it is not in his power so to do, and it does not help the case to recite in the order that he willfully refuses. That is not the equivalent of a recital or a showing that it is within his ability to comply with the order of court. Imprisonment for debt merely is not permitted; it is only allowed as a punishment for the commission of some crime or offense; and it is neither a crime nor offense to refuse to comply with an order of court when it is not in the power of the party to do so." 139 Cal. at pages 245–246, 73 P. at page 156. See also Ex parte Silvia, 123 Cal. 293, 55 P. 988; Van Hoosear v. Railroad Commission, 189 Cal. 228, 233, 207 P. 903; Bakeman v. Superior Court of Los Angeles County, 37 Cal.App. 785, 788, 174 P. 911; Merritt v. Superior Court of Los Angeles County, 93 Cal.App. 177–181, 269 P. 547; In re Mackay, 140 Cal.App. 400, 402, 35 P.2d 385. "Furthermore, the judgment must not only specify the act to be performed; it must also include a finding that such act is within the power of the contemner to perform." Ex parte Wells, 29 Cal.2d 200, 202, 173 P.2d 811, 812. See also Ex parte Moulton, 100 Cal.App.2d 559, 563, 224 P.2d 76. A statement that the contemner "has the present ability to pay" was deemed a mere conclusion of law, not a finding of fact, in Ex parte Cardella, 47 Cal.App.2d 329, 117 P.2d 908, 909. A finding of present ability to pay a "'substantial sum'" was declared a mere conclusion, "not a finding of the present ability of petitioner to pay $1200, or any other definite sum", in Ex parte Scroggin, 103 Cal.App.2d 281, 283, 229 P.2d 489, 491.

Since the order of commitment is void for failure to conform to the above stated requirements, other points urged by the petitioner need not be considered. Indeed, we have not been furnished a record adequate for the consideration of his other points, which involve the question whether the $4,800 judgment represents a debt that is enforcible by imprisonment in view of the provisions of section 15, of article I of the State Constitution.

The petitioner is discharged from custody. It is further ordered that the bail in the sum of $250 cash heretofore deposited with the clerk of this court be exonerated, and it is ordered returned to the petitioner.

PETERS, P. J., and BRAY, J., concur.

130 Cal.App.2d 685

Mary Etta CLARK, Plaintiff and Appellant,

v.

Nathan Henry CLARK, Defendant and Respondent.

Civ. 20613.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1955.

Divorce action brought by wife on grounds of extreme cruelty. The Superior Court of Los Angeles County, Clarence E. Johns, Judge pro tem, entered interlocutory decree of divorce and from the portion dividing community property plaintiff wife appealed. The Court of Appeal, McComb, J., held that where value of real estate which was part of community property was $7,500 and there were two trust deeds against the property, with resulting community interest of not quite $1,600, so that husband and wife each had interest worth about $800, award of $1,250 to wife, in her divorce action brought on ground of extreme cruelty, was in excess of her share of community interest and was not erroneous as being too small in amount.

Affirmed.

1. Divorce ⇐252

Where divorce is granted on ground of extreme cruelty, innocent party is entitled to more than one half of the community property.

2. Divorce ⇐249(1)

An award of money in lieu of specific interest in community property is proper in divorce action.

3. Divorce ⇐252

Where value of real estate which was part of community property was $7,500, and there were two trust deeds against the property resulting in community interest of not quite $1,600, so that husband and wife each had interest worth about $800, award of $1,250 to wife in her divorce action brought on ground of extreme cruelty was in excess of her share of community interest and was not erroneous as being too small in amount.

Porter & Ragland, Los Angeles, for appellant.

Gladys Towles Root and Joseph M. Rosen, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from the portion of an interlocutory decree of divorce dividing the community property between the parties.

Facts: Plaintiff was granted an interlocutory decree of divorce from defendant upon the ground of extreme cruelty. All the community property was divided between the parties by stipulation excepting the amount of plaintiff's interest in a piece of real property located at 807 East 103rd Street, Los Angeles. For her interest in this property plaintiff was awarded $1,250, payable by defendant to her at the rate of $50 per month. The property itself was awarded to defendant.

Question: Did the trial court err in not making a larger award to plaintiff for her interest in the community real property above mentioned?

[1] *No.* It is established in California that if a divorce is granted on the ground of extreme cruelty, the innocent party is entitled to more than one half of the community property. (Tipton v. Tipton, 209 Cal. 443, 444[1], 288 P. 65.)

[2] It is likewise settled that in a divorce action an award of money in lieu of a specific interest in community property is proper. (Bailey v. Bailey, 60 Cal.App.2d 291, 296[3], 140 P.2d 693; Johnston v. Johnston, 33 Cal.App.2d 90, 92, 91 P.2d 142; Marshall v. Marshall, 196 Cal. 761, 765[2], 239 P. 36.)

In the present case it was stipulated by the parties that defendant should have the real property located at 807 East 103rd Street, Los Angeles, and that the only issue for the court to determine was the amount of the money interest plaintiff should have in that property.

[3] There was evidence that the value of the property was $7,500. There were two trust deeds against the property totaling $5,902.25. The community interest of

the parties was thus $1,597.75, and one half of the community interest would be $798.87½. Therefore it is evident in awarding plaintiff $1,250 as her share of the community interest in the property the trial court awarded her a sum that was in excess of one half the value of the community property in accordance with the rule of law above stated.

Affirmed.

MOORE, P. J., and FOX, J., concur.



130 Cal.App.2d 780

Sallye Lee NELSON, Plaintiff and Appellant,

v.

DOUGLAS PEDLOW, Inc., Defendant and Respondent.

Civ. 20422.

District Court of Appeal, Second District, Division 1, California.

Feb. 15, 1955.

Action for personal injuries received when brakes allegedly failed in automobile, which plaintiff was driving, and which had been loaned plaintiff by defendant while plaintiff's automobile was in defendant's garage for repairs. The Superior Court, Los Angeles County, Allen W. Ashburn, J., entered judgment on verdict for defendant, and plaintiff appealed. The District Court of Appeal, Doran, J., held that evidence was not sufficient to warrant giving instruction on doctrine of res ipsa loquitur.

Judgment affirmed.

1. Continuance ⇐26(5)

In personal injury action arising from automobile accident, wherein police officer was not surprise witness, and plaintiff had ample time to secure subpoena duces tecum to refute testimony of such officer, refusal to grant continuance to obtain such subpoena did not constitute an abuse of trial court's discretion.

2. Trial ⇐68(3)

Matter of reopening case after argument was within trial court's discretion.

3. Negligence ⇐121(2)

To render doctrine of res ipsa loquitur applicable, it must be shown that instrumentality causing the injury was under control of defendant, and entry was of such nature that it ordinarily would not have occurred but for defendant's negligence.

4. Automobiles ⇐246(60)

In action for personal injuries received when brakes allegedly failed on automobile, which plaintiff was driving, and which had been loaned to plaintiff by defendant while plaintiff's automobile was in defendant's garage for repairs, evidence was not sufficient to warrant giving of instruction on doctrine of res ipsa loquitur.

5. Automobiles ⇐246(18)

In action for personal injuries received when brakes allegedly failed on automobile which defendant had loaned to plaintiff, refusal to instruct jury on basis of vehicle code provision prescribing brake requirements was not error in absence of showing that defendant had not complied with statute. Vehicle Code, § 670.

Anderson & Howard, John W. Howard, Arcadia, for appellant.

Stephen J. Grogan, Los Angeles, for respondent.

DORAN, Justice.

The action herein is one brought to recover for personal injuries alleged to have resulted from negligence of the defendant in supplying plaintiff with a loan automobile having defective brakes, while plaintiff's car was in defendant's garage for repairs. Trial before a jury resulted in a verdict and judgment in favor of the defendant.

From the Settled Narrative Statement it appears that the plaintiff testified, in substance, "that she had taken her car to the

Pedlow Garage to be repaired on the evening of the 18th day of November, 1951. Pedlow Garage loaned her a 1937 Chevrolet Sedan to use while her car was being repaired. She drove the car three or four miles to her home and left the car in the driveway; 'that the brakes worked all right on that trip'. On the 19th day of November, 1951, she drove the car to work, a distance of about two to three miles, in a misty rain, 'that she used the brakes on that trip and they worked all right'; that she parked the car while at work, in the street; 'that there was a light, misty rain most of the day and the streets were wet'. After work she drove the car to her employer's house where it remained until about 11:30 o'clock that evening; 'that the brakes worked all right on that trip'. At 11:30 o'clock she and her employer, Mrs. Kemnitz, left the house.

Plaintiff was following Mrs. Kemnitz's car; that plaintiff made a boulevard stop at Laurel and Saticoy and the brakes worked there; that it is about 4 miles from Saticoy to Victory Boulevard; that she used the brakes * * * and they worked all right; that there was a misty rain and the streets were wet. When approaching the intersection of Laurel Canyon and Victory Boulevard, she noted a red stop sign, removed her foot from the accelerator and commenced to slow down. She saw a car stopped at the red light in front of her and put her foot on the brake pedal when a half block from Victory and the car seemed to gain speed; that the brake pedal 'went all the way to the floor with no brake action whatsoever'; that she was not a car length, but 100 yards behind Mrs. Kemnitz's car when she applied the brakes; that she did say on her deposition that she was right behind Mrs. Kemnitz at the time and that she was not 3 car lengths from Victory Boulevard when she applied the brakes, but that she had given that distance upon her deposition without knowing the length of cars; also that she is not too good a judge of distances".

There was testimony by the Pedlows, father and son, that just previous to turning over the loan car to plaintiff, the brakes had been overhauled and were in good condition; that after the accident, the brakes were inspected and nothing found wrong, and that the car was still being driven without any further work being done on the brakes other than slight adjustment. Expert testimony was offered to the effect that Chevrolet brakes, if wet, "will not stop the car and the pedal will go wholly to the floor."

The appellant complains, first, that the trial court erred in refusing to allow a continuance on the last day of the trial, "in order to allow Plaintiff time to secure rebuttal evidence showing the falsity of the testimony of a surprise defense witness", and in refusing to reopen the case after argument, to permit plaintiff to introduce rebuttal evidence. It appears that after the defense had rested, plaintiff's attorney, in answer to the court's inquiry whether there was any rebuttal evidence, asked the court for a recess to obtain a subpoena duces tecum in order to refute the testimony of a police officer to the effect that the officer had seen a dark sedan of unknown make and model, and that a brother officer had put in a telephone call to some unknown person.

[1, 2] As noted in respondent's brief, plaintiff's attorney had had ample time to secure the subpoena; the officer was not a surprise witness but one whose testimony "was available to anyone who wanted to take the trouble to ascertain the names of the officers on patrol duty". Moreover, as admitted by plaintiff's counsel at the trial, "it is probably not a most material point since most of his testimony was stricken". There was no dispute about the fact that plaintiff's loan car remained all night at the scene of the accident. In any event, the matter of granting a continuance was within the trial court's discretion, and it does not appear that there was any abuse of discretion or that plaintiff has suffered any prejudice by reason of the court's action. The matter of reopening the case after argument, was likewise a discretionary matter, and no reversible error appears in connection therewith.

It is appellant's position that "The theory of Res Ipsa Loquitur was definitely supported by the evidence in this case and it was grave error for the lower court not to give this instruction No. 11", requested by plaintiff. The respondent's answer to this is that the doctrine does not apply under the facts here present, and that in any event the requested instruction did not contain a proper statement of the law.

Although it is true that, as said in Merry v. Knudsen Creamery Co., 94 Cal.App.2d 715, 721, 211 P.2d 905, 909, "In many cases it has been held that a collision between a moving automobile and a standing automobile, * * * calls for the application of the doctrine of *res ipsa loquitur*", it is obvious that such doctrine would not be applicable unless the case at hand met the well established requirements of that doctrine. The Merry case, cited by appellant, is not factually comparable with the present situation, and does not support appellant's contention.

[3] "To render the doctrine applicable", as said in Olson v. Whitthorne & Swan, 203 Cal. 206, 208, 263 P. 518, 519, 58 A.L.R. 129, " 'it must be shown that the instrumentality causing the injury was under the control of the defendant, and that the injury * * * must be of such a nature that it ordinarily would not have occurred but for the defendant's negligence.' 19 Cal. Jur. 708, 710. It does not apply 'where an unexplained accident might have been caused by plaintiff's negligence, or been due to one of several causes, for some of which the defendant is not responsible' ".

In the instant case, as pointed out in respondent's brief, "the instrumentality which caused the injury, i. e., the automobile, was not under the exclusive control of the defendants. The plaintiff had had exclusive control of the car for more than twenty-four hours up to and including the moment of injury. Plaintiff failed to prove that the brakes on the car were defective or that any failure of the brakes to function was the result of any negligence of the defendant. * * * It could well be inferred by the judge that the condition of the brakes had changed in that they had become wet or else the rain had made it impossible to stop the car".

[4] The *res ipsa loquitur* doctrine is not intended to open the door for mere speculation as to the cause of an injury. Rather, it furnishes a formula which in a proper case, may justifiably lead to a natural inference of negligence on the part of one who is in actual control of the particular situation. Under these circumstances the trial court's refusal to instruct on this point cannot be deemed reversible error. Moreover, the instruction tendered by plaintiff appears to assume that there was a failure of the brakes which was the cause of the accident, and then states that "In such a case an inference arises that the proximate cause of the failure of the brakes was some negligent conduct on the part of Defendant".

[5] Likewise, there was no prejudicial error in the trial court's refusal to give plaintiff's requested instruction quoting Section 670 of the Vehicle Code which prescribes brake requirements, and makes violation of the statute presumptive evidence of negligence. There was no showing that the defendant had been guilty of noncompliance with the statute by permitting the loan car to be operated upon a public highway in a defective or dangerous condition.

The record herein indicates that the case was submitted to the jury on all issues legitimately involved, and that the appellant has suffered no prejudice.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

130 Cal.App.2d 717

Janet SABA, a minor, by her Guardian ad litem, George Saba, Plaintiff and Appellant,

v.

Harry E. JACOBS, Mary Jacobs et al., Defendants and Respondents.

Civ. 20486.

District Court of Appeal, Second District, Division 2, California.

Feb. 14, 1955.

Hearing Denied April 13, 1955.

Action by child by her guardian ad litem for personal injuries suffered in fall from latter on defendants' property. The Superior Court, Los Angeles County, John J. Ford, J., gave judgment for defendants. Child appealed. The District Court of Appeal, McComb, J., held that where six year old child fell from ladder placed against defendants' garage and suffered broken leg, where there was no allegation that defendants wantonly or wilfully injured the child, child could not recover.

Judgment affirmed.

1. Negligence ⇐32(1)

The owner of premises assumes no duty to one who is on his premises by permission only and is a mere licensee, except that while on the premises no wanton or willful injury shall be inflicted on him by the owner of the premises or his agent.

2. Negligence ⇐32(1)

A mere social visitor conferring no benefit on his invitor other than an intangible social benefit is not entitled to a duty of care higher than that owing to a gratuitous licensee.

3. Negligence ⇐112

In action by child for personal injuries suffered in fall from ladder on defendants' property, where child who was on premises as a licensee did not allege that defendants wantonly or willfully injured her, she did not state a cause of action and could not recover.

George D. Sphier, Los Angeles, for appellant.

Thomas P. Menzies and James O. White, Jr., Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the sustaining of their demurrer without leave to amend, in an action to recover damages for personal injury, plaintiff appeals.

Facts: In an amended complaint plaintiff alleged as follows:

"(1) That on August 12, 1952, plaintiff, a minor six (6) years of age, was on the property owned by the defendants, and upon which the defendants resided, at the invitation of the defendants and with their express permission, knowledge and consent.

"(2) That for some time previous to August 12, 1952 the defendants placed and maintained a ladder which extended from the back yard of the premises up to and against the roof of the garage on said premises, within easy reach of the minor plaintiff.

"(3) That at all times the defendants were aware that minor plaintiff was playing around and on said ladder and that the defendants failed to warn minor plaintiff of the danger and failed to instruct minor plaintiff to cease playing around and on said ladder and further failed to remove said ladder from its position.

"(4) That on said August 12, 1952 minor plaintiff, while playing and climbing on said ladder, jumped or fell therefrom, suffering a broken leg.

"(5) That the injuries were directly and proximately caused by the carelessness and negligence of the defendants as aforesaid."

The demurrer was sustained by the trial court without leave to amend.

Question: *Did the complaint as amended allege a cause of action?*

No. The following rules are here applicable:

[1] **1.** The owner of premises assumes no duty to one who is on his premises by permission only, and is a mere licensee, except that while on the premises no wanton or wilful injury shall be inflicted on him

by the owner of the premises or his agent. (Fisher v. General Petroleum Corp., 123 Cal.App.2d 770, 777[5], 267 P.2d 841, hearing denied by the Supreme Court; Ward v. Oakley Co., 125 Cal.App.2d 840, 844[1], 271 P.2d 536; Palmquist v. Mercer, 43 Cal. 2d 92, 272 P.2d 26.)

[2] 2. A mere social visitor conferring no benefit on his invitor other than an intangible social benefit is not entitled to a duty of care higher than that owing to a gratuitous licensee. (Cf. Edwards v. Hollywood Canteen, 27 Cal.2d 802, 809, 167 P.2d 729.)

[3] Applying the foregoing rules to the facts of the instant case it is clear that plaintiff has failed to allege in her pleading that defendants breached any duty they owed to her. Plaintiff was a mere social visitor, conferring no benefit upon defendants and there is a total absence of any allegation that defendants or either of them wantonly or wilfully injured the minor.

Plaintiff concedes in her brief that the doctrine of attractive nuisance is inapplicable. Therefore we need not discuss such subject.

The rule stated in section 339 of the Restatement of Torts has no application to the facts of this case. The rule announced in section 342, Volume 2, Restatement of Torts (1934), page 932, is not, so far as it pertains to licensees, the law in California. In any event in the note accompanying the Restatement of the Law, section 339(b), page 922, it is said:

"It does not extend to those conditions the existence of which is obvious even to children and the risk of which is fully realized by them. This limitation of the possessor's liability to conditions dangerous to children, because of their inability to appreciate their surroundings or to realize the risk involved therein, frees the possessor of land from the danger of liability to which he would otherwise be subjected by maintaining on the land the normal, necessary and usual implements which are essential to its normal use but which reckless children can use to their harm in a spirit of bravado or to gratify some other childish desire and with as full a perception of the risks which they are running as though they were adults."

The foregoing statement clearly shows that section 339 of the Restatement of the Law of Torts was not intended to apply to facts such as are alleged in this case. It has likewise been held that a high ladder is not an uncommon danger or of such nature that reasonably prudent men would not keep one unguarded upon premises frequented by children. (See Neal v. Home Building, Inc., Ind., 111 N.E.2d 280.)

Brizzolari v. Market Street Ry. Co., 7 Cal.App.2d 246, 46 P.2d 783; Cambou v. Marty, 98 Cal.App. 598, 277 P. 365; Crane v. Smith, 23 Cal.2d 288, 144 P.2d 356; Roberts v. Del Monte Properties Co., 111 Cal.App.2d 69, 243 P.2d 914 and Shannon v. Central-Gaither U. School Dist., 133 Cal. App. 124, 23 P.2d 769, relied on by plaintiffs, are all factually distinguishable from the present case.

Brizzolari v. Market Street Ry. Co., supra, was an action by a passenger for hire against a carrier of passengers. It is unnecessary to point out that the quantum of care demanded of the carrier in such a case is different from that owed to a licensee by a landowner.

Cambou v. Marty, supra, involved an affirmative act of negligence while driving and backing an automobile, and does not deal with the duty owed by a landowner.

Crane v. Smith, supra, and Roberts v. Del Monte Properties Co., supra, involved the duty owed to business visitors and not to licensees, and therefore are not here applicable.

Shannon v. Central-Gaither U. School Dist., supra, arose from a traffic accident and did not set forth any duty owed by landowners to social guests, either minors or adults.

Affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

130 Cal.App.2d 790

CROFTS & ANDERSON, a corporation, Plaintiff and Appellant,

v.

H. L. PETERSEN CONSTRUCTION CO., etc., et al., Defendants,

Catherine M. Laguens, Third Party Claimant and Respondent.

Civ. 16190.

District Court of Appeal, First District, Division 1, California.

Feb. 16, 1955.

Proceeding on petition to determine title to three horses, levied on by judgment creditors, but claimed to be owned by judgment debtor's mother-in-law. The Superior Court, San Mateo County, Murray Draper, J., held that title to horses was in mother-in-law. Judgment creditors appealed. The District Court of Appeal, Peters, P. J., held that where judgment debtor kept horses in his possession at all times after alleged sale, used them, and made no charge for stabling them, and mother-in-law did not change registration of horses with horse association to her name, sale was fraudulent as to judgment creditors and void, although a bill of sale was executed and filed.

Judgment reversed.

1. Appeal and Error ⇐773(1)

Where no brief was filed in respondent's behalf, District Court of Appeal was under no duty to look up law, if any, in support of judgment, nor required to search transcript for evidence upon which judgment may have been predicated, and could accept as true statement of facts in appellant's brief. Rules on Appeal, rule 17(b).

2. Fraudulent Conveyances ⇐138

Where judgment debtor kept horses in his possession at all times after sale, used them, and made no charge for stabling, and purchaser did not transfer registration with horse owners' association to her name, sale was fraudulent as to judgment creditors and void, although a bill of sale was executed and filed. West's Ann.Civ.Code, § 3440.

3. Chattel Mortgages ⇐34

Where judgment debtor gave his mother-in-law a bill of sale to three horses, and she in turn cancelled his note on which was owing more than $8,000, such bill of sale was not a chattel mortgage as there was no compliance with chattel mortgage statute. West's Ann.Civ.Code, § 2956.

4. Chattel Mortgages ⇐43

Substantial compliance with statute providing form of chattel mortgage is sufficient. West's Ann.Civ.Code, § 2956.

Edward N. Jackson, San Francisco, Jack G. Levine, San Francisco, of counsel, for appellant.

No appearance on behalf of respondent.

PETERS, Presiding Justice.

In June of 1953, Crofts & Anderson secured a judgment by stipulation against C. R. Petersen, and his firm, the H. L. Petersen Construction Co., in the amount of $2,816.41, plus costs. Subsequently, the sheriff, pursuant to a writ of execution, levied on three Arabian horses then in the possession of Petersen. Catherine Laguens, mother-in-law of Petersen, filed a third party claim to the horses, claiming to have purchased them from Petersen for $3,000 on December 5, 1952. At the termination of the hearing of the petition to determine title the trial court concluded that Catherine Laguens "was and is the owner and entitled to the possession" of the three horses, and entered its judgment accordingly. From that judgment Crofts & Anderson appeal.

[1] Respondent has refused to pay the costs and fees incident to defending her judgment, with the result that no brief has been filed in her behalf. Under such circumstances, this court is under no duty to look up the law, if any, in support of the judgment, nor are we required to search the transcript for evidence upon which the judgment may have been predicated. We are entitled to accept as true the statement of facts in the appellant's brief. Rule 17 (b), Rules on Appeal; see discussion and collection of cases 4 Cal.Jur.2d p. 334, § 496.

Respondent owns and operates a realty company that also makes loans. On January 24, 1949, she loaned her son-in-law, Petersen, $10,000, evidenced by a note signed by Petersen and his wife calling for monthly payments of $100, and five per cent interest. The last payment made on this note was in October of 1952, at which time the note was one year delinquent. Since that date the books of respondent show $8,084.12 still due. On December 5, 1952 Petersen and his wife executed and delivered to respondent a "Bill of Sale" to many items of personal property, including the three horses here involved. The bill of sale recites that, in consideration of the cancellation of the $10,000 note, "the receipt of which cancelled note is hereby acknowledged," the Petersens sell the described personal property to respondent. This bill of sale was recorded in the county clerk's office.

Admittedly before, at the time, and at all times after the bill of sale was executed, the horses remained in the possession of Petersen, and were in his possession when the sheriff seized them pursuant to the writ of execution. An employee of the respondent testified that the bill of sale was not given in consideration of the cancellation of the note, as the bill of sale recites, but was taken as security for repayment of the obligation. Respondent stated that she would reconvey to Petersen if the note, plus interest, were paid, but that the bill of sale was not taken as security. Petersen testified that by the bill of sale he intended to secure a cancellation of the balance owed on the note, although he believed that if he ever raised the money to pay the note his mother-in-law would reconvey the property to him. He intended to transfer title by the bill of sale. He admitted that he had not only stabled the horses since the date of the bill of sale, but had used them, and that he had not charged respondent anything for their maintenance and care.

[2] Under these circumstances the trial court held that respondent should prevail over the attaching creditor. Treated as a sale, and that is how the trial court treated the transaction, because it found respondent to be the "owner" of the horses, it is obvious that as to the appellant the transaction was void under section 3440 of the Civil Code. That section provides, in part: "Every transfer of personal property * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession * * *." See also § 1746, Civ.Code; Dean v. Walkenhorst, 64 Cal. 78, 28 P. 60; Southern Cal. Collection Co. of Los Angeles v. Napkie, 106 Cal.App.2d 565, 235 P.2d 434; Hendricksen v. State Subsidiary, Ltd., 3 Cal.2d 459, 45 P.2d 190. Since there is no dispute that Petersen continuously possessed the horses and used them before and after the claimed sale to respondent, and that respondent was never in possession of them, under the above quoted section, as interpreted in the cases cited, the sale was fraudulent as to appellant. As to appellant, Petersen still owns the horses. The fact that a bill of sale was executed in no way changes the rule of these cases. Edgerton v. Scammon, 119 Cal.App. 273, 6 P.2d 295. There is no evidence of a constructive possession by respondent. She did not change the registration of these horses with the Arabian Horse Association into her name, nor is there any evidence that she paid the personal property tax imposed on the horses.

[3, 4] Nor can the third party claim be upheld on the ground that the bill of sale was a valid chattel mortgage. Not only would this be contrary to the conclusion of the trial court that respondent was the "owner" of the horses, but section 2956 of the Civil Code provides the form of a chattel mortgage, and requires that it be so titled on its face. While a strict literal compliance with this section is not required, Pacific States Savings & Loan Co. v. Strobeck, 139 Cal.App. 427, 33 P.2d 1063, and substantial compliance is sufficient, here there was no compliance at all. It does not purport to be a security document, but

a bill of sale, and, according to Petersen and respondent herself, was not intended to be a security document. The instrument was not recorded as a chattel mortgage but as a bill of sale. Under these circumstances, as a matter of law, the transaction was void as to appellant.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.



130 Cal.App.2d 787

Charles I. CUNNINGHAM, an Individual doing business under the firm name and style of Charles I. Cunningham Co., Plaintiff and Respondent,

v.

Claude WEAVER and Lorena Weaver, his wife, Defendants and Appellants.

Civ. 8508.

District Court of Appeal, Third District, California.

Feb. 15, 1955.

Action by contractor to foreclose mechanics' lien. The Superior Court, Tuolumne County, J. A. Smith, J., gave judgment for plaintiff. Defendants appealed. The District Court of Appeal, Peek, J., held that evidence sustained findings that parties agreed upon cost plus contract and that contractor was entitled to recover for equipment rentals, taxes, insurance, overhead fee of 15 per cent and contractor's fee of 10 per cent.

Affirmed.

1. Appeal and Error ⇐1011(1)

Appellate court is without power to interfere with the findings and judgment of trial court based upon substantial though conflicting evidence.

2. Mechanics' Liens ⇐281(3)

In mechanics' lien action by contractor for balance due, evidence was sufficient to support findings that parties agreed upon cost plus contract and that contractor was entitled to equipment rentals, taxes, insurance, overhead fee of 15 per cent and contractor's fee of 10 per cent.

F. Edmund O'Connell, Sonora, for appellant.

Sutter, Elledge & Carter, Modesto, for respondent.

PEEK, Justice.

This is an appeal by defendants from a money judgment and decree of foreclosure of a mechanic's lien.

Plaintiff's complaint alleged that the parties entered into an oral contract by which plaintiff was to furnish certain materials, labor and supervision in the construction of a building for defendants, for which they agreed to pay the reasonable cost; that defendants had paid only a portion of said cost, and that a balance was still due and unpaid. Defendants' answer denied the material allegations of the complaint, and affirmatively alleged that plaintiff verbally agreed to complete the construction work for an agreed sum but admitted that a balance was still owing plaintiff.

Defendants now contend that the evidence does not support the finding that they agreed to pay plaintiff the reasonable value of the work, labor and materials furnished rather than an agreed sum, and that the court erred in finding that plaintiff was entitled to recover for certain items set forth in the bill of particulars; to wit, equipment rental, various taxes and insurance, an overhead fee of 15 per cent and a contractor's fee of 10 per cent.

The record shows without contradiction that all negotiations and the resulting contract were oral, but the evidence as to the nature of the contract is in direct conflict. According to plaintiff's testimony, the parties agreed upon a cost-plus contract which specifically included materials costs, costs of transportation, office expense, equipment rentals, an overhead fee of 15 per cent and a contractor's fee of 10 per cent. He further testified that in order for a contractor

to make a firm bid, it is necessary for him to have complete plans and specifications from which estimates can be taken. Here, however, he was working from floor plans only, and hence a cost-plus arrangement was the only one possible. In support of his contention that this was understood by defendants, plaintiff introduced in evidence a letter addressed to the National Production Authority by defendants concerning their application for certain scarce materials. In that letter defendants specifically stated that plaintiff was building the structure for them "on a cost plus basis." Subsequent to defendants' going into possession, a disagreement arose between the parties concerning the balance due. In an apparent endeavor to settle their difficulties, plaintiff agreed to accept a lump sum in full settlement of all amounts he contended were due if defendants, within a specified time, could raise the money. Defendants made no objection to the amount quoted by plaintiff and agreed to endeavor to meet plaintiff's request; in fact they did make an unsuccessful attempt to raise the amount. Following defendants' failure to pay the sum requested, plaintiff filed the customary notices and instituted the present proceeding. Vouchers showing the cost of construction were not totaled by plaintiff until after suit was filed. A bill of particulars, filed at defendants' request, showed a balance then due in the sum of $24,251.80. Such statement reflects materials furnished by defendants and paid for by them, as well as payments they made to some of the subcontractors. Plaintiff's testimony that the standard procedure in a cost-plus contract was to charge for the items previously mentioned was corroborated by a general contractor who operated in that area. This witness further testified that the costs of the work and materials furnished by plaintiff were reasonable as were his charges for equipment rental and overhead expense. Defendants offered no evidence to the contrary. They chose to rely solely upon their more or less categorical denials of plaintiff's testimony and upon testimony given by Mrs. Weaver and an office employee concerning the overall cost of the job in accordance with defendants' main contention.

[1, 2] Although defendants, in discussing their first contention that the evidence was insufficient, acknowledge to a degree the apparent conflict therein, nevertheless they predicate their argument primarily upon the testimony introduced by themselves and discuss at length the weight to be given to the same. In view of the fundamental rule of review so often noted but so infrequently followed, it would seem unnecessary to more than note that this court is without power to interfere with the findings and judgment of the trial court based upon substantial, though conflicting evidence. It necessarily follows, therefore, that defendants' first contention is without merit.

Defendants' next contention, which is likewise without merit, is an attack upon the allowance of certain items as costs, and the mechanics used by the court in arriving at its final award. Here again it should be noted that plaintiff testified he had informed defendants at the outset that there would be a charge for all items previously mentioned. Furthermore, the record shows without conflict that these charges were reasonable and customary in such contracts. The award finally made by the court shows that certain of these items were reduced, others refused and others approved in full. The final determination of the trial court is not only sustained by the evidence as to what the parties agreed upon, but also by custom and usage as well as case law. See Citizens State Bank of Long Beach v. Gentry, 20 Cal.App.2d 415, 67 P.2d 364 [operating expenses]; Boat & Barge Corp. v. Beverly Finance Co., 71 Cal.App.2d 800, at page 811, 163 P.2d 913 [social security compensation, etc.] and Advanced Auto Body Works v. Asbury Transp. Co., 10 Cal.App. 2d 619, 52 P.2d 958 [overhead charges]. See also 27 A.L.R. 48.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

130 Cal.App.2d 800

Howard HALL, Plaintiff and Respondent,

v.

Al BERKELL and Bill Davis, Defendants and Appellants.

Civ. 4649.

District Court of Appeal, Fourth District, California.

Feb. 16, 1955.

Action against manager of bar and bartender for personal injuries suffered when bartender allegedly kicked plaintiff. The Superior Court, Kern County, W. L. Bradshaw, J., gave judgment for plaintiff against both defendants. Manager and bartender appealed. The District Court of Appeal, Griffin, J., held that where complaint contained no allegations of oppression, fraud or malice, and did not pray for exemplary damages, and it appeared that jury attempted to include in general award damages by way of punishment, court's instruction that in addition to actual damages jury could award exemplary damages was prejudicial.

Judgment reversed.

1. Appeal and Error ⇐1066

In action against manager of bar and bartender for personal injuries allegedly suffered when bartender kicked plaintiff, where complaint contained no allegations of malice, and did not pray for exemplary damages, and it appeared that jury had included exemplary damages in general damage award, instruction that in addition to actual damages jury could award exemplary damages was prejudicial. West's Ann. Civ.Code, § 3294.

2. Damages ⇐87(1)

"Compensatory damages" and "punitive damages" differ in nature and purpose, one is given as compensation and the other purely as punishment and by way of example. West's Ann.Civ.Code, § 3294.

See publication Words and Phrases, for other judicial constructions and definitions of "Compensatory Damages" and "Punitive Damages".

3. Pleading ⇐72

A demand for compensatory damages is not a demand legally or otherwise for punitive damages or for both. West's Ann.Civ.Code, § 3294.

4. Judgment ⇐117

Court is without authority to grant relief of a kind essentially different from that which a defaulting defendant would reasonably anticipate from a reading of the complaint.

Lawrence L. Light, Los Angeles, for appellants.

Dorris, Fleharty, Phillips & Underhill, by Thomas H. Underhill, Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent brought this action against defendants and appellants for damages alleged to have been caused by defendants kicking and striking plaintiff about the face and head in the Silver Dollar Cafe and Bar, at Mojave. The prayer of the complaint was for special damages in the sum of $1,000 and general damages in the sum of $10,000. A jury trial resulted in a general verdict for $5,000 against both defendants. The questions presented are the sufficiency of the evidence to support the verdict, and claimed error of the court in refusing and giving certain instructions.

Upon entering the cafe there was a bar to one's right or south side of the room and a shuffle board was across from it on the north side. The cafe was in the rear. Plaintiff had gone to Mojave to assist with livestock and help celebrate the "Gold Rush Days", an annual event. He did considerable drinking at the several bars during this time. On October 17, 1949, he entered this cafe about 7 p. m. and remained there for some time playing shuffle board and having several straight whiskey drinks served him. Defendant Berkell and his brother owned stock in the corporation which was the owner of the cafe and bar. Defendant Berkell owned 30 per cent of it and was managing the cafe that evening.

Defendant Davis was employed as a bartender.

The constable was seated on a stool at the bar with others, and according to defendants' testimony, defendants refused to serve plaintiff more liquor because of his intoxication. Apparently, plaintiff purchased a drink for the constable and later took it from the constable and drank it himself. Plaintiff claims he paid for that drink. Apparently Berkell saw what he was doing, went around by the plaintiff, and according to Berkell's testimony, put his arm around him and begged plaintiff to leave the premises because of his condition. He testified that plaintiff, unexpectedly, "backhanded" him and knocked him across the room against the shuffle board; that plaintiff grabbed a beer bottle from the bar and started to strike at Davis, the bartender, who was climbing on the bar from inside; that Davis struck the plaintiff near the jaw by kicking him with his shoe, and plaintiff fell to the concrete floor and became unconscious; that an ambulance was called and plaintiff was taken to a local hospital.

Plaintiff's version is a little different. He claims that Berkell came around the bar and grabbed him by the shoulder, spun him around and chastised him for drinking customer's drinks and said: "Don't be drinking the customers' drinks * * * We don't allow mooching in here"; that he started to jerk plaintiff away from the bar and had his hand folded as if he was going to strike plaintiff with it; that he (plaintiff) "backhanded" Berkell and he (plaintiff) turned to the bar, Davis jumped upon it and kicked the side of plaintiff's head and he fell backwards on the cement floor, striking the back of his head. There was a conflict in the evidence as to whether plaintiff had a beer bottle in his hand when the bartender kicked him. There is considerable corroboration of Berkell's testimony.

Plaintiff was examined at the hospital by a doctor who found no fracture of the head but he did not "rule out" the possibility of such a fracture. He indicated that there was evidence of a certain amount of concussion but that it was difficult to determine whether plaintiff's actions were due to liquor or concussion. After 30 minutes of examination plaintiff insisted on being taken to his sister's car where he spent the rest of the night. He complained of severe headaches and severe bleeding of the nose and mouth. In the morning he went into a friend's home and remained there that day. About dark, he went to another bar and cafe where he had more drinks and met a Mrs. Brauch, who took him to her home. On their arrival there Mrs. Brauch's husband objected to plaintiff's presence and started an argument with his wife. Plaintiff interfered and "back handed" the husband, who had been drinking considerably, and knocked him to the ground. A few days later plaintiff went to the county hospital in Bakersfield where he remained about six days and was then discharged. He continued to complain of his headaches and was taken to the Veterans' hospital in Van Nuys. An operation was performed on his head and he was relieved of the pressure. After some time he gained his former health.

It was stipulated at the trial that defendant Davis was then in the armed services in Washington, D. C. and was not available as a witness. A continuance was sought on the day of trial, May 26th, 1952, for the purpose of obtaining his testimony, which motion was denied. His answer was filed on January 11, 1950, and apparently no error is claimed in the briefs on appeal pertaining to the action of the trial court in denying the motion.

The first issue raised is the claim that there was no agency or relationship of master and servant established as between defendant Berkell and defendant Davis; that since plaintiff's complaint alleged that Berkell was the owner and operator of the saloon and Davis was the agent, servant and employee of defendant Berkell, and since defendants denied these allegations, the burden was upon plaintiff to prove them; that since the case was tried upon this theory, and since the evidence was uncontradicted that Davis was an employee of the corporation and not of Berkell, individually, plaintiff may not recover against Berkell, individually, citing such

cases as Billig v. Southern Pacific Company, 189 Cal. 477, 209 P. 241; Day v. Western Loan & Building Co., 42 Cal.App. 2d 226, 108 P.2d 702; and 16 Cal.Jur. p. 1110, sec. 67.

Plaintiff now contends on appeal that Berkell was the principal instigator of the vicious assault that was made on him by defendant Davis and that Berkell aided, abetted, and participated in it and that all persons participating in an assault and battery are jointly and severally liable for the entire damage sustained without regard to the degree of culpability or extent of their participation in the attack, citing such cases as More v. Finger, 128 Cal. 313, 319, 60 P. 933; Loeb v. Kimmerle, 215 Cal. 143, 150, 9 P.2d 199; 6 C.J.S., Assault and Battery, § 27, p. 831; Nevin v. Gary, 12 Cal. App. 1, 106 P. 422, and Revert v. Hesse, 184 Cal. 295, 193 P. 943.

In Loeb v. Kimmerle, supra, it was held that where the jury might reasonably believe from the evidence that the parties united or co-operated in doing a wrong, where one defendant was the mental participant and the other defendant the physical participant, and they were acting in concert and each knew the intent and purpose of the other, they may be jointly liable. A close question arises from the evidence presented whether plaintiff has brought defendant Berkell within this rule. Since the judgment must be reversed on other grounds, we will not make a determination of this question.

Although not directly argued in the briefs, the general question of erroneous instructions of law given by the trial court was raised on the motion for new trial, and is indirectly raised on appeal. It appears that two instructions on the question of exemplary or punitive damages were given. An examination of the pleadings clearly shows that plaintiff, in his complaint, did not allege facts showing that he was seeking or was entitled to exemplary damages. There is no prayer for such damages. The complaint contains no allegations of oppression, fraud, or malice on the part of defendants. Section 3294, Civ.Code. The complaint merely states that defendant Davis was the bartender and as such was the agent, servant, and/or employee of the defendant Berkell; that about October 17, 1949, defendants suddenly, without warning, struck and kicked the plaintiff about the head and face and did seriously beat, wound and injure him with their hands and feet; that as a direct and proximate result of said beating plaintiff sustained severe injuries consisting of a fractured skull, etc. "all of which caused plaintiff severe pain and suffering, to his damage in the sum of" $10,000; that as a direct and proximate result of the injuries sustained by plaintiff, as aforesaid, he was obliged to incur doctor bills, etc. in the sum of $1,000. The total prayer is for the sum of $11,000.

When defendants filed their joint answer, plaintiff's claim of exemplary damages was not indicated. It is problematical upon what theory the case was actually tried, but there is nothing in the evidence or pleadings that indicates that plaintiff was making any such claim. So far as the record is concerned, the first indication of such a claim was when plaintiff offered and the court gave an instruction to the jury to the effect that "in addition to any actual damages * * * you may award exemplary damages * * * in case you should find that the wrongful acts, if any, by the defendant causing such actual damages were committed in wanton, willful, or reckless manner, * * * were from any bad motive" etc. or when it is shown that the attack upon plaintiff was "wanton or malicious" and "without any provocation"; and that in fixing such damages the jury "may consider the pecuniary means of the defendants".

A motion for new trial on the grounds of misdirection of the jury as to the law and on the ground of insufficiency of the evidence was denied.

[1-4] It appears to us, from the evidence produced and from the instructions, as given, that the jury did attempt to include in the general award, damages by way of punishment or at least it was as likely as not that punitive damages were awarded. The giving of such unauthorized

instructions was erroneous. The same question was presented in Lorenz v. Hunt, 89 Cal.App. 6, 264 P. 336. There, plaintiff brought an action for general damages as a result of an assault and battery and did not plead nor pray for exemplary damages. The court found plaintiff was entitled to $1,500 general damages and $1000 exemplary damages. On appeal from the judgment the appellate court said, 89 Cal.App. at page 15, 264 P. at page 340:

"The complaint contains no allegation of oppression, fraud, or malice on the part of defendant nor any demand for exemplary damages. There is no basis, therefore, for the award of punitive damages. 8 Cal.Jur. 894. It is true that there is sufficient evidence to show malice, and the court found that the defendant's assault upon the plaintiff and her arrest by him were malicious and oppressive, but it cannot be held that the case was tried upon the theory that the question of punitive damages was in issue, because the evidence tending to show malice and oppression was admissible in support of the allegation of actual damages. 'It is frequently the case that evidence which is admissible to establish one issue may tend to establish another issue than that for which it is offered, and it is a rule that evidence so introduced is available to establish any of the issues in the case. This rule is, however, limited to the issues which are to be tried. If the other issue that the evidence may tend to establish is not before the court the evidence must be limited to the actual issue. The fact of its introduction cannot be used to establish an issue that the parties have not made in their pleadings. The court would not be authorized to consider it as establishing an issue that was not before it for trial. Even a finding upon such evidence would be disregarded in determining the correctness of the judgment.' "

To the same effect is O'Donnell v. Excelsior Amusement Co., 110 Cal.App. 685, 294 P. 737, 295 P. 86; Belm v. Patrick, 109 Cal.App. 599, 293 P. 847, and Gudarov v. Hadjieff, 38 Cal.2d 412, 416–417, 240 P.2d 621, 623, where it is said:

" 'The basic differences between compensatory and punitive damages refute the contention that defendant was given notice that punitive damages were sought by the complaint. The two differ in nature and purpose. One is given as compensation; the other purely as punishment and by way of example. (Civ.Code § 3294.) A demand or prayer for one is not a demand legally, or otherwise, for the other, or for both. The court is without authority to grant relief of a kind essentially different from that which a defaulting defendant would reasonably anticipate from a reading of the complaint. Plaintiff contends correctly that the term "damages" embraces both compensatory and punitive damages but this argument does not reach the problem. The allegation of the complaint which immediately precedes the prayer for relief states that plaintiff has been damaged in the sum of $100.000. This can mean only compensatory damages. We think a skilled or an unskilled reader would understand the prayer for compensation in this amount to be a demand for compensatory relief and nothing more.

" 'The fact that the damages awarded were less than those claimed is not an answer to defendant's contention that plaintiff sought only compensatory damages and was awarded in addition to that relief damages by way of punishment.' "

See also Avakian v. Noble, 121 Cal. 216, 53 P. 559; Lamb v. Harbaugh, 105 Cal. 680, 39 P. 56; Foley v. Martin, 142 Cal. 256, 264, 71 P. 165, 75 P. 842; 8 Cal.Jur. 892, sec. 129.

A new trial should be had under proper pleadings with the issues clarified, and under proper instructions.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

130 Cal.App.2d 656

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joe ROCHA, Defendant and Appellant.

Cr. 5258.

District Court of Appeal, Second District, Division 2, California.

Feb. 10, 1955.

Prosecution for grand theft. From adverse judgment of the Superior Court of Los Angeles County, Charles Fricke, J., and from order denying motion for new trial, the defendant appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to support implied finding that defendant, who sold pasturage rights after notice of termination of defendant's lease, was guilty of false representations and that such representations were made with intent to defraud.

Judgment and order affirmed.

1. False Pretenses ⇐4

The elements of crime of grand theft on theory of obtaining money by false pretenses are an intent to defraud, an actual fraud committed, use of false pretenses to perpetrate the fraud, and reliance on fraudulent representation in parting with money or other property. Pen.Code, §§ 487, subd. 1, 1237, subd. 1.

2. False Pretenses ⇐7(1)

Where defendant represented that he was in a position to sell pasture rights after he had received notice terminating lease for nonpayment of rent, and upon receipt of sufficient money from sale of pasture rights, defendant neither paid nor tendered delinquent rent nor kept promises to repay purchaser of pasture rights, inference that defendant had no intention of carrying out agreement for sale of pasture rights was justified and such false representations constituted actionable fraud. Pen.Code, §§ 487, subd. 1, 1237, subd. 1.

3. False Pretenses ⇐51

In prosecution for grand theft on theory of obtaining money by false pretenses, whether defendant's promise was dishonestly made was a question of fact to be determined from all the evidence. Pen.Code, §§ 487, subd. 1, 1237, subd. 1.

4. False Pretenses ⇐49(2, 4)

In prosecution for grand theft, evidence was sufficient to support implied finding that defendant, who sold pasturage rights after notice of termination of defendant's lease, was guilty of false representations and that such representations were made with intent to defraud. Pen. Code, §§ 487, subd. 1, 1237, subd. 1.

5. False Pretenses ⇐49(1)

In prosecution for false pretenses by defendant who sold pasturage rights for one year on ranch leased by defendant for three years, testimony of purchaser of pasturage rights was sufficiently corroborated by circumstances which included default in monthly rental payments by defendant on his lease and notice of termination of that lease before sale of pasturage rights and failure of defendant to apply any money received from sale of pasturage rights on delinquent rent. Pen.Code, §§ 487, subd. 1, 1110, 1237, subd. 1.

6. Criminal Law ⇐1119(1)

Claim by defendant that he had been denied due process because of remark made by trial judge during final argument would not be considered by reviewing court when remark allegedly made by court did not appear in the record.

7. Criminal Law ⇐1177

In prosecution for grand theft, failure of court to inquire as to whether there was any legal cause why judgment should not be pronounced was not prejudicial error when no fact was suggested which would have in any way affected disposition of case had inquiry been made, and court's attention was not drawn to the oversight. Pen.Code, § 1200.

8. Criminal Law ⇐1042

Claim that trial court erred in failing to inquire as to whether there was any legal cause why judgment should not be pronounced cannot be urged for first time on appeal. Pen.Code, § 1200.

Levy, Bernard & Jaffe, and Samuel R. Tannenbaum, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted of grand theft. Penal Code, § 487, subd. 1. Although proceedings were suspended and probation granted, he appeals from the judgment[1] and the order denying his motion for a new trial.

On June 1, 1952, George E. Atkinson, Jr., leased a 560 acre ranch which he and his wife owned in Tulare County to the defendant for a term of three years. The total rental for that period was $54,000. The lease provided for an initial payment of $3,000 and $1,500 a month, plus an additional $3,000 on or before January 1, 1953, or when the cotton crop was sold, whichever occurred first. The down payment was made on the date the lease was executed. The monthly rental was paid from June 1st through November, 1952. A payment of $4,500 was also made about the first of December. This covered the rent that was due for that month and the additional $3,000 called for by the terms of the lease, which was to be paid on January 1st or, when the cotton crop was sold, whichever occurred first. Mr. Atkinson received no rental for January, 1953, or for any of the following months. On January 9, 1953, Mr. Atkinson demanded of defendant the rent that was due on January 1st. Defendant stated he did not have the money and that he did not know how he would be able to make the payment. Defendant on that occasion sought to make some kind of a deal by which he could get out of the lease and turn it over to another party, or turn over portions of the property to other parties. Mr. Atkinson advised defendant that he would not consider any deal until his rent was paid up, and that under the terms of the lease defendant could not sublet the property or assign or transfer his interest in the lease without Mr. Atkinson's permission. Defendant was then served with a "Notice Terminating Lease and to Quit." Late in January or the first part of February, 1953, Anthony Cardoza, the complaining witness, received a telephone call from defendant, who offered to rent Cardoza a piece of pasture land in the San Joaquin Valley. Cardoza advised defendant that he was not interested at that time. Later defendant again called Cardoza relative to renting this pasture land to him. As a result, defendant and Cardoza went to Tulare County and looked over the Atkinson ranch. Defendant showed Cardoza an area of 100 acres of permanent pasture and proposed renting it to him for $5,000. Cardoza protested the price as being excessive and countered with an offer of $3,500. The deal was consummated on this basis on February 6th, Cardoza giving defendant two checks, one for $1,500 bearing that date, and the other for $2,000 dated February 16th. As a part of this transaction defendant gave Cardoza the following document:

"Feb. 6, 1953

Received of Tony Cardoza the amount of $3,500.00 Dollars for feed for total of one yr. 100 acres on West of barn of permant pasture. I joe Rocha guarantee that this ranch will feed 120 head of cattle. Also agree to keep land irrigated and keep fences up.

Joe Rocha"

These checks were cashed in due course. The count for grand theft on which defendant was convicted was based on the $1,500 check. The property referred to in the above document is the property shown Mr. Cardoza in Tulare County and described to him as part of Mr. Atkinson's ranch.

In the early part of March, Cardoza inspected the pasture land and decided that at approximately the middle of the month he would move his cattle up there. In making arrangements for their transportation he heard that Rocha "was being cancelled out

1. Penal Code section 1237, which enumerates the cases in which an appeal may be taken by a defendant, provides in part: "1. * * * an order granting probation shall be deemed to be a final judgment within the meaning of this section; * * *."

of that range." As a result, Cardoza shipped no cattle to the pasture. He thereupon contacted both Mr. Atkinson and defendant. Cardoza told defendant that he did not have any right to rent that pasture land to him. As a result of this conversation defendant offered to refund his money and told Cardoza he would see him the following Wednesday or Thursday, but never showed up. The next time Cardoza talked to defendant he was moving out of his house in Artesia. When inquiry was made by Cardoza as to why he had not made good his proposal to refund the money, defendant advised him that he could not get it. He told Cardoza, however, that he would rent him a part of a ranch he had in Oakdale. Cardoza went to Oakdale and contacted the defendant, who, however, advised him that he had rented the ranch to his brother. The suggestion was then made that defendant execute a note, to which he readily agreed. Defendant and Cardoza made arrangements to meet the next day for the execution of the note but defendant did not keep his appointment. Defendant never repaid Cardoza any money.

After receiving the termination notice on January 9th defendant contacted attorney Archie McWilliams, who advised him "that under the terms of the lease, he could charge neighbors or other people for the right to pasture cattle in that permanent pasture." Having neither paid nor tendered any money as rental for any portion of 1953, defendant was served in April with a "Three Day Notice to Pay Rent or Quit." Defendant's response to this demand was an abandonment of the ranch in May.

[1] The elements of the crime of grand theft on the theory of obtaining money by false pretenses are: (1) An intent to defraud; (2) an actual fraud committed; (3) the use of false pretenses to perpetrate the fraud; and (4) reliance upon the fraudulent representations in parting with the money or other property. People v. Nesseth, 127 Cal.App.2d 712, 274 P.2d 479; People v. Frankfort, 114 Cal.App.2d 680, 697, 251 P.2d 401.

[2] Defendant's first contention is that no false representation was made and that he did not have any intent to defraud Cardoza. His theory is that he had the legal right to sell the pasture rights and that such sale did not violate any prohibition against the assignment or subleasing in his lease with Atkinson; that the sale of the pasture rights was a contract of agistment and not a sublease or assignment. We may assume (but without so deciding) that defendant's interpretation of the lease is correct. This does not, however, absolve him from responsibility. Treating the document dated February 6, 1953, therefore, as a contract of agistment for a period of one year, necessarily implies the representation that defendant was in a position to deal with the property in this manner and for this length of time. This representation was unwarranted, because at that time he was in default under his lease with Atkinson; had failed to pay the rent due on January 1, and February 1; had stated that he did not have the money with which to pay the January rent and didn't know how he would be able to pay it; and had received a notice terminating the lease. Upon the receipt of the money from the two checks totaling $3,500, which was more than sufficient to pay the delinquent rent for January and February, defendant, nevertheless, neither paid nor tendered the same. His promise to re-pay Cardoza was met with a failure to keep the appointment. He failed to carry out his proposal to provide other grazing lands on a different ranch for Cardoza's cattle by renting these pastures to his brother, and he failed to keep his appointment to execute a note in Cardoza's favor for the money which he had received from him.

[3] From these facts and circumstances the trial judge was amply justified in drawing the inference that defendant had no intention of carrying out his promise of February 6, 1953, to provide Cardoza with pasture for his cattle for a period of one year on the Atkinson ranch. Such a false representation constitutes actionable fraud. People v. Ashley, 42 Cal.2d 246, 264–265, 267 P.2d 271; People v. Frankfort, 114 Cal.App.2d 680, 698, 251 P.2d 401; People v. Chamberlain, 96 Cal.App.2d 178, 182, 214 P.2d 600; People v. Mason, 86 Cal.App.2d 445, 449, 195 P.2d 60. Whether a promise was dis-

honestly made is a question of fact for the trial court's determination upon all the evidence. People v. Frankfort, supra, 114 Cal. App.2d at page 698, 251 P.2d 401; People v. Gordon, 71 Cal.App.2d 606, 624, 163 P.2d 110.

[4] It is thus apparent that the evidence, together with the reasonable inferences therefrom, is ample to support the implied finding of the trial court that defendant was guilty of false representation, and that such representation was made with the intent to defraud Mr. Cardoza.

Defendant argues that the lease was ambiguous and that the $3,000 payment required on January 1, 1953, or upon the sale by the lessee of the cotton produced on the ranch, whichever occurred first, should be applied to the January and February rent, thus preventing any default in the rental for those months. A reading of the rental provisions of the lease does not support this contention.[2] This payment is stated in the lease to be "in addition to the rental payments and as a part of said total rental hereinbefore set forth. * * *" Therefore the rental payments due on the first of each month were not excused by this payment of $3,000, which is clearly stated to be *additional*. The time at which this payment is to be made is expressly stated, and there could be no reasonable confusion between it and the monthly rental payments.

Defendant vainly argues that his good faith is established by reason of the fact that he consulted with counsel, who advised that under the terms of the lease he could charge neighbors or other people for the right to pasture their stock on the ranch. The difficulty with this argument is that it relates merely to an interpretation of the lease and not at all to the specific transaction with Cardoza. Advice that, under the terms of the lease, he could charge for pasturage is far short of advice that he could, with impunity, enter into an agreement letting pasture rights for a year when he was in default on the rent, had received a notice terminating his lease, did not have the money to pay the delinquent rent, and did not intend to use the money paid to him by Cardoza for the purpose of curing his default. Furthermore, the effect of defendant's counseling with Mr. McWilliams and the weight to be given thereto was a circumstance to be considered by the trial court along with other facts in determining defendant's good faith. The adverse finding of the trial court is determinative on appeal.

[5] Defendant argues "that there was no false token or writing and, therefore, the people have failed to corroborate the alleged false representation as required in Section 1110 of the Penal Code." The section, however, also provides that a false pretense may be established by the testimony of "one witness and corroborating circumstances." Here we have the testimony of the witness Cardoza and corroborating circumstances, which include default in monthly rental payments by defendant, the notice of termination of the lease, the failure of defendant to apply any of the money received from Cardoza on the delinquent rent, and the statements contained in the writing signed by defendant, dated February 6, 1952, which "lend strength" to Cardoza's story. People v. Payton, 36 Cal.App.2d 41, 53, 96 P.2d 991. Thus the requirements of Penal Code section 1110 are amply satisfied. Peo-

2. This provision reads as follows:
"*Rental*: The rental to be paid by the Lessee to the Lessor for said term is the sum of Fifty-Four Thousand Dollars ($54,000.00), payable as follows: The sum of $3,000.00 upon the execution of this lease, and the sum of $1,500.00 on the first day of each succeeding month thereafter commencing July 1, 1952, and continuing on the first day of each succeeding month thereafter until the total rental has been paid in full. In addition to the rental payments and as a part of said total rental hereinbefore set forth, the Lessee shall pay to Lessor the sum of $3,000.00 on January 1, 1953, or upon the sale by Lessee of the cotton produced on the premises herein leased, if said sale occurs prior to January 1, 1953, all of said rental payable in lawful money of the United States to the Lessor at 16288 South Paramount Boulevard, Paramount, California, or such other place as may be designated by the Lessor from time to time."

ple v. Wymer, 53 Cal.App. 204, 206, 199 P. 815.

[6] Defendant seeks to raise the point that his right to due process of law was circumvented. He bases this upon an alleged remark of the trial judge during the final argument to the effect that if the People had not made out a case of theft by false pretenses, that nevertheless they had made out a case of larceny by trick. He contends that the effect of this asserted remark was to deny due process of law in that the charge against him was neither specific nor seasonally made known to him. No such remark appears in the record, consequently this point cannot be considered on appeal. The law is clear that "any irregularity in the conduct of the trial court, and its possible effect on the outcome of the case, can only be considered on appeal to the extent that the facts in relation thereto are clearly set forth in the record." 4 Cal.Jur.2d, sec. 468, p. 298. If defendant desired this point considered, it was incumbent upon him to present a supplementary record which would lay an appropriate foundation therefor.

[7, 8] Defendant's final point is that the court committed reversible error in failing to inquire as to whether there was any legal cause why judgment should not be pronounced. Penal Code, § 1200. There is no merit in this contention. Counsel does not suggest any facts which would have in any way affected the disposition of the case had the trial judge made this inquiry. He therefore fails to show any basis for prejudice. Furthermore, this point does not appear to have been raised at the time the motion for new trial was made, argued and ruled upon. Nor does the court's attention appear to have been drawn to the oversight when he suspended proceedings and granted probation. If there had been any facts which should have been taken into consideration by the court before disposing of the case it was incumbent upon defendant and his counsel to draw such facts to the court's attention. They could have been then considered, or a continuance granted, and the defendant could have been rearraigned. This point cannot now be raised for the first time on appeal since there was no suggestion made in the trial court that the procedure differed in any respect from that prescribed by the Code.

The judgment and order are affirmed.

MOORE, P. J., and McCOMB, J., concur.



130 Cal.App.2d Supp. 898

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Betty Alice ARONOW, Defendant and Appellant.

Cr. A. 3226.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 3, 1955.

Motorist was convicted of failure to make a boulevard stop. The Municipal Court of the Los Angeles Judicial District, Parks Stillwell, J., entered judgment, and motorist appealed. The Appellate Department of the Superior Court, Shaw, P. J., held that error of Municipal Court in refusing to permit motorist to cross-examine arresting officer with respect to alleged statement by officer when he arrested motorist, "You did not stop, did you?" was not prejudicial error.

Judgment affirmed.

1. Witnesses ⇐268(8)

In prosecution of motorist for failure to make boulevard stop, court erred in refusing to permit motorist to cross-examine arresting officer concerning statement made by officer when he arrested motorist. West's Ann.Code Civ.Proc. § 2052.

2. Criminal Law ⇐1170½(5)

In prosecution of motorist for failure to make boulevard stop, error of court in refusing to permit motorist on cross-examina-

tion of arresting officer to bring out alleged fact that officer, on arresting motorist, stated: "You did not stop, did you?" was not prejudicial error.

3. Criminal Law ⇐1035(3)

Where trial judge, if he viewed the premises, did so at request of defendant, and when trial judge indicated that he was going to view the premises alone, defendant made no objection, defendant was in no position, on appeal, to complain that she was not present when trial judge allegedly viewed the premises.

4. Automobiles ⇐359

Section of the Vehicle Code providing that, to reimburse General Fund for amounts appropriated therefrom for driver training, there shall be levied a penalty assessment on all offenses involving violation of section relating to operation of motor vehicles, except offenses relating to parking or registration, in amount of $1 for each $20 of the fine, or fraction thereof, is not unconstitutional. Vehicle Code, §§ 502, 762, 773; Pen.Code, § 19.

Betty Aronow, in pro. per.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

PER CURIAM.

The defendant has appealed from the judgment sentencing her to pay a fine of $10. A $1 "Education Penalty" was also imposed. We are affirming the judgment.

The People had but one witness who testified that the defendant had, as charged, failed to make a boulevard stop. The defendant, contending that she had made a stop, endeavored on cross-examination, to inquire of the officer as to some events that immediately followed her failure to stop. She was advised by the trial court that if she wished to question the officer about any happening subsequent to her entry into the intersection she would have to make him her witness; it would be improper under cross-examination.

[1] It was error to so limit the cross-examination. Had his greeting of the defendant, as he overtook her to make the arrest, been inconsistent with his testimony, evidence of the fact could not be made unless, when a witness, the officer had been interrogated about it, section 2052, C. C. P., and he need not be questioned as the defendant's witness, but on cross-examination. His credibility as a witness and the weight to be given his testimony might also be the better evaluated because of events surrounding the arrest.

[2] Thwarted in her cross-questioning, the defendant made no offer of proof. We mention this, not as an answer to her complaint about the ruling, but by way of leading up to the fact that the defendant, when a witness, either testified to the various matters that she had endeavored to elicit from the officer, or indicated a desire to do so, and none of them served to aid her. She testified that the officer greeted her with the statement: "You did not stop, did you?" This is not a statement inconsistent with the officer's testimony, nor can it be reasonably interpreted as a showing that he was uncertain about the fact and was trying to find out from the defendant whether she had or had not made a stop. None of the other events arising subsequent to her entry into the intersection (after a stop, she insisted) cast any doubt upon the officer's credibility. In other words, the error discussed above appears not to be prejudicial; a reversal of the judgment is not warranted because of it.

[3] It does not affirmatively appear from the record that the trial judge, who was trying the case without a jury, viewed the premises. If he did, however, he was requested so to do by the defendant and when he indicated that he was going to do so, alone, she made no objection. She is in no position, now to complain that she was not present when the view was made (if it was made). People v. White, 1912, 20 Cal. App. 156, 159–160, 128 P. 417.

[4] As already noted, a penalty of $1 was added to the fine of $10 imposed upon the defendant. Statutory authority for this

penalty is found in section 773, added to the Vehicle Code in 1953, reading, so far as of interest to this case: "To reimburse the General Fund for amounts appropriated therefrom for driver training pursuant to section 5153.6 of the Education Code, on and after January 1, 1954, there shall be levied a penalty assessment on all offenses involving a violation of a section of this code * * * relating to the operation of motor vehicles, except offenses relating to parking or registration, in the following amounts: * * * (2) Where a fine is imposed * * * $1 for each $20 of fine, or fraction thereof." The defendant earnestly contends that this legislation is in violation of the state and federal constitutions, because it is limited in its application to violators of the Vehicle Code and not to misdemeanants generally. We see no reason to doubt that the legislature, although it has determined that misdemeanors, generally, may be punished by fines up to $500, section 19, Penal Code, has power to provide a different scale of punishment for violations of the Vehicle Code, including a minimum fine that must be imposed under certain circumstances, as it has done in sections 762 and 502 of that code. This power is not exhausted by its use, but the legislature may, as it has done in section 773, add a penalty that must be imposed in addition to that provided elsewhere. No constitutional provision is violated by calling the penalty a penalty assessment and not a fine, nor by making use of the fund so collected for a particular public purpose.

The judgment is affirmed.

SHAW, P. J., and BISHOP and PATROSSO, JJ., concur.

44 Cal.2d 132

Max HOLSINGER, Plaintiff and Respondent,

v.

Anne HOLSINGER, Defendant and Appellant.

S. F. 18887.

Supreme Court of California.
In Bank.
Feb. 25, 1955.

Proceeding by father of minor children for modification of provisions of divorce decree that mother and father should have joint legal custody of children but that actual physical custody should remain in mother. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., entered order awarding custody of children to father, and mother appealed. The Supreme Court, Edmonds, J., held that evidence as to change of circumstances was sufficient to support order modifying decree and giving actual physical custody to father.

Order affirmed.

Prior opinion 276 P.2d 625.

1. Parent and Child ⇐2(2, 3.3)

Neither parent is entitled to custody of child as matter of right, and each is equally entitled to custody and no showing or finding of unfitness is necessary to enable court to award custody to one or other in accordance with what, in its sound discretion, is deemed best interests of child. West's Ann.Civ.Code, § 138(2).

2. Parent and Child ⇐2(3.1, 3.3)

In determining question of custody of minor child, welfare of child and not shortcomings of respective parties is determinative.

3. Divorce ⇐296

In determining who should have custody of minor children of parties to divorce action, very broad discretion is vested in trial courts, and it is only when clear abuse of discretion is evident that reviewing court will interfere with determination of trial court.

4. Parent and Child ⇐2(4)

Court, in considering modification of custody decree, must proceed upon new facts considered in connection with facts formerly established, change of such circumstances, conduct of parties and best interests of child.

5. Divorce ⇐303(3)

In proceeding by father of minor children for modification of provisions of divorce decree that mother and father should have joint legal custody of children but that actual physical custody should remain in mother, evidence as to change of circumstances was sufficient to support trial court order modifying decree and giving actual physical custody to father.

Crist, Stafford & Peters and John M Donegan, Palo Alto, for appellant.

Freed & Freed and A. J. Cathcart, San Francisco, for respondent.

EDMONDS, Justice.

In 1950, Max Holsinger was awarded a decree of divorce from Anne Holsinger. By the final decree, they were given "the joint legal custody" of their two children, the mother to have "actual physical custody" of them, subject to certain rights of the father. Upon his application, these provisions were modified, and the mother's appeal is from the order enlarging his custodial rights.

The custody given to the mother in 1950 was subject to the conditions specified in a property settlement agreement. By that agreement, which was approved and confirmed by reference in the final decree, the father was given reasonable rights of visitation. A further provision made by the parties was that "if they have any disagreement with respect to said children, the instructions and directions of Wife shall in each such instance be followed the same as though Wife had the exclusive custody of said children."

The order of modification was made following a hearing at which both the father and mother testified in regard to the needs

of the children. Other evidence also was presented. The record shows that Judith Ann is now about 12 years old. Thomas is two years younger. From the time of the commencement of the action for divorce until about two years after the date of the final decree, the parents, notwithstanding considerable quarreling, cooperated in providing for the education of the children. The mother acquiesced in the arrangements made for them by their father. Judith was placed in a boarding school especially suited to her individual needs. The boy, at that time of pre-school age, went to the same school so that the two children might be together, although it appears from the record that a different school would now be more suitable for him. At one time, the mother agreed that he might attend a public school, but later she refused to carry out that plan. By mutual agreement, the father was allowed to have the children with him on alternate weekends.

The cooperation of the parents ceased in the fall of 1952, when Anne, accompanied by her mother, took the children from Max's home while they were visiting him. In a letter written by Anne to Max in October she said: "After battling the world for six years I am perfectly mature and capable enough to make up my own mind and I am tired of your constant interference. It has been a good training ground. I can make my own decisions."

Since the divorce action, the children have been living either at the boarding school or with the maternal grandparents. Anne testified that she expects to obtain employment and rent a larger place than the one which she now occupies. Her plan for the children is for Judith to continue in the boarding school and Thomas to enter public school. After school hours, he could go to the Community Center or to the boarding school until about five o'clock in the afternoon. Under that arrangement he would be at home alone until she could get there from her work.

The father has remarried and is living with his wife and 14 year old stepdaughter. The report of the domestic relations investigator shows that this home, physically and environmentally, is very suitable for the rearing of the children.

Apparently much of the controversy has arisen because the mother refuses to acknowledge that Judith needs more than the usual educational program for children of her age. She resents Max's intellectual evaluation of the children and herself. She admitted to the investigator that there is great animosity between her relatives and Max. She is also quite bitter toward him. During her testimony the trial judge commented: "He has some rights to these children, too, you know, * * * [You] are trying to throw your venom against him, and you are using the two children as a shield. * * *"

The order granting the motion of Max for modification of the final decree of divorce gives the father and mother "the joint legal custody" of the children. The "actual physical custody" of the boy is to be with the father. The mother is to have reasonable rights of visitation, including that of having him with her on alternate weekends. Because of the special educational and developmental problems of the girl, the father "shall have the sole and exclusive authority to make arrangements for her boarding, educational and training program and situation". He is charged with the entire financial responsibility for her care. The right of reasonable visitation is granted to both the father and the mother but the mother may have Judith with her on alternate weekends.

Anne contends that the evidence does not support this change of custody from her to the father. She argues that the trial court abused its discretion in making the order because there was no showing either that she is unfit or that there has been any change of conditions since the final decree. Other things being equal, she asserts, the custody of children of tender years should remain with the mother. Max insists that the order has substantial evidentiary support and there was no abuse of discretion in making it.

[1, 2] Neither parent is entitled to the custody of a child as a matter of right. "Under the statute, Civ.Code, § 138(2),

each is equally entitled to custody and no showing or finding of unfitness is necessary to enable the court to award custody to one or the other in accordance with what, in its sound discretion, is deemed the best interests of the child." Davis v. Davis, 41 Cal. 2d 563, 565, 261 P.2d 729, 730. "It is the welfare of the child and not the shortcomings of the respective parties which is determinative." Clarke v. Clarke, 35 Cal.2d 259, 262, 217 P.2d 401, 402.

[3, 4] "It is the settled rule that, in determining who should have the custody of the minor children of the parties to divorce actions, a very broad discretion is vested in the trial courts. It is only when a clear case of abuse of said discretion is made out that this court will interfere with the determination of the trial court on appeal." Prouty v. Prouty, 16 Cal.2d 190, 191, 105 P.2d 295, 296; accord: Gantner v. Gantner, 39 Cal.2d 272, 275, 246 P.2d 923; Clarke v. Clarke, 35 Cal.2d 259, 261, 217 P.2d 401. "[T]he correct rule for a trial court to follow when considering the modification of a custody decree, is: 'The court, in revising and modifying its decree, proceeds upon new facts considered in connection with the facts formerly established, the change of circumstances, the conduct of the parties, and the best interests of the child.'" Prouty v. Prouty, 16 Cal.2d 190, 195, 105 P.2d 295, 298; accord: Davis v. Davis, 41 Cal.2d 563, 565, 261 P.2d 729.

[5] The evidence before the court amply supports its order modifying the custodial provisions of the decree of divorce. Unquestionably, since the decree was entered, the hostility of Anne towards Max has greatly increased. It reasonably may be inferred that because of her animus, she has refused to allow him to express anything but a financial interest in the children's future. It is also apparent that Anne does not have as great an understanding as does Max of the particular problems of Judith. Clearly, the mother's failure to appraise those problems correctly shows that she is not as well prepared as the father to cope with them.

In marked contrast to this conduct of the mother, the children's father, at all times has endeavored to give them every advantage that will best prepare them for the future. His remarriage and maintenance of a home now makes it possible for him to give the children adequate care while in his physical custody. Upon the mother's refusal to allow him any further participation in providing for the education and care of the children, it became desirable, if not absolutely necessary, to order a change of custody.

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



44 Cal.2d 107

Doris CALLAHAN, Plaintiff and Appellant,

v.

Robert June GRAY, Defendant and Respondent.

L. A. 23340.

Supreme Court of California.
In Bank.
Feb. 18, 1955.

Action for personal injuries allegedly sustained by pedestrian when struck by automobile while crossing street. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., rendered judgment for defendant, and plaintiff appealed. The Supreme Court, Schauer, J., held that evidence sustained findings that pedestrian had negligently walked into side of defendant's automobile rather than being struck by it, and that pedestrian had not been injured.

Judgment affirmed.

Prior opinion 272 P.2d 56.

1. Automobiles ⇐244(50)
Damages ⇐185(1)

In pedestrian's action for alleged personal injuries resulting from impact with defendant's automobile while crossing street, evidence sustained finding that pe-

destrian had negligently walked into side of defendant's automobile rather than being struck by it, and that pedestrian had not been injured.

2. Automobiles ⇐247
Damages ⇐222

In action by pedestrian for injuries allegedly sustained while crossing street, findings that pedestrian had negligently walked into automobile, rather than being struck by it, and that she had not been injured, were, and either of them was, sufficient to support judgment for defendant.

3. Appeal and Error ⇐110

Order denying motion for new trial was not appealable, and purported appeal therefrom was dismissed.

4. Negligence ⇐136(9)

Whether defendant was negligent or plaintiff guilty of contributory negligence is ordinarily a question of mixed fact and law and may be determined as a matter of law only if reasonable men following law can draw but one conclusion from evidence.

5. Appeal and Error ⇐996

When two or more inferences can reasonably be deduced from facts, reviewing court is without power to substitute its deductions for those of trial court or jury.

Edward Clayton Jones and William M. Anderson, Los Angeles, for appellant.

Spray, Gould & Bowers and Philip L. Bradish, Los Angeles, for respondent.

SCHAUER, Justice.

[1, 2] Plaintiff appeals from an adverse judgment, entered on a jury verdict, in her action to recover for alleged personal injuries resulting from an impact with defendant's automobile when plaintiff was walking across Fair Oaks Avenue in South Pasadena, in a marked pedestrian crosswalk. She contends that the evidence as a matter of law is insufficient to support the verdict and ensuing judgment. Contrary to plaintiff's contention, the evidence amply sustains implied findings by the jury (1) that plaintiff negligently walked into the side of defendant's automobile rather than being struck by it, and (2) that plaintiff was not injured by the occurrence. Since either of such findings would support a verdict for defendant, it follows that plaintiff's contention is untenable and, hence, that the judgment should be affirmed.

[3] A purported appeal, also filed by plaintiff, from the court's order denying her motion for a new trial will be dismissed, as such an order is not appealable. (Reeves v. Reeves (1949), 34 Cal.2d 355, 357, 209 P.2d 937; see also 3 Cal.Jur.2d 500.)

The impact or collision between plaintiff and defendant's automobile took place about nine o'clock in the evening in March, 1952. Fair Oaks Avenue runs north-south, and the crosswalk is in the middle of the block rather than at an intersection; it was not controlled by lights or other traffic device. Plaintiff was crossing Fair Oaks from west to east, while defendant was driving north in the "curb lane" of traffic and approaching the crosswalk. Plaintiff testified that she was in the crosswalk and had seen defendant's car before she had reached the center of Fair Oaks, that the headlights were on, and the car was about half way between the crosswalk and the closest street intersection to the south and was traveling twenty to twenty-five miles an hour, "not going fast." Plaintiff continued walking, noticed that defendant started to slow down, and "thought he was waiting for me"; she did not know how fast he was going then. Plaintiff did not continue to watch the car but instead looked ahead at the door of the restaurant to which she was going "to get over to the curb"; she did not recall seeing the car from the time it slowed down to the time of impact with her. She stated that her legs were "contacted" by the left front fender of the car, but she did not remember whether it was the front or the side of such fender that touched her; neither was she "positive" that the impact knocked her to the ground, "I only went by what a witness said." She further testified she did not know where she was when the impact took place, whether the front bumper touched her body, whether she put out either of her hands to brace herself against falling, or when defendant's car stopped although she stated it did stop. After the impact plain-

tiff went to the door of defendant's car, asked him "why he didn't watch where he was going," and without waiting for a response walked on over to the east curb of Fair Oaks. Plaintiff also testified that defendant got out of the car and offered to take plaintiff to the hospital, but plaintiff told him she didn't think she was hurt; she repeated the statement to police officers when they arrived a few minutes later. Plaintiff then returned to a bowling alley on the west side of Fair Oaks, where she remained until approximately 11 p. m., bowling at least two games in the interim.

Defendant testified that as he was approaching the crosswalk and just before the impact he had stopped behind another car, had just started up again, and was traveling less than five miles per hour when he first saw plaintiff. She was then on the left side of his front fender, approximately the "middle of the wheel." Defendant stopped "right then * * * the minute" he saw her; no time elapsed between the time he saw her and the time his car stopped. The front part of his car did not collide with plaintiff and there was nothing to cause him to believe he had struck her at the time he saw her and stopped his car. Plaintiff was not knocked to the pavement, but remained "standing on her two feet" with her hands touching the left front fender. Defendant offered to take plaintiff to a doctor or to a hospital but plaintiff stated she was not hurt, that "she had a [bowling] tournament and she wanted to bowl."

It may also be noted that much of the testimony of both plaintiff and defendant was given in reference to a blackboard diagram which was not preserved for, or incorporated into, the record on appeal.

Medical testimony of a doctor who examined plaintiff some two and one-half months following her alleged impact with defendant's car was that her chief complaints were of pain in one shoulder, numbness of one arm, headaches, taut feeling in back and side of neck, and nervousness; that the doctor had "carefully gone over the history, and * * * performed a physical and neurological examination" on plaintiff; that the "Neurological examination was entirely negative. The patient's symptoms are entirely subjective. It is my opinion that this patient is neurologically negative, and is suffering from a psychoneurosis."

[4, 5] It is elementary that "Whether or not defendant was guilty of negligence * * * or plaintiff was guilty of contributory negligence * * * is ordinarily a question of mixed fact and law and may be determined as a matter of law only if reasonable men following the law can draw but one conclusion from the evidence presented" (Gray v. Brinkerhoff (1953), 41 Cal. 2d 180, 183, 258 P.2d 834) and "When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court [or jury]" (Crawford v. Southern Pacific Co. (1935), 3 Cal.2d 427, 429, 45 P.2d 183; In re Estate of Bristol (1943), 23 Cal.2d 221, 223, 143 P.2d 689; see also Richter v. Walker (1951), 36 Cal.2d 634, 640, 226 P.2d 593; Brucks v. Home Federal Savings & Loan Ass'n (1951), 36 Cal.2d 845, 850, 228 P.2d 545; Pfingsten v. Westenhaver (1952), 39 Cal.2d 12, 19, 244 P.2d 395; Holmberg v. Marsden (1952), 39 Cal.2d 592, 596, 248 P.2d 417; Thomas v. Hunt Mfg. Corp. (1952), 42 Cal.2d 734, 735, 269 P.2d 12; Shoemake v. Wilsey (1954), 43 Cal.2d 686, 277 P.2d 17). The evidence hereinabove recited would support jury findings that plaintiff, without looking where she was going, negligently walked into the side of defendant's car, and also that plaintiff suffered no injuries from any impact which occurred. Since from either of such findings a verdict and judgment for defendant would follow, the judgment for defendant must be affirmed.

For the reasons above stated the judgment is affirmed and the purported appeal from the order denying new trial is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice (concurring).

This case is obviously before this court because a majority of this court was dis-

satisfied with the treatment of its opinion in Gray v. Brinkerhoff, 41 Cal.2d 180, 258 P.2d 834, by the District Court of Appeal when the case at bar was decided by that court, see, 272 P.2d 56 [hearing granted see 279 P.2d 963]. This is not the first time that District Courts of Appeal have been misled by the decision of this court in Gray v. Brinkerhoff, supra, see Shoemake v. Wilsey, Cal.App., 266 P.2d 807. The difficulty seems to be that the District Courts of Appeal in the above mentioned cases have sought to state a rule of law enunciated by this court in Gray v. Brinkerhoff, supra, without realizing that in the last mentioned case this court did not purport to announce a rule of law but decided only issues of fact. This I endeavored to point out in my dissent in Gray v. Brinkerhoff, 41 Cal.2d 186, 258 P.2d 837, 838. I predicted at that time that the majority decision in that case would result in great confusion, and it is obvious that my prediction has to some extent at least come true.

While it is true that there are some slight factual differences between the case at bar and Gray v. Brinkerhoff, supra, I am constrained to believe that counsel for appellant in the case at bar were clearly justified in prosecuting this appeal upon the authority of that case. In fact, they would have been derelict in their duty to their client had they not done so.

I feel it my duty to again call attention to my dissenting opinion in Gray v. Brinkerhoff, supra, and my concurring opinion in the recent case of Shoemake v. Wilsey, 43 Cal.2d 686, at page 689, 277 P.2d 17, and suggest that before prosecuting appeals in cases such as these, consideration should be given to the settled rules with respect to the power of an appellate court to review determinations of fact by a trial court or jury as outlined in my dissenting opinion in Gray v. Brinkerhoff, supra. Since it is obvious from a reading of the record in the case at bar as well as in the case of Gray v. Brinkerhoff, supra, that both the issue of negligence and that of contributory negligence were issues of fact, and no reversible error was committed by the trial court, the judgment should be affirmed.

44 Cal.2d 113

Paul E. McBRIDE, Plaintiff and Appellant,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, The Pullman Car Company, and B. W. Hawthorne, Defendants.

Atchison, Topeka & Santa Fe Railway Company, a corporation, and The Pullman Company, a corporation, Respondents.

L. A. 23401.

Supreme Court of California.
In Bank.
Feb. 21, 1955.

As Modified on Denial of Rehearing March 22, 1955.

Action by passenger against railroad and others, for injuries sustained when he fell, while alighting from pullman car, when his crutch came in contact with wet cigar butt on steps of car, causing crutch to slip, throwing passenger to ground. The Superior Court, Los Angeles County, Raymond McIntosh, J., entered judgment of non-suit and the passenger appealed. The Supreme Court, Carter, J., held that whether railroad's servant, the porter, was guilty of breach of duty of railroad to exercise utmost care and diligence for safe carriage of passenger when porter failed to inspect and clean steps of pullman car was a question for the jury.

Judgment of nonsuit reversed.

Prior opinion, 273 P.2d 334.

1. Carriers ⇐280(1)

Duty of care owed to passenger by common carrier includes use of utmost care and diligence for his safe carriage. West's Ann.Civ.Code, § 2100.

2. Carriers ⇐247(4)

Carriage of passenger includes period during which passenger is disembarking from common carrier. West's Ann.Civ. Code, § 2100.

3. Trial ⇐139(1)

Motion for nonsuit may properly be granted only when, disregarding conflicting evidence, and giving to plaintiff's evidence

all value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, result is determination that there is no evidence of sufficient substantiality to support verdict in favor of plaintiff.

4. Trial ⇐142

Unless it can be said as matter of law that no other reasonable conclusion is legally deducible from evidence and that any other holding would be so lacking in evidentiary support that reviewing court would be impelled to reverse it upon appeal, or trial court to set it aside as matter of law, trial court is not justified in taking case from jury.

5. Carriers ⇐287(1), 303(1)

A carrier is generally held to be bound to provide safe and convenient means of access to its vehicles and of departure from them, and negligence in performance of this duty will render carrier liable to person injured as result thereof.

6. Carriers ⇐320(11)

In action for injuries sustained by passenger when he fell, while alighting from pullman car, when his crutch came in contact with wet cigar butt on steps of car, causing crutch to slip, throwing passenger to ground, it was a question for jury whether carrier's servant, the porter, was guilty of breach of duty to use utmost care and diligence owed to passenger by carrier when porter failed to inspect and clean steps of pullman car. West's Ann. Civ.Code, § 2100.

7. Negligence ⇐136(9)

Negligence is a question of fact for jury, even when there is no conflict in evidence, if different conclusions upon subject can be rationally drawn from the evidence.

8. Negligence ⇐111(1)

Plaintiff need only allege negligence in general terms, which means that it is sufficient to allege that an act was negligently done, without stating particular omission which rendered it negligent.

9. Carriers ⇐314(5)

In action for injuries sustained by crippled passenger when he fell, while alighting from pullman car, when his crutch came in contact with wet cigar butt on steps of car, causing crutch to slip, throwing passenger to ground, allegation of negligent maintenance and operation of train by railroad and others was sufficient to charge porter with negligence in failing to assist, or offering to assist crippled passenger. West's Ann.Civ.Code, § 2100.

10. Carriers ⇐281

Where passenger is blind, sick, aged, very young, crippled, or infirm, and his condition is apparent or made known to carrier, carrier is bound to render passenger necessary assistance in boarding or alighting from its train or cars. West's Ann.Civ. Code, § 2100.

Sampson & Dryden and Jacob Swartz, Los Angeles, for appellant.

Robert W. Walker and J. H. Cummins, Los Angeles, for respondents.

CARTER, Justice.

Plaintiff, Paul E. McBride, appeals from a judgment of nonsuit in an action to recover damages for personal injuries which resulted when he fell while alighting from the steps of one of the defendants' railroad cars.

Plaintiff was a fare-paying passenger in a Pullman car on defendant railroad's Grand Canyon line which originated at Los Angeles and was eastbound. Plaintiff, who had undergone a knee operation and was using crutches, boarded the train at Fullerton to go to Needles, California. After leaving Los Angeles, the train stopped at Fullerton, where plaintiff got on, then at Riverside, San Bernardino, Barstow and Needles, where he was injured while disembarking. At each stop, the door of the car in which plaintiff was riding was opened so that passengers might get on and off. Some passengers used the steps

of the car in question to get on and off the train at Fullerton and perhaps at San Bernardino before the train arrived at Needles.

The record shows that it was dark when the train arrived at Needles, plaintiff's destination; that the porter, conductor, brakeman, plaintiff's brother, sister-in-law and two nieces, preceded him down the steps; that as plaintiff was proceeding down the steps, using his crutches, he slipped and fell face forward from the step which was third from the top to the platform striking his knees first and then falling in a prone position. Plaintiff testified that as he started to fall, he noticed the wet mouth-end of a cigar on the railroad car step; that after his fall, he found a portion of the cigar on the cap at the bottom of one of his crutches. Plaintiff testified that the porter was standing at the foot of the steps, but that he did not ask if he could assist him to alight, and that he did not ask if plaintiff were hurt after his fall; that his brother and two strangers helped him to his feet from his prone position on the platform. The medical testimony shows that the accident proximately caused permanent injury to plaintiff's knees. The record shows that it was the porter's duty to "see the steps [were] clean and the handrails [were] wiped down" at every station and that he had not cleaned the steps after the train left Los Angeles. The record also shows that neither plaintiff, nor any of his party (brother, sister-in-law, or their children) had been, or were, smoking.

Plaintiff's first contention is that the duty of care owed to a passenger by a common carrier includes the use of the utmost care and diligence for his safe carriage which includes the period of debarkation.

[1, 2] Plaintiff correctly states the rule that the duty of care owed to a passenger by a common carrier includes the use of the utmost care and diligence for his safe carriage, Civ.Code, § 2100; Taylor v. Luxor Cab Co., 112 Cal.App.2d 46, 246 P.2d 45; Pezzoni v. City & County of San Francisco, 101 Cal.App.2d 123, 225 P.2d 14; Finley v. City & County of San Francisco, 115 Cal.App.2d 116, 251 P.2d 687; Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; Rystinki v. Central California Traction Co., 175 Cal. 336, 165 P. 952; Kline v. Santa Barbara etc. Ry. Co., 150 Cal. 741, 90 P. 125; Bosqui v. Sutro R. R. Co., 131 Cal. 390, 63 P. 682. Plaintiff also contends, with merit, that the carriage of a passenger includes the period during which the passenger is disembarking from the common carrier. In Fitzgerald v. Southern Pacific Co., 36 Cal.App. 660, 173 P. 91, it was held that the relation between carrier and passenger continues until the latter has alighted, and the carrier must exercise as high a degree of car in affording passengers a reasonable opportunity to alight in safety as in carrying them safely. See, also, Vietti v. Hines, 48 Cal.App. 266, 192 P. 80; Sellars v. So. Pac. Co., 33 Cal.App. 701, 166 P. 599; Carr v. Eel River etc. R. R. Co., 98 Cal. 366, 33 P. 213, 21 L.R.A. 354; Raub v. Los Angeles Terminal Ry. Co., 103 Cal. 473, 37 P. 374; Maxwell v. Fresno City Ry. Co., 4 Cal.App. 745, 89 P. 367.

[3, 4] "A motion for nonsuit may properly be granted '* * * when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.' Card v. Boms, 210 Cal. 200, 202, 291 P. 190, 191, see, also, Blumberg v. M. & T. Inc., 34 Cal.2d 226, 229, 209 P.2d 1; Golceff v. Sugarman, 36 Cal.2d 152, 153, 222 P.2d 665. 'Unless it can be said as a matter of law, that * * * no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury.' Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768, 769; see, also, Raber v. Tumin, 36 Cal.2d 654, 656, 226

P.2d 574." Palmquist v. Mercer, 43 Cal. 2d 92, 272 P.2d 26, 28.

Viewing the evidence in the light most favorable to plaintiff in accord with the foregoing rule, it appears that the porter had failed to inspect and clean the car steps at each stop made by the train in accordance with his specific duty; that as plaintiff started to fall while descending the car steps, he noticed a wet cigar butt on the step from which he fell; that after he had fallen to the platform he found a portion of the wet cigar stub on the cap of one of his crutches. The trier of fact could have legitimately inferred from this evidence that had the porter cleaned the steps there would have been no foreign substance there to come in contact with one of plaintiff's crutches causing it to slip and plaintiff to fall to the platform causing his permanent injury.

In Rystinki v. Central California Traction Co., supra, 175 Cal. 336, 343, 165 P. 952, 955, where plaintiff was injured while alighting from a common carrier, defendant carrier specified as prejudicial error the giving of certain instructions. The court there had told the jury that "common carriers of passengers bind themselves to carry safely those whom they take into their cars, so far as human care and foresight will do so, that is, with the utmost care and vigilance of a very cautious person; and such carriers are responsible for any, even the slightest negligence." This court said "By the instruction immediately preceding this one the jurors were informed that common carriers are required to do all that human care, vigilance, and foresight *'reasonably* can do under all the circumstances' to prevent accidents to passengers. Taken together, these instructions correctly state the law. They do not impute to the carrier the duties of an insurer, as appellant contends that they do, nor does the expression 'responsible for any, even the slightest negligence,' cut off appellant from the benefits of the law with reference either to contributory negligence or inevitable casualty. The degree of caution and care imposed upon a carrier of passengers is properly defined by the instruction. Treadwell v. Whittier, 80 Cal. 574–585, 22 P. 266, 5 L.R.A. 498, 13 Am. St.Rep. 175; Bosqui v. Sutro R. R. Co., 131 Cal. 390–401, 63 P. 682; Roberts v. Sierra Ry. Co., 14 Cal.App. 180–195, 111 P. 519, 527."

[5] The general rule with respect to the duty of railroads to passengers to keep the steps or vestibules of cars free from debris or foreign substances other than snow or ice is stated in a note, 34 A.L.R. 2d 360, as follows: "A carrier is generally held to be bound to provide safe and convenient means of access to its vehicles and of departure from them, and negligence in the performance of this duty will render the carrier liable to the person injured as a result thereof."

[6, 7] It was a question for the jury whether defendant's servant, the porter, was guilty of a breach of that duty of the "utmost care and diligence", Civ.Code, § 2100, owed by defendants as a common carrier to plaintiff when he failed to inspect and clean the steps of the Pullman car. Murray v. United Railroads, 49 Cal. App. 462, 465, 193 P. 596; Wahlgren v. Market Street Ry. Co., 132 Cal. 656, 663, 62 P. 308, 64 P. 993; Hellman v. Los Angeles Ry. Corp., 135 Cal.App. 627, 633, 27 P.2d 946, 28 P.2d 384; Hanton v. Pacific Electric Ry. Co., 178 Cal. 616, 618, 174 P. 61; Baker v. Market St. Ry. Co., 123 Cal. App. 688, 692, 11 P.2d 912; Finkeldey v. Omnibus Cable Co., 114 Cal. 28, 30, 31, 45 P. 996. Therefore, the court erred in granting defendants' motion for a nonsuit. "'The rule is that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence. This proposition has been frequently declared by this court. Fernandes v. Sacramento etc. R. R. Co., 52 Cal. 45; McKeever v. Market Street R. R. Co., 59 Cal. 294; Chidester v. Consolidated etc. Co., 59 Cal. 197; House v. Meyer, 100 Cal. 592, 35 P. 308.'" Wahlgren v. Market Street Ry. Co., supra, 132 Cal. 656, 663, 62 P. 308, 309, 64 P. 993. "'A trial court is justified in granting a motion for nonsuit "* * * when, and only when, disregarding conflicting

evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." * * *'" Finley v. City & County of San Francisco, supra, 115 Cal.App.2d 116, 119, 251 P.2d 687, 689. It may not be here said that there is "'"no evidence of sufficient substantiality to support a verdict in favor of plaintiff."'"

Defendants argue (citing 10 Am.Jur., Carriers, § 1394, p. 236) that in order to recover against a carrier for injuries sustained due to the presence of debris or other foreign substance upon the steps of a railway car, it is essential to show knowledge, express or implied, on the part of the carrier of the existence of such a condition. No California cases on the subject have been cited, nor have any been found; however, here we need not determine the abstract question because the evidence is sufficient to sustain a finding that the cigar butt would have been discovered by the defendants' porter if he had exercised the high degree of care imposed upon him.

Plaintiff contends that the defendants breached their duty of care to him in another respect: That the porter, who had preceded him down the steps and who was standing on the platform at the foot of the steps did not offer to assist him, a crippled passenger.

[8, 9] Defendants argue that the complaint merely alleged that "* * * the defendants and each of them negligently, carelessly and recklessly operated, maintained and controlled the train and coach then and there under their control * *" and that the complaint is, therefore, insufficient to charge the porter with negligence in his failure to assist the plaintiff while alighting. A plaintiff need only allege negligence in general terms, which means that it is sufficient to allege that an act was negligently done without stating the particular omission which rendered it negligent. Brooks v. E. J. Willig Truck Transp. Co., 40 Cal.2d 669, 680, 255 P.2d 802; Taylor v. Oakland Scavenger Co., 12 Cal.2d 310, 316, 83 P.2d 948. The allegation of negligent maintenance and operation would be sufficient to charge the porter with negligence in failing to assist, or offer to assist, a crippled passenger.

[10] A note in 55 A.L.R. 394, which cites many cases, points out that "Where a passenger is blind, sick, aged, very young, *crippled,* or infirm, and his condition is apparent or made known to the carrier, it is bound to render him the necessary assistance in boarding or alighting from its trains or cars." (Emphasis added.) In Croom v. Chicago, M. & St. P. Ry. Co., 52 Minn. 296, 53 N.W. 1128, 1129, 18 L.R.A. 602, the court said: "* * * if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity." In Yazoo & M. V. R. Co. v. Littleton, 177 Ark. 199, 5 S.W.2d 930, 931, 59 A.L.R. 936, where the plaintiff, a boy suffering from typhoid fever, because in a weakened condition, fell while alighting and was injured, the court in affirming judgment for the plaintiff said: "But, having accepted them as passengers, knowing them to be disabled, it is their duty to render such special attention as may be necessary under the circumstances in each case." To the same effect see Southern Pac. Co. v. Buntin, 54 Ariz. 180, 94 P.2d 639, 124 A.L.R. 1422, which holds that a carrier which knows a passenger to be abnormal, either physically, or mentally, is bound to give such higher degree of care for his safety as his infirmity requires, and a failure to do so is negligence even if the carrier's conduct would not be negligent toward a normal person. See,

also, McGovern v. Interurban Ry. Co., 136 Iowa 13, 111 N.W. 412, 13 L.R.A.,N.S., 476; Martin v. Southern Ry. Co., 77 S.C. 370, 58 S.E. 3, for the proposition that whether, in a particular instance, the circumstances were such as to suggest the necessity for assisting a passenger to board or alight from a train or a car is essentially a factual one, to be decided in the light of the surrounding circumstances and the character of the hazards presented.

For the foregoing reasons it appears that the trial court erred in granting defendants' motion for a nonsuit and the judgment is, therefore, reversed.

We concur:

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



44 Cal.2d 121

Charles K. SPARKS and Robert N. Sparks, Plaintiffs and Respondents,

v.

John August REDINGER, Manuel Homen et al., Defendants and Appellants.

Manuel HOMEN, Cross-Complainant,

v.

Charles K. SPARKS, Cross-Defendant.

Garth S. THOMAS, Plaintiff and Respondent,

v.

John August REDINGER, Manuel Homen et al., Defendants and Appellants.

S. F. 19119, 19120.

Supreme Court of California, In Bank.

Feb. 21, 1955.

Rehearing Denied March 22, 1955.

Actions for injuries to the driver of and passengers in an automobile struck by defendant's oncoming tractor, driven by codefendant, while the automobile was making a left turn at a highway intersection. Defendant tractor owner filed a cross-complaint against plaintiff driver for damages to cross-complainant's equipment. From orders of the Superior Court, Alameda County, Thomas J. Ledwich, J., granting plaintiffs a new trial after a jury's verdict against them on their complaints and a verdict for cross-complainant, defendants and cross-complainant appealed. The Supreme Court, Spence, J., held that the trial court's failure to give plaintiffs proposed last clear chance instruction was not prejudicial to them, so as to entitle them to a new trial, in view of given instructions to find for cross-complainant, if cross-defendant was guilty of negligence proximately contributing to cross-complainant's damages and defendant tractor driver was free from negligence.

Orders reversed.

Carter, J., dissented.

Prior opinion, Cal.App., 271 P.2d 935.

1. Appeal and Error ⇐978(1)

Where trial court grants new trial on ground of error in instructions to jury, its conclusion, in exercise of wide discretion, will not ordinarily be disturbed on appeal from such order.

2. Appeal and Error ⇐854(6), 933(1)

On appeal from order granting new trial, all presumptions favor order as against jury's verdict for appellant, and order will be affirmed, if sustainable on any reasonable view of record.

3. New Trial ⇐41(3)

Where it clearly appears that trial court's error of law, as in instructing jury, could not have affected result of trial, court must deny motion for new trial by party against whom verdict was returned. West's Ann.Const. art. 6, § 4½.

4. Trial ⇐260(8)

In action for injuries to driver of and passengers in automobile struck by defendant's oncoming tractor, driven by codefendant, while automobile was making left turn at highway intersection, trial court's failure to give jury plaintiff's proposed last clear chance instruction was not prejudicial error, entitling plaintiffs to new trial after jury's verdicts for defendants and cross-complainant tractor owner, in view of given instructions to find for cross-com-

plainant, if cross-defendant automobile driver was guilty of negligence proximately contributing to damages sustained by cross-complainant and defendant tractor driver was free from negligence. West's Ann.Const. art. 6, § 4½.

5. Negligence ⇐83.1

The last clear chance doctrine does not change rules for determination of issues of negligence of respective parties to personal injury suit.

6. Negligence ⇐83.4

To impose liability on party for injuries to another under last clear chance doctrine, jury must find, not only that such party was guilty of negligence proximately contributing to happening of accident, but also that all other necessary elements of such doctrine were present.

7. Negligence ⇐83.1

The only purpose of last clear chance doctrine is to relieve injured party from rigid application of rule that his contributory negligence bars his recovery of damages from tort-feasor, when circumstances show that such party's negligence was remote, rather than proximate, cause of his injuries; such doctrine being merely a phase of doctrine of proximate cause in relation to negligence of injured party.

8. Negligence ⇐83.1

The last clear chance doctrine is inapplicable, where it affirmatively appears that party sought to be charged with liability for injuries to party invoking doctrine was not guilty of any negligence proximately contributing to happening of accident.

Keith, Creede & Sedgwick, San Francisco, Cresswell & Davis, Oakland, and Scott Conley, San Francisco, for appellants.

James G. Quinn, Jr., William H. Quinn, Oakland, and Cyril Viadro, San Francisco, for respondents.

SPENCE, Justice.

Plaintiffs were injured in a collision when their automobile, while making a left-hand turn at a highway intersection, was struck by an oncoming tractor pulling two gravel-loaded trailers. Plaintiffs brought actions against Homen, owner of the tractor, and his employee, Redinger, the driver. Homen cross-complained against the plaintiff driver of the automobile, Charles K. Sparks, for damages to his equipment. All actions were consolidated for trial. The jury returned verdicts against all three plaintiffs on their complaints and a verdict in favor of Homen on his cross-complaint. Plaintiffs moved for a new trial. The court granted their motions on the sole ground that it had erred in failing to give plaintiffs' proposed instruction on the doctrine of last clear chance. From such orders granting a new trial, defendants and cross-complainant appeal.

[1–3] Where the trial court grants a new trial on the ground of error in the instructions, its conclusion, in the exercise of a wide discretion, will not ordinarily be disturbed. Hunton v. California Portland Cement Co., 50 Cal.App.2d 684, 695, 123 P.2d 947; Barnett v. Garrison, 93 Cal.App. 2d 553, 557, 209 P.2d 426. All presumptions favor the order as against the verdict, Mazzotta v. Los Angeles Ry. Corp., 25 Cal. 2d 165, 169, 153 P.2d 338, and the order will be affirmed if it may be sustained on any reasonable view of the record. Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465. But the trial court, no less than the appellate court, is expressly enjoined by article VI, section 4½, of our Constitution from granting a new trial for error of law unless such error is prejudicial. If it clearly appears that the error could not have affected the result of the trial, the court is bound to deny the motion. Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 262, 143 P.2d 929. Here the record affirmatively shows that the failure to give the proposed last clear chance instruction did not constitute prejudicial error, and that the trial court erred in so holding. Accordingly, the orders granting plaintiffs a new trial must be reversed.

[4] For the purpose of this discussion, it will be assumed that there was sufficient evidence relating to the happening of the accident to have warranted the giving of a

last clear chance instruction. Daniels v. City & County of San Francisco, 40 Cal. 2d 614, 623, 255 P.2d 785; Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 633, 255 P.2d 795. Apart from the failure of the court to instruct on this doctrine, no complaint is made of any of the instructions. The jury was otherwise properly instructed on negligence, contributory negligence, and proximate cause.

The same main issues were presented by the pleadings with respect to plaintiffs' complaints and defendant Homen's cross-complaint. Under the instructions given, the jury could only have returned a verdict in favor of Homen on his cross-complaint in the event that it found that Redinger, the driver of Homen's tractor, was not guilty of any negligence which proximately contributed to the happening of the accident. Thus, the jury was expressly instructed: "If you find that the cross-defendant Charles Sparks was negligent in the operation of his automobile and that such negligence proximately contributed to the damages sustained by the cross-complainant Homen, and that the defendant John Redinger was free from any negligence in the operation of the truck owned by cross-complainant Homen, then you must find a verdict in favor of cross-complainant Homen. However, any negligence on the part of cross-complainant's employee, John Redinger, which proximately contributed to the accident in question will bar a recovery for the cross-complainant."

In view of these instructions and the jury's verdict in favor of Homen on the cross-complaint, it necessarily follows that the failure to give the last clear chance instruction did not prejudice plaintiffs' cause, for the doctrine presupposes negligence on the part of both parties. 19 Cal. Jur., Negligence, § 80, pp. 651–652. Accordingly, when the jury, as here, necessarily found that the defendant driver was not guilty of any negligence proximately contributing to the accident, there was no place for the jury's application of the last clear chance principles.

[5–8] Plaintiffs argue that negligence "may consist of the failure to avoid an accident under the last clear chance doctrine"; and where the jury is not instructed on that subject in a proper case, it might find a party free from negligence, but if it were instructed on the subject it might find the same party guilty of negligence in that he had the last clear chance to avoid the accident and failed to exercise ordinary care to do so. However, plaintiffs' argument is based upon the erroneous theory that the last clear chance doctrine changes the rules for the determination of the issue of negligence on the part of the respective parties. Such is not the case, as those rules remain precisely the same; and in order to impose liability upon a party under the last clear chance doctrine, the jury must find not only that such party was guilty of negligence proximately contributing to the happening of the accident, but must also find that all other necessary elements of the last clear chance doctrine were present. The only purpose of the last clear chance doctrine is to relieve the injured party from the rigid application of the rule that contributory negligence will bar his recovery, when the circumstances are such that it may be said that such party's negligence is a remote, rather than a proximate, cause of his injuries. Girdner v. Union Oil Co., 216 Cal. 197, 201–204, 13 P.2d 915; Center v. Yellow Cab Co., 216 Cal. 205, 207–208, 13 P.2d 918. In other words, the last clear chance doctrine is but a "phase of the doctrine of proximate cause" in its relation to the negligence of the injured party who seeks to invoke it. See annotations: 92 A.L.R. 47; 119 A.L.R. 1041; 171 A.L.R. 365. It is therefore entirely clear that the last clear chance doctrine can have no possible application where it affirmatively appears that the party sought to be charged is not guilty of any negligence which proximately contributes to the happening of the accident.

The jury was fully instructed that plaintiffs were entitled to a verdict if it should find that the defendant driver was chargeable with any negligence in the operation of his truck that proximately contributed

to plaintiffs' injuries, and that "contributory negligence is of no importance unless it is a proximate cause of the accident." See Gillette v. City of San Francisco, 58 Cal.App.2d 434, 441, 136 P.2d 611; Simon v. City & County of San Francisco, 79 Cal.App.2d 590, 600, 180 P.2d 393. Moreover, the instructions were in fact more stringent than even the last clear chance doctrine in their application to the issue of Redinger's alleged negligence. They recited his duty to use ordinary care in the face of another's negligence which "in the exercise of ordinary care would be apparent to him," while the last clear chance instruction only applies in the event of actual knowledge of another's perilous position. Daniels v. City & County of San Francisco, supra, 40 Cal.2d 614, 619, 255 P.2d 785; Sills v. Los Angeles Transit Lines, supra, 40 Cal.2d 630, 637, 255 P.2d 795. In view of such broad instructions and the jury's return of a verdict in favor of the cross-complainant Homen, which only could be based on a finding that Redinger was not guilty of any negligence which proximately contributed to the accident, it is clear that the giving of the last clear chance instruction could not have changed the result, and the error, in failing to give it, was not prejudicial.

The present situation, in which the verdict for the cross-complainant Homen could only rest on a finding that his driver Redinger was free from negligence proximately contributing to the accident, is distinguishable from the cases cited by plaintiffs, where there was simply a verdict against a plaintiff on his complaint. Daniels v. City & County of San Francisco, supra, 40 Cal.2d 614, 255 P.2d 785; Sills v. Los Angeles Transit Lines, supra, 40 Cal.2d 630, 255 P.2d 795. In these cited cases the reviewing court could not tell whether the verdict in favor of defendant was based on a finding that defendant was not negligent or that plaintiff was negligent, in which latter event a last clear chance instruction might have avoided that factor as a proximate cause barring recovery. Accordingly, in those cases, the failure to instruct on the doctrine of last clear chance was deemed prejudicial. In the present case, there is no room for doubt as to the basis for the verdict, as the record affirmatively shows that it was necessarily based on the jury's finding that defendant and cross-complainant Homen's driver was not chargeable with any negligence proximately contributing to the happening of the accident.

The orders granting a new trial are reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SCHAUER, JJ., concur.

CARTER, Justice.

I dissent.

This is another last clear chance case that adds to the confusion in this field. The majority opinion erroneously states that the doctrine presupposes negligence by both plaintiff *and defendant* and then holds that instructions on negligence gave the jury a clear picture of the circumstances under which the jury could find defendant driver of the truck, negligent under the last clear chance doctrine.

On the first proposition, the majority opinion states: "* * * the doctrine presupposes negligence on the part of both parties." And: "Plaintiffs argue that negligence 'may consist of the failure to avoid an accident under the last clear chance doctrine'; and where the jury is not instructed on that subject in a proper case, it might find a party free from negligence, but if it were instructed on the subject it might find the same party guilty of negligence in that he had the last clear chance to avoid the accident and failed to exercise ordinary care to do so. However, plaintiffs' argument is based upon the erroneous theory that the last clear chance doctrine changes the rules for the determination of the issue of negligence on the part of the respective parties. Such is not the case, as those rules remain precisely the same; and in order to impose liability upon a party under the last clear chance doctrine the jury must find not only that such party was guilty of negligence proximately contributing to the happening of the accident, but must also find that all other necessary ele-

ments of the last clear chance doctrine were present."

It is not the law that under the doctrine of last clear chance negligence of defendant is "presupposed" or that the application of the doctrine has nothing to do with forming a basis for defendant's negligence. It is well settled that under this doctrine there may have been no antecedent negligence on defendant's part. His negligence may arise solely from his conduct after a situation is presented in which he must use care to avoid the accident, because he has the last clear chance to do so, even though he was not negligent prior to that time. Therefore the jury should be instructed on the doctrine or its equivalent to permit it to determine whether defendant was negligent in the light of the situation confronting him. The question is ably discussed: "But last clear chance cases are not so simple; the difference between the *original* and the *final* negligence of the parties must be taken into account. The plaintiff must be guilty of some *original* negligence by which he places himself in a position of danger; and the defendant, seeing plaintiff in such danger, must be guilty of some *final* negligence which proximately causes the injury. And if, at the last moment, either party can avoid the accident by the exercise of ordinary care, the law then disregards his prior misconduct, and deals with his behavior at the time the injury is done. In this event, the *prior* misconduct is said to be the cause of the danger, and the *later* misconduct the cause of the injury. * * *

"In last clear chance cases, the *original* negligence of the injured party in getting himself into a position of peril, is merely an *attendant condition,* and not the *proximate cause* of the injury, * * * and the *final* negligence of the defendant, after discovering plaintiff in a position of danger, is a new and independent negligence, and the proximate cause of the injury."

"Let us sketchily repeat those special conditions: first, that the plaintiff has been guilty of original negligence of some kind; second, that by reason of such original negligence he, the plaintiff, is in a position of danger; * * * fourth, that the defendant then has an opportunity to avoid injuring the plaintiff, by exercising ordinary care under the circumstances; and fifth, that the defendant fails to exercise such ordinary care, or in other words, is guilty of some *final* negligence.

"That is to say, the defendant's duty under the last clear chance doctrine, to exercise *final care* [emphasis added] to avoid the accident, does not arise until he discovers plaintiff in a position of danger. * * * But even if he was guilty of original negligence, that fact alone will not make him liable under the last clear chance doctrine; for just as plaintiff's original negligence is merely an *attendant condition,* and not the proximate cause, of the injury, * * * so, on principle, it would seem that defendant's original negligence should likewise be considered an *attendant condition,* and not the proximate cause, under the last clear chance doctrine. As soon, however, as defendant discovers plaintiff in a position of danger, he is then bound to exercise ordinary care to avoid the accident; and if, under all the circumstances, he does exercise such ordinary care, he is not liable; but if, under all the circumstances, he fails to use ordinary care from that time on, he may be held guilty of *final negligence* [emphasis added], and the plaintiff may invoke the doctrine. It then becomes the function of the court or jury to determine whether or not, under all the circumstances, the defendant, after discovering plaintiff in a position of danger, was guilty of such *final negligence* [emphasis added]."

"One says that the antecedent negligence of one or both parties is immaterial; that 'the law deals with their behavior in the situation in which it finds them at the time the mischief is done, regardless of their prior misconduct'; and that the prior misconduct is the cause of the *danger* only, while it is the later misconduct that is the cause of the *injury.*" Hall, Last Clear Chance, pp. 4, 82, 212.

While some of the older cases said that for the doctrine to apply defendant's negligence is presupposed, see cases collected 19 Cal.Jur. 651–652, other cases and recent ones have pointed out that defendant's neg-

ligence, and hence liability, may arise from his conduct after the last clear chance situation is presented to him, the proposition being stated in the language that plaintiff's negligence is remote and the proximate cause of the injury is defendant's negligence in failing to avert the injury. It is stated in Doherty v. California Nav., etc., Co., 6 Cal.App. 131, 137, 91 P. 419, 421, quoting from Wheeler v. Grand Trunk Ry. Co. of Canada, 70 N.H. 607, 50 A. 103, 54 L.R.A. 955: "'If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except it may be as one of the circumstances by which the requisite measure of care is to be determined. In such a case the law deals with their behavior in the situation in which it finds them at the time the mischief is done, regardless of their prior misconduct. The latter * * * is the cause of the danger, the former is the cause of the injury. * * *'" In Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 637, 255 P.2d 795, 799, the court said: "* * * where a person sees another in a position which is in fact dangerous, he may not rely upon dullness to excuse him from not realizing the danger of the position * * *; and if he sees the dangerous situation he must use reasonable diligence in analyzing the same." In Bonebrake v. McCormick, 35 Cal.2d 16 19, 215 P.2d 728, 729: "* * * the boy by his own negligence put himself in a position of danger from which he could not escape by the exercise of ordinary care, that defendant knew of the boy's peril, that she had the last clear chance to avoid the accident *by the exercise of ordinary care but failed to do so, and that the boy was killed as a proximate result of such failure.*" (Emphasis added.) This court said in Girdner v. Union Oil Co., 216 Cal. 197, 200, 13 P.2d 915, 917: "* * * established the fact that when plaintiff approached and was proceeding across the path of the oil truck, and up to the time of the collision, he did not see and was totally oblivious of the approach of the truck, and the danger that confronted him; that defendant Elam first saw plaintiff's car some 40 or 50 feet away from the intersection; that he saw plaintiff looking straight ahead, in an opposite direction, and not slowing the speed of his automobile; that Elam was traveling at a speed of 20 miles an hour and could have stopped his truck almost immediately, and within a distance of a few feet; that he had ample time and sufficient distance, at least 25 to 35 feet, in which to stop and avoid coming in contact with plaintiff's car, but failed to do so. * * * The real issue is cases of the character here involved is not whose negligence came first or last, but whose negligence, however it came, was the proximate cause of the injury. * * *

"If defendant is not able to avoid injuring plaintiff in the exercise of ordinary care, the plaintiff's original negligence continues to be the proximate cause of his own injury, which bars recovery. If, on the other hand, defendant is able to avoid injuring the negligent plaintiff, and *negligently fails to do so,* plaintiff's original though continuing negligence only remotely contributes to the injury and is not the proximate cause thereof, and hence the applied doctrine, by its own principles, establishes the right of plaintiff to recover notwithstanding the fact that his original negligence would, by its continuing nature, bar a recovery if the doctrine were not applicable." Emphasis added; Girdner v. Union Oil Co., supra, 216 Cal. at pages 201–220, 203, 13 P.2d at page 917, 918. Similarly in Center v. Yellow Cab Co., 216 Cal. 205, 208, 13 P.2d 918, 920, it was said: "If the elements of the last clear chance doctrine are present, and the doctrine applies, the contributory negligence of the party injured is not the proximate cause, as the *negligence of defendant, being later,* constitutes the sole proximate cause." (Emphasis added.) In Daniels v. City & County of San Francisco, 40 Cal.2d 614, 255 P.2d 785, and the Sills, Bonebrake, Girdner and Center cases there was no antecedent negligence on defendant's part. The sole negligence with respect to him was his conduct after being presented with a last clear chance situation.

The majority uses the fallacious premise above discussed to conclude that since plaintiff lost on the cross complaint, and

there were adequate instructions on the subject of defendant's duty after he was confronted with the plaintiff's perilous position, the failure to give an instruction on last clear chance was not prejudicial error. Those instructions did not embody the elements of last clear chance; they did not advise the jury that if defendant could have avoided injuring plaintiff by the exercise of ordinary care after discovering plaintiff's peril then plaintiff could recover. Certainly plaintiff was entitled to have his theory of liability presented to the jury with respect to his case regardless of the cross complaint. Daniels v. City & County of San Francisco, supra, 40 Cal.2d 614, 255 P.2d 785, and Sills v. Los Angeles Transit Lines, supra, 40 Cal.2d 630, 255 P.2d 795, contrary to the majority opinion, are clearly applicable and show that the instructions given did not cure the error in refusing the last clear chance instruction. In the Daniels case it is said [40 Cal.2d 614, 255 P.2d 791]: "Defendants submit that even though the court erroneously refused to instruct on the last clear chance doctrine, nevertheless no prejudice resulted to plaintiffs because (1) *the doctrine was covered by other instructions given by the court and (2) the general verdict of the jury imports findings in favor of defendants on all material issues so as to preclude plaintiffs from raising an objection based on that theory of recovery.* Neither point is well taken.

"The instructions cited by defendants in nowise purported to include the elements of the last clear chance doctrine. Rather they were directed only to the duty of the bus driver to 'use reasonable prudence in analyzing the * * * situation' confronting him so as to avoid colliding with plaintiffs' automobile. Moreover, the court in its other instructions plainly refuted any application of the last clear chance doctrine by charging the jury that any negligence on the part of either Mrs. Daniels or her guest, Mrs. Smith, would bar a recovery, though a necessary tenet of the doctrine is the presence of the plaintiff's negligence. [Citations.] *It is the duty of the court to instruct on every theory of the case finding support in the evidence.*" (Emphasis added.) In the Sills case, it is said: "Defendants finally contend that even though it was improper for the trial court to have refused the requested instruction on the last clear chance doctrine, such refusal was not prejudicial error. In support of their position, defendants urge that every major element of that doctrine was covered by other instructions. Two of the cited instructions concerned proximate cause, one being the usual definition thereof and the other referring to a 'violation of law' as 'of no consequence unless it was a proximate cause' of the injury. The third cited instruction was a lengthy declaration of the law relating to the right-of-way at an intersection, and the duty to exercise ordinary care so as to avoid a collision. Manifestly, such instructions did not purport to deal with the last clear chance doctrine and cannot be deemed adequate for submitting to the jury the question of defendants' liability upon that theory. Moreover, at defendants' request the jury was expressly charged, without qualification, that contributory negligence would bar a recovery, and no declaration was made covering plaintiff's theory of his right to prevail under the last clear chance doctrine. [Citation.] In these circumstances defendants unavailingly argue the proposition that the erroneously refused instruction should not be deemed prejudicial because the principle therein stated was fully and fairly covered in other instructions to the jury." Sills v. Los Angeles Transit Lines, supra, 40 Cal.2d 630, 639, 255 P.2d 795, 801.

The majority opinion holds, in effect, that any time the defendant files a cross complaint plaintiff is not entitled to a last clear chance instruction although the facts justify it. No authority is cited for that proposition and I believe there is none. There is no basis for it.

I would, therefore, affirm the orders granting a new trial.

Rehearing denied; CARTER, J., dissenting.

130 Cal.App.2d 750

John HARDEN, Jr., Plaintiff, Cross-Defendant and Respondent,

v.

SKINNER AND HAMMOND et al., Defendants, Cross-Complainants and Appellants.

Civ. 16166.

District Court of Appeal, First District, Division 1, California.

Feb. 15, 1955.

Action for accounting after dissolution of a claimed partnership. Plaintiff moved for change of venue on grounds of convenience of witnesses and that ends of justice would be promoted by change. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., granted the motion, and defendants appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that where issue was existence of oral partnership agreement, testimony of clients of claimed partnership as to whether plaintiff acted as, and was represented as, a partner, could be, even though corroborative of plaintiff's own testimony, considered in determining whether to change venue for convenience of client-witnesses.

Order affirmed.

1. Appeal and Error ⇐965
Venue ⇐51, 52(1)

The granting or denying of a motion for change of venue on grounds of convenience of witnesses and that ends of justice would be promoted by change is discretionary with trial court and subject to reversal only on clear showing of abuse.

2. Venue ⇐51, 52(4), 53

A motion for change of venue on grounds of convenience of witnesses and that ends of justice would be promoted by change requires a showing on both grounds, and it must appear that witnesses involved will testify as to relevant and material facts, and an offer to stipulate the testimony eliminates the necessity of producing witnesses, but fact that witnesses may be subject to subpoena does not affect the ground. West's Code Civ.Proc. § 397, subd. 3.

3. Venue ⇐52(1)

Mere numerical majority of witnesses on one side or other does not necessarily determine merits of a motion for change of venue on ground of convenience of witnesses, but permitting trial to be had as near as possible to residences of greatest number of witnesses is not abuse of discretion. West's Code Civ.Proc. § 397, subd. 3.

4. Venue ⇐52(1)

Convenience of parties themselves may not be considered on a motion for change of venue on ground of convenience of witnesses. West's Code Civ.Proc. § 397, subd. 3.

5. Venue ⇐70

On motion for change of venue on grounds of convenience of witnesses and that ends of justice would be promoted by change, there must be some evidence that ends of justice will be served by change, but direct evidence is not necessary, and trial court may rely, not only on direct facts set forth, but on any reasonable and relevant inference arising therefrom. West's Code Civ.Proc. § 397, subd. 3.

6. Venue ⇐63, 70

Notice of motion for change of venue on grounds of convenience of witnesses and that ends of justice would be promoted by change, and supporting affidavits, justified trial court's inference that justice would be served by change, even though no specific facts were set forth to support such averment. West's Code Civ.Proc. § 397, subd. 3.

7. Partnership ⇐50

In action for accounting as to dissolution of alleged partnership, wherein issue was existence of oral partnership agreement, testimony by clients of alleged partnership as to whether plaintiff, in his relations with clients had acted as, and had been represented by defendants to be, a partner, was relevant and admissible.

8. Venue ⇐72

On motion for change of venue on ground of convenience of witnesses, witnesses' evidence that is merely cumulative of conceded facts may be disregarded. West's Code Civ.Proc. § 397, subd. 3.

9. Venue ⇐52(4)

In action for accounting on dissolution of claimed partnership, wherein issue was existence of oral partnership agreement and plaintiff moved for change of venue on ground of convenience of witnesses, probable testimony of clients of claimed partnership as to whether plaintiff acted as, and was represented as, a partner, even though corroborative of plaintiff's own testimony, would be relevant so as to justify changing venue for convenience of client-witnesses. West's Code Civ.Proc. § 397, subd. 3.

10. Venue ⇐52(2)

In action wherein plaintiff moved for change of venue on ground of convenience of witnesses, testimony of defendants' employees, whom plaintiff wished to call, could be considered in determining convenience of witnesses. West's Code Civ.Proc. § 397, subd. 3.

11. Venue ⇐52(2)

Generally, convenience of litigants' employees should not be considered on a motion for change of venue on ground of convenience of witnesses. West's Code Civ.Proc. § 397, subd. 3.

12. Partnership ⇐52

Before a person can be charged as a partner by reason of his declarations made to third persons, a prima facie showing of existence of partnership must be made.

13. Venue ⇐52(4)

In action for accounting on dissolution of claimed partnership, wherein issue was existence of oral partnership agreement, probable testimony as to conversations between witnesses and defendants admitting existence of partnership would be admissible after establishment of prima facie case by plaintiff's testimony, so as to justify changing venue on ground of convenience of witnesses. West's Code Civ.Proc. § 397, subd. 3.

Philip S. Ehrlich, Albert A. Axelrod, Irving Rovens, San Francisco, for appellants.

Morgan & Beauzay, San Jose, for respondent.

PETERS, Presiding Justice.

On the grounds of the convenience of witnesses and that the ends of justice would be promoted by the change, plaintiff John Harden, Jr., moved for a change of venue from San Francisco to Santa Clara County. The trial court granted the motion. Defendants, Skinner and Hammond, et al., appeal. The sole question presented is whether the trial court abused its discretion in granting the motion.

By his first amended complaint respondent sought an accounting after dissolution of a claimed partnership. So far as pertinent here, it is therein alleged that by oral agreement respondent entered into a partnership with Skinner and Hammond, a then existing partnership, for the purpose of engaging in the accounting business in San Jose under the name "Skinner and Hammond"; that the firm was thereafter dissolved by mutual consent; and that although respondent, in reliance on the dissolution, abandoned the San Jose office, no steps have been in fact taken to wind up the partnership's affairs.

Appellants, who are the partnership of "Skinner and Hammond," and five individuals, other than respondent, comprising that firm, by answer denied that any partnership relationship ever existed between respondent and Skinner and Hammond. By cross-complaint it is alleged that respondent was an employee of the partnership and that, as such, he breached his position of trust by soliciting clients of the partnership as clients for a new firm formed by him. This cross-complaint prays that respondent be enjoined from soliciting clients, for a return of certain property, and for the partnership's share of the income of the San Jose office, operated by respondent.

The notice of motion for change of venue recites that such motion will be made "on the ground that the convenience of witnesses and the ends of justice would be promoted by the change." The supporting affidavit contains the names and addresses of two sets of witnesses. The first list contains the names and addresses of 90 witnesses, all living in Santa Clara County. It is averred that all 90 are necessary witnesses

who were former clients of the alleged partnership and who will testify that they did business with the partnership in San Jose; that many of them received announcements of the selection of respondent as a partner in the firm; that respondent signed their tax returns as a partner in the firm; and that he contracted as to charges, settled accounts, and had his name on the office door as a resident partner. The second list contains the names and addresses of 9 employees of the alleged partnership, all living in Santa Clara County. These, too, are alleged to be necessary witnesses who, in addition to testifying as to the above facts, will also testify that in conversations with them appellants referred to respondent as a partner.

In their opposing affidavit appellants insist that the primary issue presented by the pleadings is whether or not a San Jose partnership existed. They offer to stipulate that statements were sent to clients announcing the selection of Harden as a resident partner of the firm, and that his name so appeared on the front door of the office, and on all stationery and forms used by Skinner and Hammond. That portion of these witnesses' proposed testimony as set forth in respondent's affidavit to the effect that respondent signed the clients' tax returns as a partner is attacked as irrelevant, incompetent, immaterial, self-serving, not the best evidence and hearsay, and inadmissible at the trial. The handling of the clients' accounts as a partner is claimed to be incompetent, irrelevant and immaterial, and as calling for the opinion and conclusion of the witnesses. It is also averred that the conversations between appellants and the employees set forth in respondent's affidavit are not admissible until respondent first makes a prima facie showing of the existence of the partnership. Appellants also aver that all of the witnesses named by respondent reside within 100 miles of San Francisco, and so, of course, could be subpoenaed, and that the principal office of the partnership is in San Francisco.

On this showing the trial court granted the motion for a change of venue. In our opinion the granting or denying of the motion was well within the discretion of the trial court. Its action, therefore, cannot be disturbed by an appellate court.

[1, 2] Section 397 of the Code of Civil Procedure provides, in subdivision 3, that a change of venue may be granted "When the convenience of witnesses and the ends of justice would be promoted by the change." There can be and there is no dispute that the granting or denying of such a motion is discretionary with the trial court and is subject to reversal only on a clear showing of an abuse of this discretion. Wood v. Silvers, 35 Cal.App.2d 604, 96 P.2d 366, 97 P.2d 265; Rios v. Lacey Trucking Co., 123 Cal.App.2d 865, 268 P.2d 160. There can also be no doubt that before such a motion can be granted there must be some showing of both convenience of witnesses and that the ends of justice will be served by the change. People v. Spring Valley Co., 109 Cal.App.2d 656, 241 P.2d 1069; Churchill v. White, 119 Cal.App.2d 503, 259 P.2d 974; Rios v. Lacey Trucking Co., 123 Cal.App.2d 865, 268 P.2d 160. It is equally clear that before such a motion may be granted it must appear that the witnesses involved will testify as to relevant and material facts. Mize v. Old Taylor Fruit Co., 114 Cal.App. 588, 300 P. 128; Gordon v. Perkins, 203 Cal. 183, 263 P. 231; Ennis-Brown Co. v. Long, 7 Cal.App. 313, 94 P. 250. Obviously, if the opposing party offers to stipulate to the facts to be adduced, this eliminates that issue from the case and the necessity of producing witnesses to prove the fact involved. Blossom v. Waller, 30 Cal.App. 439, 158 P. 509; Wood v. Silvers, 35 Cal.App.2d 604, 96 P.2d 366, 97 P.2d 265. The fact that the witnesses may be subject to subpoena is not at all relevant on any issue here presented. Obviously, their convenience may be served, and the ends of justice served, by granting the change even though such witnesses could be subpoenaed.

Now how do these rules apply to the present case?

[3, 4] It is apparent that there was a sufficient showing of convenience of witnesses. All of the 90 client-witnesses live in Santa Clara County. Of course, the "mere numerical majority of the witnesses

on one side or the other does not necessarily determine the merits of the motion", Wood v. Silvers, supra, 35 Cal.App.2d at page 607, 96 P.2d at page 367, but it is equally clear that a court cannot be said to have abused its discretion if it permits the trial to be had as near as possible to the residences of the greatest number of witnesses. Respondent's affidavit shows proximity of all 90 witnesses' residences to the requested *locus* of the trial. Appellants made no countershowing that their witnesses would be inconvenienced by the change, except to aver that the principal place of business of the partnership was San Francisco. This averment may be disregarded because convenience of the parties themselves may not be considered on such a motion. Wrin v. Ohlandt, 213 Cal. 158, 1 P.2d 991; Rios v. Lacey Trucking Co., 123 Cal.App.2d 865, 268 P.2d 160.

[5, 6] It is also apparent that, aside from the bare averment that the ends of justice would be served by the change, there was no specific averment as to the facts that are relied upon to support such averment. There can be no doubt, as already pointed out, that, in addition to the convenience of witnesses, there must be some evidence that the ends of justice will be served by the change, before the motion can be properly granted. But this does not mean that there must be direct evidence on that issue. The trial court may rely not only on the direct facts set forth in the affidavits, but also on any reasonable and relevant inference arising therefrom. Benjamin v. Benjamin, 128 Cal.App.2d 367, 275 P.2d 43. There are several logical and valid inferences arising from the averments in the affidavits to support the trial court's conclusion that the ends of justice will be better served by moving the trial closer to the witnesses. Thus, the witnesses will be accessible for immediate recall if further testimony from them is desired, thus preventing delays. The proximity of the San Jose office to the place of trial presumably makes more expeditious the production of records. The obvious savings in the witnesses' time and expense in traveling to and from the place of trial also promotes the ends of justice. Thus, the trial court was justified in inferring that justice would be promoted by the change.

[7–9] As already pointed out, the evidence to be produced must be relevant and material and admissible. The showing here made satisfies these requirements. From the pleadings, it is obvious that the most significant issue in respondent's case will be proof of the oral agreement of partnership. It appears from respondent's affidavit with its list of witnesses and accompanying statement of the nature of their testimony, an essential in making a motion for change of venue on the ground of convenience of witnesses, see Juneau v. Juneau, 45 Cal.App.2d 14, 113 P.2d 463; San Jose Hospital v. Etherton, 84 Cal.App. 516, 258 P. 611, that some 90 former clients of "Skinner and Hammond" will testify that they did business with appellants as a partnership; that they received engraved announcements of respondent's selection as a partner; that his name was on the door of the offices and upon all stationery and forms as a resident partner; and that he dealt with their accounts and signed their tax returns in that capacity. It is true that part of this testimony will not be necessary because appellants in their affidavit offer to stipulate that these clients did receive announcements of the selection of respondent as a partner in "Skinner and Hammond" and that he was so represented upon the front door of the office in San Jose and upon all stationery and forms. But these witnesses, in addition to these stipulated facts, will testify that respondent signed their tax returns as a partner, and settled all accounts with them as a partner. Appellants claim that this evidence would be inadmissible hearsay, under the rule that a stranger to a partnership cannot testify as to the existence of a partnership. Hazard, Gould & Co. v. Rosenberg, 177 Cal. 295, 170 P. 612; see cases collected 20 Cal.Jur. p. 712, § 28. But while this testimony may not be admissible to prove the existence of the partnership, it is relevant and admissible to show that in his relations with the witnesses respondent acted as, and was represented by appellants to be, a partner. In a sense such testimony will be merely cumulative of the conceded facts. It is

equally true that evidence that is merely cumulative of conceded facts may be disregarded on such a motion. Di Giorgio Fruit Corp. v. Zachary, 60 Cal.App.2d 560, 141 P.2d 8. But the court, in a proper case, may consider such evidence, particularly in a case like the instant one. Here, it may be assumed, that respondent will testify as to an oral agreement of partnership. Appellants will deny such an agreement. Such may be assumed because the parties have already so averred in their verified pleadings. Respondent will be forced to rely in corroboration of his story on circumstantial evidence that he acted as a partner, and that appellants apparently acquiesced in such fact. He will be forced to rely on as many circumstances as he can produce that he was vested with the responsibility of a partner and acted like one, and thus try to convince the trial court that he in fact must have been a partner. While all this evidence of circumstances will be in a sense corroborative of his testimony as to the existence of the partnership, from a realistic standpoint the proof of the circumstances will be the very heart of respondent's case. Therefore, the clients' testimony will be both relevant and material, and certainly would be admissible, at least after respondent has established a prima facie case by his testimony.

[10, 11] The testimony of the 9 witnesses who are employees of Skinner and Hammond will also be relevant and material, and was properly considered by the trial court in granting the motion. While it is generally stated that convenience of employees of the litigants should not be considered on such a motion, Security Investment Co. v. Gifford, 179 Cal. 277, 176 P. 444; Wood v. Silvers, 35 Cal.App.2d 604, 96 P.2d 366, 97 P.2d 265, these 9 witnesses are not being called by their employer to testify for such employer. They are being called by the adverse party and so are, as to him, ordinary witnesses.

[12, 13] Appellants claim that the proposed testimony of these witnesses as to conversations between them and appellants admitting the existence of the partnership is not admissible. It is undoubtedly the law that before a person can be charged as a partner by reason of his declarations made to third persons, a prima facie showing of the existence of a partnership must first be made. Swanson v. Siem, 124 Cal.App. 519, 12 P.2d 1053. But, after such a prima facie showing, the admissions of the several parties are admissible. Milstein v. Sartain, 56 Cal.App.2d 924, 133 P.2d 836; Kloke v. Pongratz, 38 Cal.App.2d 395, 101 P.2d 522. Respondent will obviously establish a prima facie case by his own testimony in reference to the oral agreement pleaded by him. The admission testimony will then be admissible.

Appellants having failed to substantiate their claim that the trial court abused its discretion, the record in fact showing the contrary, the order granting the motion for a change of venue is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



130 Cal.App.2d 758

SAM FINMAN, Inc., a corporation, Plaintiff and Appellant,

v.

ROKUZ HOLDING CORPORATION, a corporation, Phillip Lyon, Individually and doing business under the fictitious name and style of Phillip Lyon Company, a corporation, et al., Defendants and Respondents.

Civ. 16176.

District Court of Appeal, First District, Division 1, California.

Feb. 15, 1955.

Hearing Denied April 13, 1955.

Action against building owner and owner's agent for breach of contract with plaintiff to lease building or for breach of warranty that agent was authorized to bind owner in such contract. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., entered order granting change of venue, and plaintiff appealed. The District Court of Appeals, Bray, J., held that, where contract

had not been entered into between plaintiff and building owner, and owner's residence was in Los Angeles, venue was properly laid in county of Los Angeles.

Order affirmed.

1. Venue ⇐4

For purposes of venue, nature of cause of action will be ascertained from complaint alone, and court will inspect complaint for purpose of determining character of action and judgment which may be rendered. West's Ann.Code Civ.Proc. § 395.

2. Venue ⇐72

In venue proceeding arising in breach of contract action, defendant's affidavit may be considered with complaint and its exhibits to determine where contract sued upon had been entered into. West's Ann. Code Civ.Proc. § 395.

3. Appeal and Error ⇐1011(1)

If, upon appeal in venue proceeding arising in breach of contract action, evidence either as to nature of cause of action or as to place where contract was entered into is conflicting, the District Court of Appeal will be bound by trial court's determination. West's Ann.Code Civ.Proc. § 395.

4. Contracts ⇐22(1)

An offer may be accepted by telegram.

5. Contracts ⇐22(1)

Telegram, which is made in acceptance of an offer, takes effect on its deposit for transmission.

6. Contracts ⇐14

Even if letter and telegram appeared on their faces to constitute an offer and an acceptance a contract would not result in absence of parties' intention to have such instruments constitute a contract.

7. Landlord and tenant ⇐22(4)

In action against building owner and owner's agent for breach of contract with plaintiff to lease building, evidence was sufficient to establish that neither plaintiff nor owner intended certain letter and telegram, which could be construed as offer and acceptance, to constitute a contract but intended the negotiations to continue thereafter. West's Ann.Civ.Code, §§ 1583, 2343.

8. Contracts ⇐147(2)

If possible, intention of parties to written contract is to be ascertained from the writing alone.

9. Contracts ⇐170(1)

Where language of written contract is ambiguous and uncertain, resort may be had to parties' subsequent conduct for purpose of discovering what they understood agreement to mean.

10. Contracts ⇐170(1)

Acts of parties under written contract afford reliable means of arriving at their intention, and, while not conclusive, construction thus given to contract by parties before controversy has arisen will, when reasonable, be adopted and enforced by the courts.

11. Venue ⇐22(1)

Where contract had not been entered into between plaintiff and building owner, and residence of owner's agent was in Los Angeles, venue, in action against building owner and owner's agent for breach of alleged contract with plaintiff to lease building or for breach of warranty that agent was authorized to bind owner in such alleged contract, was properly laid in county of Los Angeles. West's Ann.Code Civ. Proc. § 395.

Morris M. Grupp, Lewis, Field & DeGoff, San Francisco, for appellant.

Julius Mackson, Los Angeles, for respondents.

BRAY, Justice.

This appeal by plaintiff from an order granting change of venue from the City and County of San Francisco to the County of Los Angeles raises principally the question of whether there was a contract between the parties entered into in San Francisco.

Record.

Plaintiff's complaint sought damages for an alleged breach of contract by defendant Rokuz Holding Corporation to lease cer-

tain San Francisco realty, or a breach by defendant Lyon[1] of a warranty that Lyon was authorized to bind Rokuz in said contract. Defendant Lyon moved to change the place of trial to Los Angeles on the ground that Lyon personally, the partnership and its members, and the Rokuz Corporation, were residents of the County of Los Angeles; that there was no contract entered into or to be performed in San Francisco and in fact no contract at all; and that Los Angeles County is the proper place of trial. Attached to the affidavit of merits accompanying the motion were three letters. Attached to plaintiff's complaint were two letters and a telegram. All these documents will be considered later.

Lyon, being residents of Los Angeles, were entitled to have the case transferred there, unless there was a contract and it was entered into in San Francisco. See Code Civ.Proc. § 395. (There is no contention that any of the provisions of that section other than the one providing venue in the county where the contract was entered into, would apply.)

The Facts.

[1-3] Preliminarily, two rules of law must be borne in mind. (1) The nature of the *cause of action* so far as it affects or determines the place of trial will be ascertained from the complaint alone, and the court will inspect the complaint for the purpose of determining the character of the action and the judgment which may be rendered. See Kaluzok v. Brisson, 27 Cal.2d 760, 167 P.2d 481, 163 A.L.R. 1308; Sims v. Mains, 131 Cal.App. 307, 21 P.2d 447; 25 Cal.Jur. 907; 11 Cal.Jur. 10-yr. Supp. 337. Here the complaint on its face alleges either a contract to lease real property entered into by Rokuz through its authorized agent Lyon or the entering by Lyon into a contract in the name of Rokuz without believing in good faith that he had authority to do so. Civil Code, § 2343, subd. 2, makes an agent liable in the latter event. However, attached to the complaint are the three documents which plaintiff alleges constituted the contract. Thus it is necessary to examine them to determine whether the action is one on contract and if so, where it was executed. While only the complaint is to be considered to determine the *nature* of the cause of action, the affidavit of a defendant in a venue proceeding may be considered with the complaint to determine where the contract sued upon was entered into. Sexton v. Simondet, 97 Cal.App.2d 894, 218 P. 1021, where although plaintiff alleged the contract to have been entered into and to be performed in Sacramento County, the reviewing court examined the contract annexed to the defendant's affidavit and found to the contrary. See Crofts & Anderson v. Johnson, 101 Cal.App.2d 418, 225 P.2d 594. Therefore, in determining the question of whether there was a contract entered into in San Francisco, we must examine not only the complaint and its exhibits, but also the defendants' affidavit which includes the additional correspondence between the parties. Necessarily, the determination of where the contract was entered into, involves the question of whether there was a contract. See Johnson v. Benton, 73 Cal.App. 571, 239 P. 63. If the evidence is conflicting on either subject, we are bound by the lower court's determination. Unless it appears from the complaint and affidavit as a matter of law that there was a contract entered into in San Francisco, the order granting the change of venue must be affirmed.

The facts are to be gleaned from the correspondence, which is undisputed. The correspondence was between Trevor & Co.[2] realtors in San Francisco, and Lyon at Los Angeles representing Rokuz, a New York corporation qualified to do business in California, with its offices in Los Angeles. After certain negotiations between Trevor and Lyon, Trevor on August 24, 1951, at San Francisco wrote Lyon at Los Angeles setting out generally the terms upon which plaintiff would be willing to lease Rokuz'

1. The defendants referred to herein as "Lyon, are Phillip Lyon and Phillip Lyon Company, a partnership comprised of Phillip Lyon and Irving E. Daniels, and are real estate brokers.

2. Herein called "Trevor."

property. August 28th, Lyon at Los Angeles wrote Trevor at San Francisco stating that the owners were agreeable to entering into a lease of the premises with plaintiff on the terms and conditions therein set forth. "If the matter set forth is satisfactory, would you advise me promptly and I shall have the lease prepared and sent to you for signature of the tenant." August 29th, Trevor at San Francisco wired Lyon at Los Angeles: "Re your letter August 28th 1951 re Finman matter, we are instructed by Mr. Finman to wire you as follows: 'Your leasing proposition as outlined in letter of August 28th 1951 and addressed to Mr. Heifetz of Trevor and Company is entirely satisfactory and accepted by me hereby proceed at once to close on that basis. Give present tenant notice as of September 1st so that I will have possession on December 1st 1951.'"

[4, 5] Plaintiff contends that the letter of August 28th was an offer by Rokuz through its authorized agent to lease to plaintiff on the terms therein stated and that Trevor's telegram was an acceptance in San Francisco of the offer by plaintiff, and that the letter and the telegram constituted a contract to lease. Defendants contend that they were merely part of the negotiations which were not yet completed. If the letter and the telegram constituted offer and acceptance instead of merely part of negotiations, then there can be no doubt that a contract was executed in San Francisco. Section 1583, Civil Code, provides: "Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer * * *." An offer may be accepted by telegram. See Wilson v. White, 161 Cal. 453, 462, 119 P. 895. A telegram accepting an offer takes effect on its deposit for transmission. Humphry v. Farmers Union & Milling Co., 47 Cal.App. 211, 214, 190 P. 489. "If a contract is made by exchange of letters or telegrams, it is held to have been made at the place where the letter is mailed or telegram filed containing an unconditional acceptance by one party of the offer of the other." Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 315, 74 P. 855, 65 L.R.A. 90.

Before determining whether the letter and telegram constituted offer and acceptance, let us consider the further correspondence of the parties. August 31st, Lyon at Los Angeles sent Trevor at San Francisco a letter enclosing original and copy of lease "which I think covers the subject matter of our discussion and correspondence. If this is satisfactory as to form," have it properly executed by plaintiff. A check for $4,000 was asked for. The letter then stated that Rokuz had suggested that a commission "be paid to us jointly" over the term of the lease of "3% monthly, or 1½% to each of us [presumably this meant that the commission was to be divided equally between Trevor and Lyon] * * * I would like to have your thoughts about this." September 5th, Trevor at San Francisco wrote Lyon at Los Angeles enclosing the original and copy of lease executed by plaintiff, informing him that Trevor had the $4,000 on deposit which he would forward to Lyon on return of the copy of the lease, and authorizing Lyon to turn the lease over to Rokuz upon complying with three conditions listed, all dealing with the removal of the present tenant of the property. Trevor then refused the proposed commission arrangement. September 11th, Lyon wrote Trevor enclosing the signature page of the lease and stated that the conditions in the letter of September 5th were not acceptable to Rokuz and regretting to have the deal "break up."

Was There a Contract?

Plaintiff's cause of action against Lyon is based upon section 2343, Civil Code, which provides: "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others: * * * 2. When he enters into a written contract *in the name of his principal,* without believing, in good faith, that he has authority to do so; * * *." (Emphasis added.) Therefore, if there was no written contract in the

name of Rokuz there could be no contract entered into in San Francisco. While the letter of August 28th gave such conditions of the proposed lease as (1) the term, (2) requirement of removal of present tenant and delivery of premises 90 days thereafter but without blame if Rokuz unable to remove tenant, (3) rental, (4) taxes, (5) restrictions on use of premises, (6) alterations, it did not purport to contain all of the covenants in the usual lease of business property. While the form of lease thereafter sent turned out to be satisfactory to plaintiff, had it not been satisfactory even though containing the above mentioned matters, it could hardly be said that plaintiff was required by the telegram and letter to accept it, nor to limit the lease to the meagre terms set forth in the letter. The letter does not purport to contain all the matters customarily included in a lease. For example, nothing is said about whether the rent is payable in advance or at any particular time during the month, nor about who shall make repairs. A reasonable construction of the letter is that it is a part of the negotiations for a lease giving the main terms but not being a final offer in itself. That this is the interpretation put upon the letter and the telegram by the parties is shown by Lyon's letter of August 31st sending the lease and requiring the payment of the first and last months' rental and of a commission. Neither of these matters were referred to in the letter of August 28th. Then plaintiff in his letter of September 5th required certain matters as a condition precedent to the lease taking effect, none of which were referred to theretofore. Of most importance here is the fact that the letter of August 28th does not purport to be a "written contract in the name of his principal" as required by section 2343, Civil Code. It merely states that the principal is "agreeable to entering into a lease * * *" Nichols Grain & Milling Co. v. Jersey Farm Dairy Co., 134 Cal.App. 126, 24 P.2d 925, 926, cited by plaintiff, holds that section 2343 gives a "right of action upon the contract" against a person who enters into a written contract *in the name of his principal* without believing in good faith that he has authority to do so. There, however, the agent did more than state that his principal was "agreeable" to entering into a contract. He signed the letter on which the action was based "Robert Gardiner [the principal] By Geo. Masters [the agent]." In Ferroni v. Pacific Finance Corp., 21 Cal.2d 773, 135 P.2d 569, the contract in question was signed by the agent in the principal's name.

[6, 7] Assuming, as claimed by plaintiff, that the letter of August 28th and the telegram of August 29th appear on their faces to constitute an offer and an acceptance such as to make a contract by Lyon in the name of his principal Rokuz, such fact is not final in the determination of whether there actually was such a contract. This depends upon the intention of the parties. If they did not intend those instruments to constitute a contract, but merely intended them as steps in negotiations of a contract, then, however they appear on their faces, no contract was entered into. The subsequent letters show conclusively that neither party intended the two instruments to constitute a contract between the parties but intended the negotiations to continue.

[8–10] "The intention of parties to a written contract is to be ascertained from the writing alone, if possible, but where the language is ambiguous and uncertain, resort may be had to the subsequent conduct of the parties for the purpose of discovering what they understood the agreement to mean. The acts of the parties under the contract afford one of the most reliable means of arriving at their intention; and, while not conclusive, the construction thus given to a contract by the parties before any controversy has arisen as to its meaning will, when reasonable, be adopted and enforced by the courts." 12 Cal.Jur.2d p. 341, § 129.

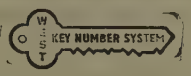
[11] As there was no contract between plaintiff and any of the parties entered into in San Francisco or at all, and as Lyon's residence is Los Angeles, the court properly changed the place of trial to the County of Los Angeles.

In view of our decision we do not deem it necessary to consider certain other con-

tentions raised by defendants, one of which is based upon the fact that plaintiff in no wise alleges that Trevor was plaintiff's authorized agent.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



130 Cal.App.2d 860

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Gabriel Vincente MARCIAS, Defendant and Appellant.

Cr. 1010.

District Court of Appeal, Fourth District, California.

Feb. 18, 1955.

Hearing Denied March 16, 1955.

Prosecution for possession of firearm by defendant who had been previously convicted of four felonies. From adverse judgment of the Superior Court, San Diego County, Arthur L. Mundo, J., the defendant appealed. The District Court of Appeal, Barnard, P. J., held that the evidence was sufficient to sustain the conviction.

Judgment affirmed.

1. Weapons ⇐17(4)

Evidence was sufficient to sustain conviction for possession of firearm by defendant who had previously been convicted of four felonies. Pen.Code, § 12021.

2. Criminal Law ⇐1166½(12)

Statement by judge, after both sides had rested, that case could be decided without argument was neither prejudicial nor reversible error when counsel for defendant had been permitted to make comment. Pen.Code, § 12021.

3. Criminal Law ⇐641(1)

Record did not disclose that defendant was inadequately represented by his attorney who had long experience in trying criminal cases. Pen.Code, § 12021.

4. Mental Health ⇐432

In prosecution for possession of firearm by defendant, who had been convicted for prior felonies, record did not disclose that placing of defendant in solitary confinement shortly after his arrest deprived him of his full mental faculties so that he could not properly conduct his defense. Pen.Code, § 12021.

5. Criminal Law ⇐1166½(1)

In prosecution without a jury for possession of firearm by defendant who had previously been convicted of four felonies, one of which included escape from penitentiary, handcuffing and shackling of defendant throughout his trial was not prejudicial. Pen.Code, § 12021.

6. Criminal Law ⇐641(1)

Where defendant had been granted three extensions of time for filing his opening brief, and after time for filing closing brief had expired defendant asked for further extension of time in which to file closing brief and, for first time, asked for appointment of counsel to represent him, defendant was deemed to have waived his right to apply for appointment of counsel and was not justified in further delaying case through that expedient.

Gabriel Vincente Marcias, in pro. per.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the possession of a firearm in violation of section 12021 of the Penal Code. He was also charged with four prior convictions, with terms served at San Quentin. These included a sentence for robbery in 1942, one for escape from the penitentiary in 1943, one in 1945 for assault with a deadly weapon, and one in 1945 for possession of a weapon in violation of section 4502 of the Penal Code. The defendant pleaded not guilty to the offense charged, but admitted the prior convictions. Trial by jury

was duly waived and he was tried before the court, the trial judge finding him guilty as charged. He was sentenced to imprisonment in state prison, the sentence to run concurrently with relation to any unserved sentences. He filed notice of appeal from the judgment and from "the motion denying a new trial." The record discloses no motion for a new trial or action thereon.

[1] The evidence discloses that the defendant was out on parole at the times here involved. About the middle of February, 1954, he purchased some clothing at a pawn shop in San Diego. On that occasion he said he would like to buy a gun, and the saleslady took some guns out of a counter so that he could look at them. The defendant admired a Colt .32 automatic pistol which was numbered 347079. This gun had one clip but did not have a holster. The saleslady was called away and when she returned the defendant handed a gun back to her and she did not then notice that a gun was missing. About the same time the defendant rented Locker No. 5 at a locker club in San Diego on a weekly basis. He rented it under an assumed name and made three weekly payments. The key to the locker was usually left in the office of the locker club but he testified that on one occasion he took the key away with him.

On the morning of March 1, 1954, this locker was opened at the request of a police officer and the officer found this automatic pistol on a shelf in the locker. It was in a leather holster, and the officer also found a clip and a box of ammunition. During that day this officer had a talk with the defendant's parole officer with respect to the defendant and the gun. On the evening of that day, while the parole officer was interviewing the defendant, the police officers arrested the defendant. On investigation it was found that this automatic pistol was missing from the pawn shop, and the records of the shop showed that it had not been sold.

On March 2, 1954, the officer who found the gun had a talk with the defendant at the jail. The defendant told the officer that a boy named "Don" had given him the gun and he had rented the locker to keep the gun; that Don was an ex-felon but he did not know his last name; that he had bought the holster and another clip because the clip which was in the gun originally did not work too well; that no one else had ever gone to his locker with him; and that he had not worn or carried the gun. When the officer pointed out that the holster was new but showed some wear the defendant said he remembered giving the gun on one occasion to Don and that Don had taken it away and later returned it to the defendant. The officer told the defendant that the gun had been stolen from this pawn shop, and the defendant said that he did not steal it. He said that he had bought some clothing at this pawn shop, but denied that he had looked at any guns.

At the trial the defendant testified that he had been going around with a girl named Marion; that Marion asked him to keep an overnight bag for her and he agreed to do so; that one of the fellows with her asked the defendant to keep a bag for him in which there was some camera equipment; that he refused to do this because his parole officer came to his room once a week and if he saw the camera equipment he might inquire about it; that the fellow suggested putting it in a locker; that they went to this locker club and the defendant paid the rent for the locker; that he then got the two bags and put them in the locker; that subsequently, at this person's request, he went in and got the bag with the camera equipment; that a week later Marion asked him to get some articles she had left in the bag; that the defendant did so and then saw the gun in her bag; that Marion said her uncle had given her the gun; that soon afterward the defendant found that Marion's group were working on an extortion plot in which the camera equipment was used; that he told Marion he wanted all of her things out of this locker; that during this period Marion had told him that the clip on the gun was "messed up" and asked him to buy another, which he did; that defendant was led to believe that someone in Marion's group had taken her bag out of the locker; that he found that they had failed to get the gun out of the locker, and later received

a note saying that they had gone to Miami, but would be back soon and for him not to worry about the gun; that a week or ten days elapsed and he began to worry about the gun; that he did not want to remove the gun from the locker because he might be stopped by the police; that on March 1st he paid a week's rent on his room and then took his clothes and put them in a locker at the bus depot; that he walked around town determining whether leaving would be the wisest thing to do; that he stalled around until 7:00 P.M. when his parole officer usually arrived; that he finally decided that the best thing was to explain the situation to the parole officer and went to his room and waited for the officer; and that while he was explaining the matter to the parole officer the police officers arrived. On cross-examination, the defendant testified that he had told his parole officer and the police officers when he was arrested that Don had given him the gun; that he had not told them anything about any girl having the gun; that he did not know where Marion or Don were; that he had never given the gun to Don to take out of the locker; that Don did go there once with the defendant and when the locker was opened Don reached in and got the gun himself; that Don replaced the gun without the defendant knowing it; that he had known the gun was back in the locker for about ten days; and that he let Don take the gun out of the locker when Don wanted it, but Don took it at defendant's request.

The appellant contends that the evidence is insufficient to support the judgment. He admits that he paid rent for the locker and had access to it when the gun was there, but argues that the gun did not come into his possession voluntarily; that when he placed the overnight bag in the locker he had no knowledge that it contained the gun; and that the evidence shows that when he became aware that the gun was in the locker he made every effort to have it removed and returned to the rightful owner, and when this failed he consulted his parole officer about the gun. Shortly after his arrest the appellant told the officer that Don had given him the gun and that he had rented the locker to keep the gun. He told a different story while on the witness stand which was full of variations and inconsistencies, and which was not well calculated to inspire confidence in its credibility. By his own story he admitted possession and that he had exercised control over the weapon. His explanation of that possession was not satisfactory and was not believed by the trial judge. The evidence justifies the inference that he took this gun from the pawn shop and the evidence as a whole, including the appellant's own testimony, is sufficient to sustain the judgment.

[2] It is also contended that the trial judge was prejudiced against the appellant and "prejudged him guilty without allowing oral argument." After both sides had rested, the judge stated that "This case can be decided without argument" and proceeded to state that the evidence showed that the appellant did have the gun in his possession. Counsel for the appellant said he would like to make one comment and went on to say that the evidence disclosed that the gun came into appellant's possession involuntarily. The court said: "I don't believe the story", and went on to comment on the inconsistent statements made by the appellant, and the fact that he had an opportunity to get rid of the gun. No further argument was offered, for obvious reasons, and the court then found the appellant guilty. The court listened to everything counsel had to say and there is no indication that counsel desired to make any further argument. The situation was similar to that appearing in People v. Don Carlos, 47 Cal.App.Supp.2d 863, 117 P.2d 748, and neither prejudice nor reversible error appears.

[3] The appellant contends that he was inadequately represented at the trial by the court-appointed counsel. It is argued that after the preliminary examination the appellant did not have an opportunity to talk to counsel until two days before his trial; that counsel failed to object to appellant's being handcuffed and shackled, except at the time of judgment; that counsel failed

to call witnesses in appellant's behalf who could corroborate in part the appellant's testimony; and that it was necessary for the appellant to prepare his own notice of appeal after judgment of conviction. The contentions that appellant had no opportunity to talk to counsel, and that his counsel failed to call material witnesses are not supported by the record. Appellant's attorney had had a long experience in trying criminal cases in San Diego, and the record does not show that he was appointed by the court. This counsel represented this appellant at the preliminary hearing and at the trial. His conduct of the trial, including the cross-examination of witnesses, was all that could be expected of any attorney. There is nothing in the record to indicate that this attorney did not make the necessary preparation, or that he failed to call any witnesses requested or suggested by the appellant. The evidence strongly indicates that the appellant did not know where any such witnesses were to be found, and that he did not suggest to his counsel any other evidence or testimony that might possibly be procured.

[4] It is further contended that the placing of the appellant in solitary confinement very shortly after his arrest, and throughout his trial, "deprived him of his full facilities to conduct his defense." It is argued that this solitary confinement so affected appellant's mind that he was deprived of his full mental faculties and was unable to carry out a trend of thought while on the witness stand so that he repeated himself, "and at times his testimony appeared to be little more than jibberish." Good reason appears for keeping the appellant in solitary confinement, and the record does not support the contention that this affected his ability to testify. His testimony takes up 47 pages of the transcript and indicates a high degree of mental agility. Aside from an overdeveloped imagination no mental defect appears, and there is nothing in the record to indicate that he was not able to cooperate with counsel who had charge of conducting his defense.

[5] It is further contended that the handcuffing and shackling of defendant throughout his trial deprived him of a fair trial. The record discloses no request that the appellant not be kept under restraint while in the court room. The only reference to this matter in the entire record appears at the time of sentencing when defense counsel, in making a plea for a light punishment, referred to the appellant's confinement and to his having been brought into court "with leg irons and handcuffs on him." At that time the trial judge remarked that the appellant had demonstrated to the sheriff that he would escape if given the slightest chance, and that the sheriff could not be blamed for bringing him into court that way. The matter was not previously called to the attention of the court, and nothing was brought out as to the circumstances to which the judge referred. It does appear that one of appellant's prior convictions was for an escape from the penitentiary, and the appellant admitted at the trial that he had escaped from the San Diego police in 1942. There was no jury present and there is nothing in the record to indicate any prejudice.

[6] In his closing brief appellant argues that he was prejudiced by the refusal of this court to appoint an attorney to represent him on this appeal. The appellant applied for and obtained three extensions of time for filing his opening brief, covering the period from July 29 to November 7, 1954. He filed his opening brief on October 25, and the respondent's brief was later filed. After the time for filing a closing brief had expired the appellant asked for a further extension of 30 days in which to file the closing brief and, for the first time, asked for the appointment of counsel to represent him. This request was denied as having been made too late. The appellant was later advised that if he cared to submit a closing brief prior to the hearing which had been set for February 8, 1955, that brief would be considered, and such a brief was filed. Under these circumstances the appellant waived his right to apply for the appointment of counsel, and was not justified in further delaying the case through that expedient. Appellant's briefs demonstrate that he had able

legal help in their preparation and no possible prejudice appears.

The purported appeal from the denial of a new trial is dismissed. The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



131 Cal.App.2d 49

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Paul Albert DICKERSON et al., Defendants,

Paul Albert Dickerson and Stanley Payne Sampson, Appellants.

Cr. No. 2575.

District Court of Appeal, Third District.

Feb. 21, 1955.

Hearing Denied March 22, 1955.

Two of three defendants were convicted in the Superior Court, Solano County, Joseph M. Raines, J., of burglary in the second degree, and they appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence, though wholly circumstantial, was sufficient to sustain convictions.

Judgment affirmed.

1. Criminal Law ⇐552(1)

Commission of a crime may be adequately established by evidence which is wholly circumstantial.

2. Criminal Law ⇐1159(2)

Doctrine of reasonable doubt, along with presumption of innocence, passes out of case at conclusion of trial.

3. Burglary ⇐41(1)

Evidence, though wholly circumstantial, was sufficient to sustain convictions of burglary in the second degree.

4. Criminal Law ⇐938(1)

In burglary prosecution, wherein one of defendants supported his motion for new trial on ground of newly discovered evidence with affidavit wherein affiant stated that he had committed the burglary and that movant-defendant knew nothing about it, and that if new trial were granted, affiant would waive constitutional privilege which he had claimed at prior trial, and would testify, but where affidavit gave no details of how and when affiant had committed the crime, trial court acted within its discretion in refusing to grant new trial.

5. Criminal Law ⇐369(1, 2)

Evidence of crimes or misconduct outside framework of trial is generally inadmissible, but evidence of facts relevant and material to issues which incidentally show other crimes or misconduct is admissible.

6. Burglary ⇐36

In burglary prosecution involving theft of two shotguns, testimony of police officer relating conversation with one of defendants in course of investigation of another matter, showing that this defendant knew man through whom third party, who had been seen with defendants shortly after burglary for which they were on trial, had disposed of one of guns taken in the burglary, was admissible as bearing on this defendant's complicity in the burglary.

7. Criminal Law ⇐1171(1)

In burglary prosecution involving theft of two shotguns, even if testimony of police officer relating conversation which he had had with one of defendants in course of investigation of another matter involving taking and disposal of another gun, and which bore on this defendant's complicity in the burglary, was inadmissible, prosecuting attorney was not guilty of prejudicial misconduct in seeking and obtaining introduction of the testimony.

8. Criminal Law ⇐1171(3)

In burglary prosecution, wherein prosecuting attorney, in arguing the cause, twice misquoted testimony of police officer relating conversation which he had had with one of defendants in course of investigation of another matter, and which bore on this

defendant's complicity in the burglary, but where jury must have known that evidence was being misstated in view of objections, convictions were not reversed.

Stewart D. Millon, Vallejo, for appellant Dickerson.

Robert K. Winters, Benicia, for appellant Sampson.

Edmund G. Brown, Atty. Gen., Gail A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

By an amended information the two appellants and Sarita Marie Sampson, common-law wife of appellant Sampson, were jointly accused of having burglarized Steffens Sport Shop in Vallejo. Appellants Dickerson and Sampson were also charged respectively with five and six prior convictions, which they admitted. The three were tried together before a jury which acquitted Mrs. Sampson, but convicted each of the appellants of burglary in the second degree. After denial of their motions for a new trial both appellants were sentenced to imprisonment at San Quentin. Within sixty days thereafter the trial judge, pursuant to Section 669 of the Penal Code, ordered that the term of imprisonment imposed upon appellant Sampson be served consecutively to that for a prior felony conviction and that an amended commitment be issued to so provide.

Upon these appeals from the judgments entered upon the jury's verdicts and from the orders denying new trials, both appellants contend that the following circumstantial evidence is insufficient to sustain the verdicts.

The commission of the burglary was not witnessed, but at approximately 3:12 a. m. on December 12, 1953, the Vallejo Police Department received a citizen's telephonic report that the burglary alarm in Steffens Sport Shop was ringing. Patrol cars were dispatched thereto. The officers discovered that entrance to the store had been gained through a broken window and that two shotguns had been removed from a display rack. These guns had been racked so close to the point where the break had been made in the window that they could be reached and removed from the outside. Broken glass and some blood were observed beneath the window and on the sidewalk near the street curb. One week later, on December 19th, the Sacramento police went to Yreka to take one Hap Myers into custody on another charge. At that time they found one of the stolen shotguns hidden in his room and they later recovered the other gun which he had sold in Sacramento on December 14th. Myers was subsequently identified as a man who was in the company of the appellants in the close vicinity of Steffens Sport Shop at about the time of its burglarization. At approximately 3:15 on the morning of the robbery a highway patrol officer saw a car fail to stop at a stop sign. This stop sign was a few blocks away from Steffens store. The patrol officer followed the car two or three blocks, then brought it to a halt and questioned the four occupants, three men and a woman. The men were Myers, Sampson and Dickerson, the woman was Mrs. Sampson. The officer soon came to the conclusion that Sampson, who had been driving, was so intoxicated as to be in no condition to drive and that Dickerson was for the same reason equally incapacitated. Mrs. Sampson said she did not have an operator's license. It does not appear why Myers did not take over the driving. The patrol officer radioed the sheriff's office to have a physician waiting to give Sampson a sobriety test and at the same time he summoned a taxi to take the other three to a bus depot as they said they wished to go to Sacramento. These calls were placed at 3:21 a. m. The automobile was locked and left standing on the street until after noon when Sampson was released from jail. The patrol officer did not search the vehicle, but while talking to the parties noticed some blood on a pair of gloves lying in the front seat. It was the theory of the prosecution these gloves were worn by Dickerson when he broke the window in perpetration of the burglary. After the arrest of Myers in Yreka a similar pair of gloves was found in Sampson's apartment in Sacramento. These gloves were introduced in evidence and an

expert witness who had tested them prior to trial said he found remnants of blood thereon. There was an irregular cut about an inch long near the base of the thumb of the right-hand glove, extending through the glove texture. It was shown that the position of this cut approximated the position of a cut near the base of Dickerson's right thumb, which cut Dickerson had treated by a physician in Sacramento about 11 o'clock a. m. of the day following the burglary. Sampson accompanied Dickerson to the attending physician's office and had arranged with the physician for the treatment of Dickerson. The taxi driver who drove Dickerson, Myers and Mrs. Sampson to the bus depot was given a dollor bill by Dickerson. He noticed that the bill had blood on it. He looked on the seat where the passengers had been sitting and saw considerable blood on the seat. He looked toward Dickerson and noticed that Dickerson had spots on his trousers which appeared to be blood and that he was wearing gloves which were similar to the gloves received in evidence. The gloves are tan pigskin. The cut on Dickerson's thumb required five or six sutures. Neither Sampson nor Dickerson took the stand at the trial and Myers, who was called as a witness for the prosecution, refused to testify on constitutional grounds. Mrs. Sampson testified that she and appellants did not know Myers and that the man who was in the car with them on the morning in question was a strange hitchhiker whom they had picked up a few minutes prior to the stopping of their car by the patrol officer. She said she and Dickerson parted company with Myers at the bus depot. Myers sold one of the shotguns taken from Steffens store in Sacramento through a Walter Wade and a Harry Carpenter. The sale was made to a Mr. Layton. Wade met Myers at Fourth and K Streets in Sacramento, took the shotgun from him, told Myers he knew where he could dispose of the gun, gave the gun to Carpenter, and Carpenter, having sold it to Layton, received from Layton a check for the price. From this price he retained a few dollars and gave the rest to Wade, who gave the money to Myers, save a few dollars for himself. A Sacramento police officer testified that on December 20th, when he was questioning Sampson in regard to another matter, Sampson admitted having known Myers "at the pen". Over objection the officer testified as follows:

> "A. I asked him about these guns which were taken from this residence at Brite in Yolo County, and he said one of those guns was sold by Hap to a fellow by the name of Walter, a colored fellow by the name of Walter. I says, 'Where did Hap happen to know this fellow Walter?' He says, 'In a joint.' I says, 'What do you mean, in a joint?' He said, 'Up at the pen.' I says, 'Do you know anybody by the name of Walter?' He says, 'Yes, I did.' He said a name I can't recall, and I went to our Bureau of Identification at that time and got a picture of a colored man that I knew by the name of Walter Wade and thinking it might be the same fellow in this picture, I brought it down and showed it to Mr. Sampson. And he says, 'Yes, that's the man.'"

This testimony was by the court ruled as not binding upon Dickerson or upon Mrs. Sampson.

[1–3] We think it unnecessary to separately discuss the sufficiency of the evidence as to each defendant. The evidence was wholly circumstantial, but the commission of a crime may be adequately established by such evidence. People v. Green, 13 Cal.2d 37, 42, 87 P.2d 821, 823—wherein the court said that a conviction on circumstantial evidence "may not be set aside because the evidence is susceptible of two reasonable inferences, one looking to the guilt of the defendant and the other to his innocence." From all the evidence in this case it could reasonably be inferred by the jury that the four people found in the automobile of Sampson so few minutes after the breaking of the window set off the burglary alarm had all gone to or near the store in the car; that one or more of them actively perpetrated the burglary by breaking the window; that Dickerson took the guns from the racks, drawing them through

the broken window, cutting his hand in so doing, and returned to the car; that they were stopped within a few minutes by the patrol officer and that the guns were then either secreted in the car, or had been secreted without being taken into the car and were picked up later by Myers. Dickerson is substantially tied into active participation in the burglary, and though Sampson argues that the evidence as to him shows nothing more than opportunity and grave suspicion, we think his driving the car in which Dickerson and Myers rode away from the scene of the crime and his entire association is too close and too continuous to be brushed off as mere opportunity under suspicious circumstances. We are, of course, not here concerned with reasonable doubt. That doctrine passes out of the case at the conclusion of the trial along with the presumption of innocence. We hold the evidence sufficient to uphold each conviction.

[4] Dickerson contends that the trial court abused its discretion in denying his motion for new trial, which was based upon the ground of newly-discovered evidence. This motion was supported by an affidavit made by Myers to the effect that he, Myers, had committed the burglary and that Dickerson did not participate in the commission of the offense and had no knowledge thereof. This affidavit is as remarkable for what it omits as for what it contains. Though Myers says he committed the burglary and Dickerson had nothing to do with it, he does not give any details of how and when he committed the crime so that the People, in opposition to the motion, could check his facts with those known to exist. It was competent for the trial court to consider these matters as well as to distrust Myers' statement in his affidavit that if a new trial were granted to Dickerson he (Myers) would testify and would waive his constitutional privilege at such trial. Notwithstanding that statement, it might well have turned out that Myers would have changed his mind if a new trial had been granted and he had been called to the stand. It is not necessary to consider whether or not this really constituted new evidence. It is enough to say that the trial court was acting within its discretion when it refused on the affidavit of Myers to grant Dickerson a new trial.

[5, 6] Sampson contends that the court committed error in permitting the Sacramento police officer, Trimble, to give the testimony hereinbefore quoted concerning the conversation between them; that the district attorney was guilty of prejudicial misconduct in seeking and obtaining the introduction of that testimony; and that he was guilty of further misconduct in misquoting that same testimony when arguing to the jury. It is a general rule that evidence of other crimes or misconduct outside the framework of the trial is inadmissible. There are certain well-recognized exceptions to the rule, the main one relevant here being the exception that evidence of facts relevant and material to the issues which incidentally show other crimes or misconduct is admissible notwithstanding. In relating the conversation with Sampson the officer said he had questioned him about some guns taken from a residence in Yolo County. Sampson told the officer that one of the guns taken in Yolo County was sold by Myers to Walter. This was the same Walter through whom Myers sold a gun taken in the Steffens store burglary. It was material to show past associations between Sampson and Myers as bearing upon the inferences to be drawn from his being found with Myers within a few minutes after the Steffens store was burglarized and as conflicting with the testimony of Mrs. Sampson that Myers was merely a stranger whom the others had picked up. The jury were entitled to know the relationships among these men as an aid to deciding whether or not they should infer that Sampson was guilty of complicity in the burglary with which he was charged and this was particularly so where the circumstantial evidence did not conclusively establish guilty complicity. When Sampson told the officer that one of the guns taken at Bryte had been sold by Myers to this same Walter it was permissible to follow up that line of inquiry reasonably and ask the next question, "Where did Hap [Myers] happen to know this fellow?" Sampson's reply was that Myers knew Walter "up at the pen."

The officer then inquired, and we think the inquiry was pertinent to be given in evidence in this trial: "Do you know anybody by the name of Walter?" to which Sampson replied, "Yes, I did." He then showed Sampson a picture of Wade taken from the identification files in police headquarters and Sampson said, "Yes, that's the man." All of this may have had but little weight, but we think that there was no error in permitting the testimony. It did show that Sampson knew Wade, the man through whom Myers had disposed of one of the guns taken in the burglary. If Sampson objected to this testimony standing in its unfinished state and wished to guard against an inference by the jury that he knew Wade too well and had known him too long, the witness stand was available.

[7, 8] We come now to the alleged misconduct of the district attorney, both in respect to the proffering of the foregoing testimony of the officer and to his comments upon it during argument. The prosecuting attorney had asked the officer what led him to get out a search warrant which took him to the home of Layton where the gun Layton had bought was found, and the officer answered that he was questioning Sampson in the detective bureau on that morning about some shotguns that had been removed from a residence in Bryte, Yolo County. He was about to state what Sampson had hold him about those things when counsel for Sampson objected, asked that the jury be excused, and that the matter of the admissibility of that evidence be taken up by the court in the absence of the jury. This request was granted. The prosecuting attorney said: "Your Honor, we expect to show by Captain Trimble that he was having a conversation with Mr. Sampson, and they were talking about guns generally, and Sampson during the course of that conversation told him he understood or had some information that this man Myers had sold a shotgun through some fellow * * *, and as a result, or it was on the strength of that conversation, and it was through that conversation they * * * got a line on those particular guns. It is to show knowledge on the part of the defendant that he knew the guns were in Sacramento." The court asked if that could not be done without reference to other possible offenses and was told that the prosecutor thought it could and the court told the witness "to answer within the limits" as best he could. The jury was then called in and the witness was asked what time the conversation had taken place and who were present and where they were. He was then asked to relate the conversation, and he related it as we have hereinbefore set out. We do not see in this situation any misconduct even if it could be said that any part of the conversation which the witness then related was inadmissible. The court had thrown reasonable precautions about the further testimony of the officer and if the witness went too far it was not the fault of the prosecutor. However, when the prosecuting attorney argued the cause he stated that during the course of the conversation "Sampson told Captain Trimble that this Hap Myers had sold a gun the previous month to a fellow by the name of Walter, who he didn't know except by the name of Walter; Captain Trimble said, 'Well, let's see,' and he went to his police files and pulled out People's Exhibit No. 11 and he says, 'Is this the man you are talking about?' and he said, 'Oh, yes, yes, that is the man all right, that is the fellow Hap Myers sold the gun to.' Captain Trimble said, 'How did you know this fellow, where did you find out about these fellows?' And he said, 'I knew him up at the joint,' and Trimble said, 'What joint?' He said, 'Up at Folsom.'" It is obvious that misstatements of the testimony of the officer witness were here made, and of course no trial or appellate court can condone a misstatement of facts by an attorney in an argument to a jury. Later in the argument the prosecutor said, "* * * Mr. Dickerson and Mrs. Sampson had no explanation as to why he stopped to get the hitchhiker. Who he might be, whether he knew him up at the joint, as he told Captain Trimble." Again the prosecutor was guilty of misstating the evidence to the jury as Sampson had not told the officer he had known Myers "up at the joint" or "up at Folsom". This second misstatement occurred after the prosecutor had been called to task for the first misstatement. Whether or not this misconduct is sufficient to re-

quire reversal of the judgment against Sampson presents the closest question before this Court upon Sampson's appeal. In such cases there is a strong temptation for an appellate court to conclude that unless reversals are accorded for such misconduct prosecuting attorneys will keep on crowding the line. In considering the matter we must assume that prosecuting attorneys know the rules; and where, as here, the offense is repetitious it is serious. Courts have often been called upon to consider such misconduct. Apparently criticism thereof too often falls upon deaf ears. However, we have concluded that in this case the judgment ought not to be reversed, being moved thereto largely by considering that the jury had heard the evidence and in view of the objections made must have known that in material part that evidence was being misquoted. We cannot assume that the jury was influenced by the prosecutor's misstatements. Under the circumstances we hold that the judgment against Sampson should not be reversed for the misconduct of the prosecuting attorney.

The judgments and the orders appealed from are affirmed.

PEEK and SCHOTTKY, JJ., concur.



131 Cal.App.2d 72

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Paul Joseph ALLEN, Defendant and Appellant.

Cr. 3092.

District Court of Appeal, First District, Division 2, California.

Feb. 23, 1955.

Rehearing Denied March 10, 1955.

Hearing Denied March 22, 1955.

Defendant was convicted of a violation of Penal Code, § 288. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered judgment and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Dooling, J., held that the record disclosed no abuse of discretion in ruling that five-year-old girl was competent to testify in prosecution for violation of Section 288 allegedly committed on her person.

Judgment and order affirmed.

1. Criminal Law ⇐1036(2)

Where no objection to competency of a witness is made in trial court, any such objection will be deemed waived and cannot be considered for the first time on appeal.

2. Criminal Law ⇐1153(2)

Witnesses ⇐77

In determining competency of a witness, trial court may consider his testimony as well as his answers on voir dire, and if record of his testimony shows that witness was intelligent enough to receive impressions and competent intelligibly to relate them, reviewing court will not be concerned with any lack of thoroughness in voir dire examination of witness. West's Ann.C.C.P. § 1880(2).

3. Witnesses ⇐40(2)

Record disclosed no abuse of discretion in ruling that five-year-old girl was competent to testify in prosecution for violation of Penal Code § 288, allegedly committed on her person. West's Ann.C.C.P. § 1880(2); Pen.Code, § 288.

Arthur D. Klang, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., California, Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Defendant was convicted by a jury of a violation of Penal Code section 288 committed on the person of a five year old girl. He appeals from the judgment and the order denying his motion for new trial.

[1] Appellant does not question the sufficiency of the evidence nor does he claim any other error except that the trial judge erred in qualifying the five year old child as a competent witness. The record shows that after certain preliminary ques-

tions by the judge he asked: "Does either side wish a *voir dire* on this?" Appellant's counsel replied: "No questions." The court thereupon ordered the witness to be sworn. The witness was then examined on direct and cross-examination. No objection to her competency was made at any stage of the proceedings. Under the decisions where "objection to the competency of a witness is not made in the trial court any objection to the witness' competency will be deemed to have been waived and cannot be considered for the first time on appeal." People v. Aleshire, 90 Cal.App.2d 506, 509, 203 P.2d 569, 571; People v. Lamb, 121 Cal. App.2d 838, 847, 264 P.2d 126.

[2] Appellant is represented by new counsel on this appeal who argues that it would be manifestly unfair to affirm appellant's conviction on the testimony of an incompetent witness merely because of the failure of his attorney to make proper objection in the trial court. If an examination of the record indicated that the child was an incompetent witness we would be inclined to agree with appellant's counsel, but we have no such record before us. An examination of the child's testimony shows that she told a straightforward story on the witness stand. She voluntarily told her parents of the criminal incident within a few minutes after it occurred and there was no suggestion that she had been coached by her parents or any one else in the testimony that she gave. A reading of her answers on *voir dire* and her subsequent testimony both on direct and cross indicates that she was capable of receiving just impressions of the facts respecting which she was examined and relating them truly. Code Civ. Proc. § 1880(2). The trial court is entitled to consider in determining the witness' competency not only her answers on *voir dire* but her later testimony as well, People v. Ernst, 121 Cal.App.2d 287, 290, 263 P.2d 114; People v. Lamb, supra, 121 Cal.App.2d 838, 844, 264 P.2d 126; People v. Arcia, 85 Cal. App.2d 127, 129, 192 P.2d 31, and if the "record of her testimony shows that she was intelligent enough to receive impressions and competent intelligibly to relate them" an appellate court will not be "concerned * * with any lack of thoroughness in her *voir dire* examination". People v. Harrison, 46 Cal.App.2d 779, 785, 117 P.2d 19, 22; People v. Ernst, supra, 121 Cal.App.2d 287, 291, 263 P.2d 114; People v. Denton, 78 Cal. App.2d 540, 546, 178 P.2d 524; People v. Freeman, 24 Cal.App.2d 619, 621, 75 P.2d 640. We may add that appellant was represented in the trial court by an experienced counsel (an assistant public defender) and his failure to further examine the child on *voir dire* or to object to her competency indicates that he was satisfied of the correctness of the trial judge's ruling that the witness was competent.

[3] Unless we were to hold as a matter of law that no child under six years of age can be a competent witness, which we are not prepared to do, we cannot hold on the record before us that the trial judge abused his discretion in ruling that this child was competent to testify.

Judgment and order affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.



The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James COBB and Walter Ray Ault, Defendants and Appellants.

Cr. 5253.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1955.

Rehearing Denied March 7, 1955.

Hearing Granted March 22, 1955. *

Defendants were convicted of attempted robbery. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment and defendants appealed. The Court of Appeal, Doran, J., held that misconduct of relative of one of defendants in speaking to juror during trial was not prejudicial error requiring reversal in ab-

* Opinion vacated 287 P.2d 752.

sence of showing what conversation was about or that any injustice was done to either defendant.

Affirmed.

1. Robbery ⇐24(1)

Evidence was sufficient to sustain conviction for attempted robbery.

2. Criminal Law ⇐1174(5)

Misconduct of relative of one of defendants in speaking to juror during trial was not prejudicial error requiring reversal of conviction for attempted robbery in absence of showing what conversation was about or that any injustice was done either defendant.

3. Criminal Law ⇐379

To be admissible, character evidence must be directed to general reputation in community in which party lives or is generally known, and such evidence is properly excluded where reputation is confined to vicinity of his place of business or among members of restricted group of persons.

4. Criminal Law ⇐379

In prosecution for attempted robbery character evidence of witness who knew defendant's reputation only in his place of business and not in community in which defendant lived was inadmissible.

Eller & Winton, Howard L. Winton, Beverly Hills, for appellant Ault.

Lowell Lyons, Los Angeles, for appellant Cobb.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendants were charged by information with burglary in Count I and attempted robbery in Count II. Prior convictions of felonies were also charged against both defendants. After the trial had commenced each admitted the prior convictions. The jury returned a verdict of not guilty as to Count I and guilty as to Count II. The jury also found that defendant Cobb was armed at the time of the commission of the crime but that Ault was not armed.

The appeal is from the judgment.

A description of the offense, as recited in respondent's brief, is as follows:

"About 8:20 p. m. on February 9, 1954 Police Officers Leonard and Hernandez went to the M & E Liquor Store at 8916 South Broadway, where they spoke to Mr. Shelton, the employee of the store, and then went to the rear of the store, behind the refrigerator, where they remained. At approximately 8:45 p. m., Cobb, followed within three or four feet by Ault, entered the liquor store. They walked up to the counter by the cash register, and Cobb asked for two packages of cigarettes. Mr. Shelton went over, picked up the cigarettes and put them on the counter in front of them. Cobb put a dollar bill on the counter, and Mr. Shelton picked it up and turned to the cash register to ring it up. Before Mr. Shelton could ring it up and give him his change, Cobb pulled out a blue steel foreign automatic pistol, pointed it at Mr. Shelton, and said, 'This is a stick up. Raise your hands and walk to the back.' Mr. Shelton said, 'O.K.,' raised his hands, turned around, and walked toward the back of the store where the refrigerator was. Cobb followed him, with his back to Ault. Mr. Shelton walked past Officer Leonard. The officer stepped out from behind the refrigerator and said, 'Police, drop that gun!' Cobb stopped and Ault looked over his shoulder. Cobb pointed the gun which he had in his hand at Officer Leonard, and Officer Leonard fired three shots at the men. Cobb turned and ran past Ault, and out the front door. Ault turned and ran after him. As they neared the door Officer Leonard fired two more shots, saying, 'Stop or I'll shoot!' Officer Hernandez aimed his gun at Ault and fired. Both Cobb and Ault ran out the door, followed by the police officers. They ran in a northerly direction on South Broadway. Officer Hernandez fired again, and Ault hesitated as if he was going to stop, but did not do so. Officer Hernandez fired another shot and Ault dropped to the ground. Cobb continued running, and turned east on Eighty-ninth Street." Cobb was arrested shortly thereafter. Both defendants were wounded.

It is contended by defendant Ault that,

"I

"The court erred in not investigating a private communication between a juror and a relative of one of the codefendants."

"II

"There was not sufficient proof aliunde of the corpus delicti of the crime of attempted robbery, and appellant's conviction was improperly based on an alleged extra-judicial confession."

Defendant Cobb contends that,

"II

"The court erred in not declaring a mistrial on its own motion where the court had knowledge an unauthorized person had tampered with the jury."

"III

"The evidence is insufficient to support the verdict. Mere suspicion is not a finding of crime."

"IV

"Making an issue of Cobb's prior record before the jury where he admitted prior record was a denial of due process of law and violative of Section 1025 of the Penal Code."

[1] The two officers and the clerk identified the defendants. It is unnecessary to discuss the sufficiency of the evidence; that it was sufficient as a matter of law there is no question.

[2] The failure of the court to investigate a "communication" between a juror and a relative of one of the defendants. The trial judge stated,

" 'Yesterday when we took the recess, one of the relatives of one of the defendants spoke to one of the jurors. If there is any further repitition of that, anybody doing that is going to find themselves landed in jail. That is a criminal offense, and also a violation of the law so far as contempt of Court is concerned. If there is any more conduct on the part of the relatives of either of these defendants, any attempt to reach or talk to jurors, this Court is going to act very severely in the matter.'

"The District Attorney added, 'The information that I had was that apparently they knew each other because the names were called.'

"The Court then stated, 'That doesn't alter the situation. I'm not taking any action at this time, because it may have been a foolish rather than a vicious act, but I want to serve notice now, any more performances of that sort and we are going to take some definite action.' " That is the extent of the record. Obviously, no prejudicial error resulted from the incident. See People v. Murphy, 92 Cal.App. 729, 268 P. 927; People v. Golsh, 63 Cal.App. 609, 219 P. 456; People v. Perez, 19 Cal.App.2d 472, 65 P.2d 1319, and People v. Phelen, 123 Cal. 551, 56 P. 424.

The proof of the corpus delicti was established beyond question and the contention relating to involuntary confessions lacks support in the record.

Appellant Cobb's contentions as recited above lack support in the record and are without merit.

[3, 4] The court's ruling that the testimony of a character witness was inadmissible was not error. "To be admissible such evidence must be directed to the general reputation in the community in which the party lives or is generally known. (40 C.J.S., Homicide, § 222, p. 1141; People v. Soules, 41 Cal.App.2d 298, 306, 106 P.2d 639; People v. Griner, 124 Cal. 19, 21–22, 56 P. 625.) 'Such evidence is properly excluded where the reputation is confined to the vicinity of his place of business or among the members of a restricted group of persons.' (Cosler v. Norwood, 97 Cal. App.2d 665, 667, 218 P.2d 800; People v. Markham, 64 Cal. 157, 163, 30 P. 620.)" The foregoing rule is basic and the witness in the within action did not meet the test.

The reference to the conviction of prior felonies, on cross-examination, was proper.

There are no prejudicial errors in the record and the judgment is affirmed.

DRAPEAU, J., concurs.

WHITE, Presiding Justice.

I concur.

However, I find myself in disagreement with that portion of the majority opinion which holds that the trial court's ruling that the testimony of a character witness was inadmissible was not error. The record reflects that by way of foundation the witness testified on direct examination that he was in the upholstering business and that appellant Cobb had worked for him off and on for the previous four years; that he knew Cobb's reputation for honesty, integrity and truthfulness, based on his own opinion and discussion of his reputation by men who worked for him; that he had discussed Cobb's reputation with such other persons when he hired him; that he knew Cobb's reputation for the traits involved; that the persons with whom he talked were mostly upholsterers who lived in Los Angeles and worked with him and Cobb off and on; that he based his opinion on the conversations and his knowledge of Cobb's general reputation in the community; that the persons with whom he talked resided in the general community itself; and that he knew the general reputation of Cobb in the community for honesty and integrity and truthfulness, based upon discussion about that general reputation in the community about four years previously when he hired him, and on and off since. On voir dire the witness testified that he knew nobody who lived in Cobb's neighborhood; that his only contact with Cobb was that he was an employee, and through the men in the shop; that he had not talked about Cobb's reputation with anybody outside of the men in the shop; that he knew of Cobb's reputation at the shop, but outside of that they never had anything in common; that he mostly talked with people at his place of business, and might have talked to people out of the building where his shop was, but they were people connected with the business; that he had talked to eight or ten people who resided in the community about Cobb within the previous four years, and they discussed Cobb's general reputation in the community for the traits involved; that not all of those eight worked in the shop, but four or five did not work for him; that he based his opinion on the discussion with those people of the general reputation of Cobb in the community, and that he knew Cobb's general reputation in the community.

The Court refused to allow the witness to testify as to Cobb's general reputation in the community for peace, quiet, honesty, integrity and truthfulness.

Respondent seeks to justify the correctness of the court's ruling because, "We submit that here clearly any knowledge which the witness might have had of the reputation of Cobb was not knowledge of his general reputation in the community where he lived or was generally known, *but was, rather, reputation in the vicinity of Cobb's place of business and among people connected with the business.*" (Emphasis added.)

I am satisfied that the ruling was erroneous. Respondent relies on the case of People v. Carnavacci, 119 Cal.App.2d 14, 17, 258 P.2d 1121, 1123, wherein it is stated that "To be admissible such evidence must be directed to the general reputation in the community in which the party lives or is generally known. 40 C.J.S., Homicide, § 222, p. 1141; People v. Soules, 41 Cal.App.2d 298, 306, 106 P.2d 639; People v. Griner, 124 Cal. 19, 21–22, 56 P. 625. *'Such evidence is properly excluded where the reputation is confined to the vicinity of his place of business or among the members of a restricted group of persons.'* Cosler v. Norwood, 97 Cal.App.2d 665, 667, 218 P.2d 800, 801; People v. Markham, 64 Cal. 157, 163, 30 P. 620."

We are persuaded that the true and correct rule is that stated in People v. Derrick, 85 Cal.App. 406, 409, 259 P. 481, 482, as follows: "In this age of rapid transit and quick communication it is not only conceivable, but a matter of common knowledge, that business men may acquire no reputation one way or the other in the community in which they actually reside, and bear an excellent reputation miles distant where they follow their daily vocations and come in contact with many associates. People v. Schmidt, 79 Cal.App. 413, 249 P. 832 [250 P. 1104]; see, also, State v. Henderson, 29 W.Va. 147, 1 S.E. 225, 240; State v. Cushing, 14 Wash. 527, 45 P. 145–147, 53 Am. St.Rep. 883. Any other view would prevent

many eminent citizens from proving well-earned reputations."

Nor can there be any doubt about the well known rule regarding evidence that the fact that the character or reputation of a person in the community in which he resides has not been discussed nor questioned is cogent evidence of the person's good character and good reputation. People v. Adams, 137 Cal. 580, 70 P. 662; People v. Stennett, 51 Cal.App. 370, 197 P. 372.

However, in the case now engaging our attention I am satisfied that a reversal cannot be ordered because after a reading of the entire record, including the testimony, I am persuaded that a miscarriage of justice has not resulted. Constitution of California, Article VI, Section 4½. The error was therefore not prejudicial, and in view of the overwhelming evidence of appellant Cobb's guilt, the erroneous ruling could have had little, if any, effect in the determination of the jury.



130 Cal.App.2d 853

F. W. AWALT, individually and doing business as Western Crane Service, Plaintiff and Respondent,

v.

MERCER, FRASER COMPANY, a corporation, Defendant and Appellant.

Civ. 8530.

District Court of Appeal, Third District, California.

Feb. 18, 1955.

Action to recover for damage to crane, rented to contractor, resulting when wall of building being constructed by contractor collapsed upon crane. The Superior Court, Humboldt County, Delos A. Mace, J., gave judgment for crane owner. Contractor appealed. The District Court of Appeal, Schottky, J., held that where wall of building contractor was erecting collapsed and fell on crane, and contractor did not plead or bring forward any evidence of contributory negligence on part of crane owner's employee who was operating crane, an inference of negligence on part of contractor in erecting wall arose, sufficient to support verdict.

Judgment affirmed.

1. Bailment ⇐31(3)

In action to recover for damage to crane, rented to contractor, resulting when wall of building contractor was erecting fell on crane, where there was conflicting evidence as to whether boom of crane was repairable, evidence supported finding that it was not repairable.

2. Negligence ⇐121(2)

A finding of negligence may be predicated upon happening of an accident for which no explanation thereof is made by the defendant, where it appears that the thing causing the accident was under the management and control of the defendant.

3. Bailment ⇐31(1)

In action for damage to crane, rented to contractor, resulting when wall of building contractor was erecting collapsed upon crane, where contractor did not plead or prove contributory negligence on part of crane owner's employee who was operating crane, an inference of negligence by contractor in construction of building arose sufficient to support verdict for crane owner.

4. Bailment ⇐33

Where crane owner's complaint alleged bailment and that through negligence of contractor crane was damaged, and contractor offered evidence that it was not negligent, issue of contractor's negligence was properly before court and finding that contractor was negligent was within issues.

5. Bailment ⇐32

In action for damage to crane, rented to contractor, resulting when wall of building contractor was erecting collapsed upon crane, where there was evidence sufficient to justify trial court's conclusion that crane's boom could not be repaired, and there was no evidence as to age or prospective life of damaged boom, court did

not err in awarding damages based on cost of new boom.

6. Bailment ⇐14(1)

A bailee for hire is not an insurer. West's Ann.Civ.Code, §§ 1928, 1929.

Woodman, Leddy & Sautter, Eureka, for appellant.

Earl B. Myers & Thomas Needham, San Francisco, for respondent.

SCHOTTKY, Justice.

Respondent commenced an action against appellant to recover damages for a loss which respondent alleged resulted from the negligent and careless handling of a crane which respondent had rented to appellant. Respondent was awarded judgment in the sum of $1,112.03 and this appeal is from said judgment.

The principal grounds urged by appellant upon this appeal are the insufficiency of the evidence and that the trial court did not apply the proper measure of damages. Before discussing these contentions we shall give a brief summary of evidence as shown by the record.

Respondent was in the business of renting out heavy-duty mechanical equipment. Said business was located in Berkeley, California, and was conducted under the name of "Western Crane Service." Appellant was a corporation and was engaged in the construction of some large wooden buildings for a third party in Eureka, California. Appellant rented a lifting crane from respondent at the rate of $925 a month. Respondent furnished an operator and oiler for the machine, but they were to be and were paid by appellant. A crane was sent from Berkeley to Eureka and appellant used it in constructing the buildings from the inception of the work on them. It was used to lift heavy trusses, timbers or sections into place.

Around one o'clock p. m. on June 4, 1948, while the crane was being used in holding a truss in place while it was secured to the building, a section of the building collapsed and in so doing the crane was tipped over on its side and damaged. The boom was damaged and in an unusable condition, the four ton counterweight was knocked loose, the machine's frame was bent, the cab was damaged and the flywheel housing was broken. Repairs were made to the crane in the shop of appellant and a new boom and flywheel housing were purchased by respondent and sent to Eureka, where they were assembled on the crane. The damaged boom was returned to respondent's yard in Berkeley. The crane was then used in the completion of the building. The total rental period was from April 27, 1948, to September 25, 1948. The operator then returned the crane to Berkeley where it was used in some work. Further repairs were not made until January, 1949, as respondent stated that he had to wait for the insurance money in order to do the necessary repairs. Respondent testified that the extent of damage to the boom rendered it useless to him and that it could not be used in his business. He stated that booms could be repaired, but that he could not use repaired booms in the rental business. Respondent's witness, a Mr. Zaft who was in the welding and repair business, testified that the boom could not be repaired at the time due to a lack of manten steel, that he could not repair it because a special jig was needed to make sure the boom was returned to perfect alignment, that as far as he was concerned the only usable items of the damaged boom to repair it were its fittings, and that it was not possible to repair the boom to make it as good as it was before the accident.

The cost of the new boom was $1,053.18, which did not include the transportation charge involved in getting it. The flywheel housing apparently cost $58.85. The exact cost of all the other repairs by respondent was not shown by the evidence. Respondent made most of the repairs in his own repair shop and did not keep separate time sheets, vouchers, records, etc., on the repair of this crane, so that at the trial he did not have any substantial evidence of the cost of the repairs, except in regard to the new boom and flywheel housing. Respondent prepared an "estimate" of the

necessary repairs which was submitted to his insurance adjuster, but the exact cost of such repairs was not shown; it was testified to by the operator of the crane and respondent that the repairs were made so as to put the crane back into the same condition as it was when it had been rented to the appellant. Respondent did not demand the amount of the repairs from appellant at any time before the complaint was filed, and appellant had no knowledge that respondent sought to recover for such additional repairs until he was notified of respondent's suit.

In relation to the damages, the respondent stated that even if this boom could be repaired he could not use it in his business. Respondent stated that some booms are repaired, but that this one could not be made usable for his business. Mr. Zaft, an expert witness, testified that the boom was not repairable because of a lack of manten steel, that it was impossible to straighten out the twisted portions of this boom, that booms could be repaired, but that in his opinion it was not feasible to repair this boom. Respondent showed that he had spent $1,053.19 in the purchase of a new base section of 30 feet, a 10 foot section and a 5 foot section. The damaged boom was 65 feet in length, that is, a base section of 15 feet, three 10 foot sections, one 5 foot section and a 15 foot tip section. A basic boom consisted of the 15 foot base section and the 15 foot tip section, totaling 30 feet. The total length of a boom is dependent upon the footage of sections used between the base and tip sections. So that the amount recovered by respondent was not what 65 feet of boom would have cost, but only the 45 feet that he replaced with new parts. In other words, 20 feet of boom section was not replaced with new section, but were replaced with some that respondent had on hand; no damages were sought or given for the damage to such sections. In regard to the flywheel housing, it was so broken that it was not repairable, so that a new one was purchased at the cost of $58.-85.

[1] A witness for appellant, its mechanic foreman, testified that the repair made on the crane right after the accident put it in as good condition as it was before the accident, except as to some painting on the cab, and that in his opinion the boom was repairable. This witness only gave the damaged boom a cursory examination and at most his testimony raised a conflict in the evidence as to whether or not the boom was repairable, which conflict was resolved in favor of the respondent and substantiated by the evidence.

The court found, among other things, that appellant was so negligent and careless in the construction of the building that it collapsed and that such collapsing caused the crane to be damaged, such damage being the amount of the judgment; that appellant was a bailee for hire of the crane and had violated the terms of the bailment in that he failed to use ordinary care in the preservation and safety of said equipment while it was in his possession.

The court awarded respondent judgment in the sum of $1,112.03 which was the amount of the cost of the new boom and the flywheel housing. The court denied recovery for the other repairs made by respondent upon the ground of lack of substantial evidence on this point since all of the evidence produced as to this was his "estimate" and not the actual amount of labor and costs expended.

[2, 3] Appellant contends that there is not sufficient evidence to support the findings of the court that there was negligence in the construction of the building and that appellant failed to use ordinary care in the preservation and safety of the crane. We believe the following quotation from the memorandum opinion is amply supported by the evidence and the law:

> "While it is true, in the case at bar, that the defendant paid the wages of the operator and oiler, also carried Workmen's Compensation, the issue here involved centers itself upon the alleged negligence of the defendant. The Answer of the defendant does not plead contributory negligence upon the part of the crane operator, Campbell. The real issue is: Was the damage to

the bailed article (crane) occasioned by negligence of the defendant? In this connection the evidence of the operator, Campbell, stands uncontradicted. It appeared that while the crane was hoisting a truss for placement in the construction of the building that a section of the building collapsed, thereby overturning and damaging the crane. This construction work was under the control and direction of the defendant and buildings, if properly constructed or being assembled in the process of construction, do not ordinarily collapse. It was not shown that the operator, Campbell, did anything in the handling or operation of the crane to cause the damage which was occasioned. No counter evidence was developed to destroy the inference of negligence. While it may be conceded that the doctrine of 'res ipsa loquitur' sometimes works as a hardship to a defendant who cannot rebut the inference of negligence, the California cases hold that a finding of negligence may be predicated upon the happening of an accident for which no explanation thereof is made by the defendant where it appears that the thing causing the accident is under the management and control of the defendant. The witness, Brown, manager of defendant merely testified he did not know what was the cause of the accident. An 'I don't know' explanation is no explanation at all. (See Ireland v. Marsden, 108 Cal. App. 632, 643 [291 P. 912].)"

[4] Appellant contends that the issue that the building was so negligently and carelessly constructed by appellant that it collapsed and caused the damage to the crane was not properly presented by the pleadings. Respondent's complaint alleged the bailment and that in violation of the bailment agreement to return the crane in good condition the appellant neglected it and through its negligence, carelessness and ill use the crane was damaged. Proof of this would create a prima facie case, which could be defended against by a showing that the damage occurred without negligence on the part of the bailee. Appellant denied the allegations stated above and offered evidence on that subject, so that the issue was properly before the court and the finding was therefore properly within the issues.

[5] Appellant contends further that the court incorrectly allowed respondent the cost of replacing the boom sections as damages and complains that it was charged with the replacement cost of a new boom when the one that was damaged was a used one. There was ample evidence to justify the trial court's conclusion that the boom could not be repaired satisfactorily. There was no evidence as to the age or prospective life of the damaged boom produced by either appellant or respondent, nor did the appellant show that the costs to repair it would have been less than the difference in the value of the boom before and after the accident. There was a conflict in the evidence as to whether or not the boom was repairable and, in granting judgment for respondent in the amount of the new sections, the trial judge in effect resolved the conflict in favor of respondent as to the 45 feet of new boom purchased. The record shows that the respondent used equipment which he kept in excellent condition and that on a prior occasion when a boom was damaged a new one was purchased because three attempts to fix it had failed. Appellant failed to introduce any evidence to reduce the damages, except some testimony that the boom was repairable.

[6] While it is true that in California a bailee for hire is not an insurer, Homan v. Burkhart, 108 Cal.App. 363, 291 P. 624, it is provided in section 1928 of the Civil Code that "The hirer of a thing must use ordinary care for its preservation in safety and in good condition." And section 1929 provides that "The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his want of ordinary care."

We are satisfied that the instant case was one in which there was a conflict in the evidence as to the issues of negligence and damages, which conflict it was the duty

of the trial court to resolve. We are satisfied also that the trial court's conclusions that the damage to the crane was attributable to the negligence of appellant and that the respondent was thereby damaged in the amount of the judgment awarded finds ample support in the record.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



130 Cal.App.2d 841

Otho RIDGEWAY, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA; Alfred Stenzel and Trousdale Construction Company and Pacific Employers Insurance Company, Respondents.

Civ. 8685.

District Court of Appeal, Third District, California.

Feb. 17, 1955.

Proceeding to review award of Industrial Accident Commission made to petitioner for compensation, insofar as it determined that he was employee of defendant construction company at time of injury involved. The District Court of Appeal, Schottky, J., held that evidence on issue of amount of control exercisable by prime contractor over subcontractor's employees was insufficient to support finding of Industrial Accident Commission that prime contractor was special employer of subcontractor's carpenter foreman at time of his injury.

Award annulled.

1. Workmen's Compensation ⇐237

Payment of wages is not of itself sufficient to establish that recipient thereof is servant of one paying the same.

2. Workmen's Compensation ⇐1939

If there is any evidence, whether by direct or reasonable inference, which will support finding of Industrial Accident Commission in workmen's compensation case, reviewing court has no power to disturb it.

3. Workmen's Compensation ⇐1939

Function of court on review of action of Industrial Accident Commission, in workmen's compensation case, is to determine whether evidence, if believed, is substantial and supports findings.

4. Workmen's Compensation ⇐1939

Award of Industrial Accident Commission in workmen's compensation case may not be annulled because there are two conclusions which fairly may be drawn from evidence, both of which are reasonable, one sustaining, and other opposing right to compensation.

5. Workmen's Compensation ⇐208

In order to establish relationship of special employer and employee, it is necessary that special employer have some control over details of work to be done and not merely in results accomplished.

6. Workmen's Compensation ⇐1461

In workmen's compensation proceeding, evidence on issue of amount of control exercisable by prime contractor over subcontractor's employees was insufficient to support finding of Industrial Accident Commission that prime contractor was special employer of subcontractor's carpenter foreman at time of his injury.

Bradford, Cross, Dahl & Hefner, Sacramento, for petitioner.

Everett A. Corten & T. Groezinger, San Francisco, for Industrial Accident Commission.

Francis B. McGrath, San Francisco, for Trousdale Construction Co.

Mullen & Filippi, San Francisco, for Stenzel.

SCHOTTKY, Justice.

This is a proceeding to review the findings and award granted to petitioner in so

far as it determines that he was an employee of Trousdale Construction Company at the time of the industrial injury. The award was based on a finding that Trousdale Construction Company was the special employer of petitioner at the time of said injury.

The question presented is whether or not the Commission exceeded its jurisdiction in so finding.

Petitioner was a carpenter foreman for Stenzel. On June 1, 1951, petitioner sustained an injury to his back, which injury arose out of and occurred in the course of employment. The Commission's referee found that Stenzel was the subcontractor of rough carpentry work on the job and that the persons engaged in such rough carpentry work, including petitioner, were his employees. Petitioner was paid by checks from the Trousdale Construction Company in accordance with the written agreement which provided that Trousdale would carry Stenzel's employees on its payroll "as an accommodation to Stenzel," that Stenzel would prepare the payroll, that Trousdale would make the usual deductions and "pay Workmen's Compensation Insurance for and on behalf of Stenzel," the charges for all of these items to be deducted from the contract price due Stenzel. The agreement also provided that Trousdale was to pay Stenzel $500 a month during the job as "so-called wages" with the usual deductions therefrom, but this payment also would be deducted from the contract price at settlement time.

Pursuant to the agreement pertaining to 528 houses, for which the contract price was $218,000, Trousdale settled with Stenzel at the conclusion of the work by paying $33,006.72, showing as deductions from the $218,000 contract price, $171,290.07 expended for payroll and $13,703.21 as payroll deductions made on Stenzel's behalf.

[1] The payment of wages is not of itself sufficient to establish that the recipient thereof is the servant of the one paying the same. Independence Indemnity Co. v. Industrial Accident Commission, 203 Cal. 51, 262 P. 757; Guarantee Insurance Co. v. Industrial Accident Commission, 22 Cal. 2d 516, 139 P.2d 905. Petitioner testified that he took orders only from Stenzel or Carlson, a carpenter foreman and Stenzel's representative in the field. On one occasion a Trousdale foreman attempted to give petitioner an order and this incident appears in the record as follows:

"A. He said, 'Otho, will you come over and straighten the siding on the side of this house?', and I said, 'No, Mac, I won't, because I have got work to do over here. You better take it up with Swede', and he said, 'OK, I guess I better do that.'

"Q. And when you told him he better take it up with Swede, you had reference to Carlson? A. Carlson.

"Q. You told him you had work of your own to do? A. That is right.

"Q. You didn't take his orders, and for him to get Carlson to get somebody else to do it? A. That is right.

"Q. And do you know if it was done? A. Yes, it was done."

It was upon this incident that the referee based his finding that Trousdale was the special employer of petitioner as he stated in his report: "This indicates to me that Trousdale, as general contractor, did have some control over the details of the work done by Stenzel's employees, even though it exercised that control only indirectly, acting through Stenzel's principal foreman. I believe this is sufficient evidence of the right to control to establish that Trousdale was a special employer of applicant and Stenzel's other employees, although Stenzel was the general employer."

Petitioner contends that the evidence is insufficient to support the finding that the Trousdale Construction Company was a special employer of petitioner. He argues that the above-related incident is not sufficient to show that Trousdale had control of the details of the work and that there is no other evidence in the record to show any control by Trousdale of the details of the work performed by Stenzel's employees but only interest in the result of such work.

We do not believe that the evidence sustains the view that Trousdale had any control over the details of the work. We

believe, rather, that it supports the view that Trousdale was interested in the result and had the necessary control to attain such result, namely, the normal authority of a general contractor over his sub-contractors to see that the work is on time and that it is in accordance with the contract. The contract between Trousdale and Stenzel does not show authority in Trousdale to control the details of the work, but only that he was interested in the result, that is, that Stenzel got the specified number of houses framed or "roughed in" within the allotted amount of time so that the operations of building the whole tract of houses could go along on schedule. A similar situation was involved with the cement men when they weren't pouring foundations fast enough and were slowing down production by Stenzel's men. Carlson went to McMullen and told him of the delay and he in turn spoke to the foreman of the cement men. McMullen, Trousdale's foreman, was more or less a coordinator, to see that the right things occurred at the right time, that the job flowed smoothly, otherwise production would be hampered and slowed down, thereby causing an inefficient operation and possible great loss to all concerned.

Some other provisions of the contract should be noted. It provides that Stenzel furnish, at his own expense, all necessary labor; that Stenzel's work should be performed by competent and experienced men; that such work be able to pass inspections by the Veterans Administration and/or the Federal Housing Administration and also by the Trousdale Construction Company; that all work be performed in good and workmanlike manner, and materials shall not be wasted but shall be economically used; and that any required corrections to work done shall be made at Stenzel's own expense. The instrument does not give Trousdale any right of control over Stenzel's employees, but shows that Stenzel is to employ the labor necessary to fulfill his contract and that Stenzel himself is *responsible* for required corrections in the work. The contract gives Trousdale the right to inspect and reject the end result done by his independent contractor, the same right given most buyers to reject an unsatisfactory performance in the work product, and demand that the contractor or subcontractor see that the work is corrected. Testimony showed that in the construction business it is the general practice for a general superintendent to deal directly with the subcontractor and with his foreman when given special authority to do so, but not to deal directly with the employees of such subcontractor. However, this does not show a general practice of making the employees of subcontractor those of the general contractor merely because a defect in the performance of the subcontract must be remedied before it will be accepted. Stenzel testified that Carlson was his representative in the field to handle anything that might arise on the job that came within his portion of the building plan; that is, Carlson was Stenzel's overseer and contact man on the job. So when McMullen was told to see Carlson in regard to correcting some of the work done on the siding of a house, which was not acceptable to the general contractor, it was in accord with the general practice. In performance of the contract obligations to furnish acceptable work, Carlson had the siding corrected. Nowhere in the record is it shown that Trousdale had any right or attempted to exercise any right of control over the activities or details of work to be done by Stenzel's employees. All requests by Trousdale, through his foreman, for certain work to be done were made to Stenzel or Carlson, and were in accord with the rights under the contract, that Stenzel furnish acceptable work and have certain work done by a certain time, as the completion of the rough carpentry work on three or more houses per day. The only time McMullen ever deviated from this practice was when he addressed petitioner in regard to the siding of the house and petitioner told him to see Carlson. (Petitioner was also a foreman for Stenzel, but was not Stenzel's field man or representative on the job.) McMullen saw Carlson and Carlson had a Stenzel employee other than petitioner correct the work.

It is no doubt true, as contended by respondents, that a dual employment relationship may be found to exist where the em-

ployees of an independent contractor come under the direction and control of the other party to the contract giving rise to the employment. As stated in Industrial Indemnity Exchange v. Industrial Accident Commission 26 Cal.2d 130, at page 134, 156 P.2d, 926 at page 928:

"But an employee may at the same time be under a general and a special employer, and where, either by the terms of a contract or during the course of its performance, the employee of an independent contractor comes under the control and direction of the other party to the contract, a dual employment relationship is held to exist. [Cases cited.]"

And in Wessell v. Barrett, 62 Cal.App.2d 374, 376, 144 P.2d 656, 657 (hearing denied), the applicable law is stated as follows:

"The general principles relating to liability in cases of general and special employment are stated in Campbell on Workmen's Compensation, Vol. 1, sec. 457, where it is said: 'The requisites for imposing liability upon both general and special employer are: (1) a loaned employee situation, in which an employee of one is sent to perform labor for another; (2) a common or joint participation in the work and benefit to each from its rendition; (3) some power, not necessarily complete, of direction and control over details in each.'

"In Employers' Liability Assur. Corp. v. Industrial Accident Comm., 179 Cal. 432, 439, 177 P. 273, 276, the Supreme Court stated the principle as follows: 'where, at the time of the accident, both the general and special employer exerted some measure of control over the injured person through their respective foreman or employés both should be held liable.' The rule has been followed and approved in many later cases some of which are: Famous Players Lasky Corp. v. Industrial Accident Comm., 194 Cal. 134, 137, 228 P. 5, 34 A.L.R. 765; Independence Indemnity Co. v. Industrial Accident Comm., 203 Cal. 51, 55, 262 P. 757; Umsted v. Scofield Engineering Const. Co., 203 Cal. 224, 227, 263 P. 799; Department of Water & Power v. Industrial Accident Comm., 220 Cal. 638, 641, 32 P.2d 354; and Silberman v. Industrial Accident Comm., 21 Cal.2d 609, 611, 134 P.2d 228. In Entremont v. Whitsell, 13 Cal. 2d 290, 89 P.2d 392, and Stewart & Nuss Inc., v. Industrial Accident Comm., 55 Cal.App.2d 501, 130 P.2d 985, emphasis is laid on the right to exercise direction and control, and in Guarantee Ins. Co. v. Industrial Accident Comm., 22 Cal.2d 516, 139 P.2d 905, 907, it is said that if the special employer had the right to exercise control over the employee 'it would be immaterial whether she actually exercised the control.'"

Respondent commission argues that where, as here, there is no express agreement indicating the right of the special employer to exercise the requisite measure of control over the employee, it is a question of fact which may be determined by the trier of facts from the circumstances of the case, quoting from Industrial Indemnity Exchange v. Industrial Accident Commission, supra, where it is stated at page 135 of 26 Cal.2d, at page 929 of 156 P.2d:

"In the present case the evidence does not disclose an express agreement either affirming or denying the right of the claimed special employer to control the manner and method in which the work was performed by the injured workman. The existence or nonexistence of the right must, therefore, be determined by reasonable inferences drawn from the circumstances shown."

[2-4] It is well established that "if there is any evidence, whether direct or by reasonable inference, which will support the finding of the commission, a reviewing court has no power to disturb it. [Case cited.] The function of the court on review of the action of the commission is to determine whether the evidence, if believed, is substantial and supports the findings." Industrial Indemnity Co. v. Industrial Accident Comm., 115 Cal.App.2d 684, 692, 252 P.2d 649, 654. "Neither may

the award be annulled because there are two conclusions which fairly may be drawn from the evidence, both of which are reasonable, the one sustaining and the other opposing the right to compensation." State Employees, etc., System v. Industrial Accident Comm., 97 Cal.App.2d 380, 382, 217 P.2d 992, 994; Industrial Indemnity Exchange v. Industrial Accident Comm., 26 Cal.2d 130, 136, 156 P.2d 926.

[5, 6] Bearing in mind the fundamental rule that in order to establish the relationship of special employer and employee it is necessary that the special employer have some control over the details of the work to be done and not merely in the results accomplished, we are satisfied that the evidence in the instant case does not show, nor is it reasonably inferable therefrom, that Trousdale Construction Company had any control as to the mode of accomplishment, but merely shows that it had control as to the result accomplished. It is apparent that the referee based his opinion on the brief incident hereinbefore set forth when McMullen, Trousdale's general superintendent, endeavored to direct the activities of petitioner. But said incident shows nothing more than the exercise of the right given the general contractor to inspect and reject the end result obtained by one of his independent contractors and to request its correction.

The instant case may be likened to one in which a municipality enters into an agreement whereby certain of its streets will be repaired by an independent contracting paving company. The city's inspector observes a defect in work being performed by the heavy roller. He directs the operator of the roller to remedy the defect. Whether the roller operator complies directly with the *request* of the inspector or requires such request to channel through his foreman, the defect is remedied. In the latter case, the roller operator is injured while performing work under the direction of his paving contractor employer. He files an application for benefits and names the city of Sacramento a defendant. In support of his claim he testifies to the occasion when the city's inspector required that defects in his workmanship be remedied. The Commission thus has presented to it a situation exactly analogous to the case at bar. May an award against the city of Sacramento under those circumstances stand? In such situations can it honestly be said the city or general contractor has a right to control an employee of the subcontractor or paving contractor simply by reason of the fact contractual rights legally give them the prerogative to demand that defects be remedied?

Another analogy that might be drawn is the case of the home owner who employs an independent painting contractor to paint his home. The mistress of the house, not satisfied with paint splashes on other portions of the house, directs one of the workmen to clean it up. He refuses, but when the mistress appeals her case to the foreman, or the independent contractor himself, the job is done. Does that individual painter thus become the employee of the mistress of the house? Must she remain silent and accept any result tendered, at the risk of becoming liable to a painter injured on the job?

In view of the written agreement and the circumstances as shown by the record we believe that to affirm the determination of the respondent Commission that petitioner was a special employee of the Trousdale Construction Company would go far toward making every employee of a subcontractor the special employee of the general contractor.

In view of the foregoing the award is annulled in so far as it determines that petitioner was a special employee of Trousdale.

VAN DYKE, P. J., and FINLEY, Judge pro tem., concur.

131 Cal.App.2d 22

PEOPLE of the State of California, Plaintiff and Appellant,

v.

Robert A. ASAMOTO and Robert A. Asamoto, d/b/a Bellevue Nursery, Defendant and Respondent.

Civ. 20283.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1955.

As Modified on Denial of Rehearing March 18, 1955.

Hearing Denied April 20, 1955.

The Attorney General brought action to enforce the provisions of marketing order of the Director of Agriculture for bedding plants grown and sold for resale. The Superior Court of Los Angeles County, William J. Palmer, J., entered judgment adverse to the People of the State of California, and the People appealed. The District Court of Appeal, White, P. J., held that marketing order was not authorized by the Agricultural Code.

Judgment affirmed.

1. Statutes ⇐184

Objective sought to be achieved by a statute as well as evil to be prevented is of prime consideration in its interpretation.

2. Statutes ⇐188

Where word of common usage has more than one meaning, meaning, which will best attain purpose of statute, should be adopted, even though ordinary meaning of word is thereby enlarged or restricted.

3. Constitutional Law ⇐81

The police power may be invoked only where commodity or service sought to be regulated is affected with a public interest and where regulation is for purpose of protecting health, peace, safety, and general welfare of the public.

4. Constitutional Law ⇐70(3)

Mere declaration by a legislature that a business is affected with a public interest, so that it may be regulated under the police power, is not conclusive of question whether attempted regulation on that ground is justified.

5. Constitutional Law ⇐45

If a statute has no real or substantial relation to any legitimate police power objective, court has duty to so declare.

6. Constitutional Law ⇐48

Where there is a proper legislative purpose, a law enacted to carry out that purpose, if not arbitrary or discriminatory, must be upheld by the courts.

7. Constitutional Law ⇐81

The law places limits on the discretion of the legislature in the exercise of the police power.

8. Constitutional Law ⇐45

Whether there has been a reasonable exercise by the legislature of the police power is a court question.

9. Agriculture ⇐2

Marketing order of the Director of Agriculture for bedding plants grown and sold for resale was not authorized by the Agricultural Code. West's Ann.Agric.Code, §§ 1300.10, 1300.10(a), 1300.11, 1300.12(c), 1300.13, 1300.14.

Edmund G. Brown, Atty. Gen., Alberta Gattone, Deputy Atty. Gen., for appellant.

Chuman, McKibbin & Yokozeki, David McKibbin, David T. Yokozeki, Los Angeles, of counsel, for respondent.

WHITE, Presiding Justice.

This action was instituted by the Attorney General of the State of California upon the request of the Director of Agriculture for the purpose of enforcing the provisions of a certain "Marketing Order for California Bedding Plants", and certain ancillary orders promulgated pursuant thereto.

The California Marketing Act of 1937, Chapter 10, Division 6 of the Agricultural Code under which the instant orders were issued, was adopted in 1937 as a redraft and enlargement of the California Agricultural Act of 1935, Stats.1935, Chapter 307, and the California Agricultural Agreement Act, Stats.1935, Chapter 677. Section 1300.10 of the Agricultural Code contains the legislative declarations as follows:

"[*Conditions adversely affecting agricultural producers.*] (a) It is hereby declared that the marketing of agricultural commodities in this State in excess of reasonable and normal market demands therefor; disorderly marketing of such commodities; improper preparation for market and lack of uniform grading and classification of agricultural commodities; unfair methods of competition in the marketing of such commodities; and the inability of individual producers to maintain present markets or to develop new or larger markets for California grown agricultural commodities, results in an unreasonable and unnecessary economic waste of the agricultural wealth of this State. Such conditions and the accompanying waste jeopardize the future continued production of adequate food supplies for the people of this and other States, and prevent agricultural producers from obtaining a fair return from their labor, their farms and the agricultural commodities which they produce. As a consequence, the purchasing power of such producers has been in the past, and may continue to be in the future, unless such conditions are remedied, low in relation to that of persons engaged in other gainful occupations within this State. Agricultural producers are thereby prevented from maintaining a proper standard of living and from contributing their fair share to the support of the necessary governmental and educational functions, thus tending to increase unfairly the tax burdens of other citizens of this State."

It is then stated that the foregoing conditions concern the health, peace, safety and general welfare of the people of this State and that the provisions of the aforesaid Chapter 10 are enacted in the exercise of the police powers of the State for the purpose of protecting the health, peace, safety and general welfare of the people of California.

The purposes of said Chapter 10 are thus stated in section 1300.11 of the Agricultural Code:

"(a) To enable agricultural producers of this State, with the aid of the State, more effectively to correlate the marketing of their agricultural commodities with market demands therefor.

"(b) To establish orderly marketing of agricultural commodities.

"(c) To provide for uniform grading and proper preparation of agricultural commodities for market.

"(d) To provide methods and means for the maintenance of present markets or for the development of new or larger markets for agricultural commodities grown within this State or for the prevention, modification or elimination of trade barriers which obstruct the free flow of such agricultural commodities to market.

"(e) To eliminate or reduce economic waste in the marketing of agricultural commodities, and

"(f) To restore and maintain adequate purchasing power for the agricultural producers of this state."

Insofar as administration and enforcement of the Act, administrative powers of the Director and the authority to issue marketing orders are concerned, section 1300.13 provides that the Director of Agriculture, whenever he has reason to believe that the issuance of a marketing order or amendments to an existing one, will tend to effectuate the declared policy of the Act with respect to any agricultural commodity, he may give due notice of, and an opportunity for, a public hearing upon a proposed marketing order or contemplated amendments to an existing one. The last mentioned section then prescribes the method for giving such notice "* * * to all producers or handlers of such agricultural commodity whose names and addresses appear upon lists of such persons, on file in the Department of Agriculture, who may be directly affected by the provisions of such proposed marketing order or such proposed amendments."

Section 1300.14 of the Agricultural Code provides that following the aforesaid hearing, the Director must make findings respecting the proposed marketing order or amendments thereto, as follows:

"(1) That such provisions are necessary in order to effect a reasonable correlation

of such supply of the agricultural commodity affected with market demands therefor and that such marketing order or amendments thereto will tend to reestablish or maintain such level of prices for such agricultural commodity, as will provide a purchasing power for such agricultural commodity which is adequate to maintain in the business of producing such agricultural commodity such number of producers as is required to provide such supply of the quantities and qualities of such agricultural commodity as is necessary to fulfill the normal requirements of consumers thereof.

"(2) That such marketing order or amendments thereto will tend to approach such equality of purchasing power at as rapid a rate as is feasible in view of the market demand for such commodity.

"(3) That such marketing order or amendments thereto are in conformity with the provisions of this chapter and within the applicable limitations and restrictions set forth therein and will tend to effectuate the declared purposes and policies of this chapter.

"(4) That such marketing order or amendments thereto will protect the interests of consumers of such commodity, by exercising the powers of this chapter only to such extent as is necessary to establish the equality of purchasing power described in paragraph (1) of subsection (a) of this section."

The section last mentioned then provides that in making the aforesaid findings the Director shall take into consideration all facts available to him with reference to certain economic factors.

Section 1300.16, in substance, provides that no marketing order or amendment thereto, affecting producers or producer marketing shall become effective until the Director finds one or more of the following: "(A) That such marketing order or amendment thereto has been assented to in writing by not less than sixty-five percent (65%) of the producers who are engaged, within the area specified in such marketing order or amendment thereto, in the production for market or engaged in such producer marketing, of not less than fifty-one percent (51%) of the agricultural commodity specified therein in commercial quantities, or (B) that such marketing order or amendment thereto has been assented to in writing by producers who produce not less than sixty-five percent (65%) of the volume of such agricultural commodity and by fifty-one percent (51%) of the total number of producers so engaged, or (C) that such marketing order or amendment thereto has been approved or favored by producers in a referendum among producers directly affected if the valid votes cast in such referendum in favor of such marketing order or amendment thereto represent not less than fifty-one percent (51%) of the total number of producers of said commodity of record with the department who marketed not less than fifty-one percent (51%) of the total quantity of said commodity marketed in the next preceding marketing season by said total number of producers of record with the department. Whenever any marketing order or any major amendment to any marketing order is issued by the director, he shall determine whether assent, approval, or favor thereto of the producers shall be by written assents or by referendum."

The amended complaint herein alleges that, pursuant to and acting in accordance with the foregoing and other provisions of Chapter 10, Division 6 of the Agricultural Code, the Director, on July 10, 1951, issued an order entitled "Marketing Order for California Bedding Plants". That said Order became effective July 18, 1951, and was in full force and effect at the time this action was commenced.

Pursuant to the foregoing Marketing Order for California Bedding Plants, the Director, on August 14, 1951, issued an "Order of the Director of Agriculture Establishing a Rate of Assessment for the Marketing Order for California Bedding Plants for the Marketing Season August 1, 1951, through July 31, 1952", hereinafter referred to as the "Assessment Order".

The original complaint herein was filed on July 8, 1952, predicated upon the aforementioned Marketing Order, Enforcement Order and Assessment Order. Respondent filed a demurrer to the complaint, which

was sustained with leave to amend on November 20, 1952. Immediately thereafter, an "Order of the Director of Agriculture Correcting the Record of the Order and Findings of the Director of Agriculture Making Effective the Marketing Order for California Bedding Plants", hereinafter referred to as the "Amended Enforcement Order", was issued by the Director on November 25, 1952, allegedly *nunc pro tunc* as of July 10, 1951, the date of the original Enforcement Order.

Shortly thereafter, a first amended complaint predicated on the aforementioned Marketing Order, Amended Enforcement Order, Assessment Order and Minimum Price Order was filed on December 5, 1952, to which an answer was filed on May 8, 1953.

When the cause was called for trial, the seventeenth cause of action was dismissed on motion of plaintiff. Defendant then moved for a dismissal of the remaining sixteen causes of action on the ground that each failed to state acts sufficient to constitute a cause of action. This motion was granted and accordingly, judgment was entered in favor of defendant. From such judgment plaintiff prosecutes this appeal.

It appears that following the rendition of judgment and after an appeal was taken the Marketing Order for California Bedding Plants was amended. The ancillary order regarding sales was terminated, and a new and substantially different ancillary order regarding unfair trade practices has been promulgated. In appellant's brief it is stated "The State waives any claim to civil penalties by reason of defendant's sales below industry cost, and the questions presented by that portion of the complaint seeking enforcement of that ancillary order prohibiting sales below industry cost are now moot."

Appellant, however, asserts that this appeal is predicated upon the proposition that the Marketing Order for California Bedding Plants was a proper order under the California Marketing Act and that the assessments levied under the order were proper and valid assessments and should have been allowed by the trial court *regardless* of the validity or invalidity of the ancillary order *re* industry costs.

Appellant first contends that the California Marketing Act of 1937, Chapter 10, Div. 6, of the Agricultural Code under which the instant orders were promulgated is constitutional. Neither in the trial court nor on appeal is any contention advanced that the legislation here in question is unconstitutional as an improper exercise of the police power of the State in violation of the due process clause of the Federal Constitution, or that it impinges upon the guarantees of the state constitution. The question of the constitutionality of legislative plans for the marketing of agricultural commodities was set at rest by the decisions in Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577; People v. Western Fruit Growers, 22 Cal.2d 494, 140 P.2d 13; Agricultural Prorate Commission of California v. Superior Ct. of Los Angeles County, 5 Cal.2d 550, 55 P.2d 495; Dickey v. Raisin Proration Zone No. 1, 24 Cal.2d 796, 151 P.2d 505, 157 A.L.R. 324.

The question presented to us is whether bedding plants are covered by the Act and therefore, whether the Marketing Order for such plants is valid. It is the contention of respondent that bedding plants were not envisioned by the Act and that therefore, the Marketing Order is in excess of any authority conferred upon the Director of Agriculture by the Act.

The Marketing Order for California Bedding Plants defines them as "all horticultural plants grown and sold by growers in bedding plant containers". In Webster's New Collegiate Dictionary is found a common and well-accepted definition of the term as follows: "—adj. Suitable for garden beds, esp. decorative beds; as, *bedding* plants;". And the Minimum Price Order issued by the Director sets forth examples of bedding plants which are listed in seven groups. Listed as the first and last items in each group are the following bedding plants:

I. African Daisy—Zinnia;
II. Amaranthus—Viola;
III. Calceolaria—St. Augustine Grass;

IV. Agapanthus—Shasta Daisy;

V. Anemone—Petunia;

VI. Boxwood—Privet;

VII. Dichondra (only listing in this group).

It would therefore appear that bedding plants are primarily the daisies, the petunias, and the violets, among others, which the producer grows in "flats" from seed, and which are cultivated by him in greenhouses or lathhouses. After the seeds have germinated, and the tender plants emerge, they are sold by the grower, generally to retail nurserymen, who in turn sell them, by the dozen plants or by the flat, to the ultimate consumers—the homemakers, who transplant them into their flower beds, in order that the plant may grow to flowering maturity and accomplish the so-called "home beautiful". Some of the bedding plants are vegetable, such as celery or tomato, which are sold by retailers for planting in the home garden.

The respondent is a wholesale nurseryman, a grower of bedding plants, and it is the marketing of such plants to retail nurserymen that the Marketing Order seeks to regulate.

There would appear to be considerable merit to respondent's claim that the Act with which we are here concerned pertains to agricultural commodities having a food value, and to basic staples.

As pointed out by respondent, "In 1937, (when the Act was adopted) there still existed wide economic distress in the nation, agricultural prices were deflated, and farmers, the producers of the nation's food, found themselves in a serious financial plight. It appears implicit from a reading of all of the provisions of the Act itself, and from all of the circumstances existing at the time of its enactment in 1937, that it pertains only to basic staples, e. g., cotton, and to agricultural commodities having a food value. Indeed, in Section 1300.10(a), Ag.C.A., the legislative declaration specifies the conditions adversely affecting agricultural producers, and states:

" 'Such conditions and the accompanying waste jeopardize the *future continued production of adequate food supplies* for the people of this and other States, and prevent agricultural producers from obtaining a fair return from their labor, their farms and the agricultural commodities which they produce.' (Emphasis added.)

"Section 1300.12(c), Ag.C.A., defines agricultural commodity:

" '(c) "*Agricultural Commodity*" means any and all agricultural, horticultural, viticultural (including wine) and vegetable products produced in this State, * * * either in their natural state or as processed by a producer for the purpose of marketing such product or by a processor as herein defined, and including bees and honey * * * but not including timber or timber products.' "

[1, 2] In its broadest and technical sense undoubtedly, the term "horticulture" includes flowers and ornamental plants, but in view of the legislative declaration concerning "adequate food supplies", and having regard to the economic conditions existing at the time of the enactment of the Act, it would seem doubtful that the legislature intended the term to cover flowers and ornamental plants. It is fundamental that the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation, and where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted, even though the ordinary meaning of the word is thereby enlarged or restricted and especially in order to *avoid absurdity or to prevent injustice.*

The legislative declaration contained in section 1300.10 of the Agricultural Code would seem to indicate that the primary concern of the law making body was the maintenance of an adequate food supply essential to the needs of the people of the State. That the legislature was concerned about luxury flowers for decorative and ornamental purposes would seem rather doubtful.

There is a further consideration that throws an element of doubt around the assumption that the legislature intended that

flowers and ornamental plants should be covered by the Act, and that is, that it would have been a simple matter to have added the word "floriculture" to the other cultures specified. And interestingly enough, the lawmakers did finally include floriculture within the definition of agricultural commodities when by amendment of section 1300.12(c) by Statutes of 1953, Chapter 936, § 1, the phrase "including floricultural" was added after the word "horticultural". But the amendment came too late to aid appellant, because it was inoperative during the period covered by this litigation.

The main, and in our opinion, determinative issue on this appeal, however, is the contention advanced by respondent that the marketing of bedding plants is not affected with a public interest, and therefore, regulation of such marketing constituted an invalid exercise of the police power, and is violative of the due process clause of both the federal and state constitutions.

[3] Recognizing the limitations upon the exercise of the police power for regulatory purposes in that it may be invoked only where the commodity or service sought to be regulated is affected with a public interest and where such regulation is for the purpose of protecting the health, peace, safety and general welfare of the public, the legislature expressly declared in section 1300.10 of the Agricultural Code that:

"(c) * * * The marketing of agricultural commodities within this State is hereby declared to be affected with a public interest. The provisions of this chapter are enacted in the exercise of the police powers of this State for the purpose of protecting the health, peace, safety and general welfare of the people of this State."

[4–8] *But the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified.* The circumstances of its alleged change from the status of private business and its freedom from regulation into one in which the public have come to have an interest, are always a subject of judicial inquiry. As was said by our Supreme Court in State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436, 441, 254 P.2d 29, 32: "If a statute has no real or substantial relation to any legitimate police power objective, it is the duty of the court to so declare", and again, 40 Cal.2d on page 440, 254 P.2d on page 31, it is held, " 'If there is a proper legislative purpose, a law enacted to carry out that purpose, if not arbitrary nor discriminatory, must be upheld by the courts.' In re Fuller (1940), 15 Cal.2d 425, 428, 102 P.2d 321, 324.

"However, in the exercise of the police power the law places limits on the discretion of the legislature. Whether there has been a reasonable exercise of this power is a court question."

Appellant relies strongly on the case of Nebbia v. People of State of New York, 291 U.S. 502, 54 S.Ct. 505, 513, 78 L.Ed. 940, and argues that the "affected with a public interest" doctrine was completely abdicated in that case. The same contention was advanced in the case of State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, supra, and was rejected with the statement, 40 Cal.2d at page 442, 254 P.2d at page 33, that, "On the contrary that case (Nebbia v. People of State of New York) may be cited merely for an interpretation of that doctrine. At page 536 of 291 U.S., at page 516 of 54 S.Ct. the court stated that the phrase can mean 'no more than that an industry, for adequate reason, is subject to control for the public good.' "

Appellant urges that, "The bedding plant industry is a specialized, well developed, separate but integral and very essential part of the agricultural industry of the State.", and further, "The growing and selling of bedding plants commercially is essential to the agriculture of the State of California for many reasons." Conceding, as urged by appellant, that some farmers buy bedding plants for certain of their crops, nevertheless, that the bedding plant industry is not "essential" would seem to follow from the fact that agriculture existed without suffering, prior to the development of a bedding

plant industry. But assuming the correctness of appellant's contention as to the "essential" nature of the bedding plant industry, and that all farmers are dependent upon the industry in order to start their crops, we come to one of the provisions contained in Article I, section A 4 of the Marketing Order which limits its coverage to bedding plants grown and sold "for resale". This comprehends only those bedding plants sold by the grower to the retailer for further sale to the consuming public. In no way does it impose any regulation whatsoever on bedding plants sold by the grower to a consumer, e. g., a farmer. As stated by respondent, "Therefore the farmer may buy from the grower for the purpose of planting, and the grower may sell to such farmer as many thousand flats of bedding plants as the farmer may desire, and such marketing is completely exempt from the operation of the Marketing Order. Thus, the agriculture of the State is completely maintained by the 'essential' bedding plant industry, without the benefit of any assist whatsoever from the Marketing Order. In view of this circumstance, the argument of appellant that the Marketing Order is essential to the agriculture of the State totally collapses."

Appellant further argues in support of the Marketing Order that without it "there would be few gardens". In his Memorandum "Notice of Decision" the trial judge answered appellant's contentions that "gardens" and "beauty and lavishness" are so essential to the "general welfare" that the bedding plant industry is thereby affected with the public interest, with this cogent comment:

"As a home gardener and a hobbying sort of naturalist, I yield to no one in my appreciation of all the loveliness and of the utility of flowers. I heartily agree with the very able counsel for plaintiff that man does not live by bread alone, but he can live by bread, without flowers, for a long time, as millions of people do.

"If the legislature can authorize a monopoly, with policing, assessments, price controls, production controls, and all the concomitants of monopoly, in the business of bedding flower plants, I see no limit to its power to destroy competition."

[9] There is great similarity between the issues presented to the Supreme Court in the case of State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, supra, and those tendered to us on this appeal. Upon the authority of and for the reasons stated in that case, we are convinced that the Marketing Order was not issued in conformity with the California Marketing Act, and that, in promulgating it, the Director exceeded his authority.

We find ourselves in further accord with the views expressed by the trial judge in his Memorandum "Notice of Decision", when he said: "It is beyond my powers of comprehension to understand how in the business of growing and selling bedding flower plants (petunias, scabiosa, nierembergia, hollyhock, wallflower, African Daisy, etc.) the public health, morals, safety, peace or welfare can be served by destroying the incentive for a grower to reduce his costs below the average of the industry and to pass on to the home owner the benefit of that achievement."

This decision is not to be understood as questioning the validity and constitutionality of the California Marketing Act in its entirety. We simply hold that the Marketing Order for California Bedding Plants as applied to the facts pleaded in the instant case is invalid and in excess of the authority conferred upon the Director by the Act.

The foregoing conclusions at which we have arrived renders unnecessary a discussion of or a decision upon other issues raised.

For the reasons herein stated, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.

131 Cal.App.2d 117

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James REED, Defendant and Appellant.

Cr. 5291.

District Court of Appeal, Second District, Division 3, California.

Feb. 25, 1955.

Defendant was convicted of grand theft. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judgment and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that instructions adequately stated the law on the issue of intent, and that Superior Court properly stated the evidence respecting value of stolen goods.

Judgment and order affirmed.

1. Larceny ⇐71(1)

In prosecution for grand theft, wherein defendant contended that he was so intoxicated that he was incapable of forming an intent to steal, instructions adequately stated the law on the issue of intent. Pen. Code, § 22.

2. Criminal Law ⇐777½

In grand theft prosecution, court properly stated evidence relating to the value of the stolen goods.

Alexander L. Oster, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

James Reed was accused by information of grand theft and with having suffered two prior convictions of felonies. He pleaded not guilty and not guilty by reason of insanity, but later withdrew the latter plea. He admitted both prior convictions. In a jury trial he was convicted and he was sentenced to state prison. He made a motion for new trial which was denied and he appeals from the judgment and the order.

The victim of the theft was a Mr. Morphis, defendant's employer. The stolen goods consisted of a portable typewriter worth $99, an electric razor worth $10, and postage stamps of the value of $128, all of which had been taken from the office of Mr. Morphis at his place of business between noon of Saturday and the following Sunday morning. Defendant had access to the office. Mr. Morphis' truck also was missing but was recovered and in it were found the keys which defendant had previously carried. About a week later defendant returned by mail approximately $99 worth of postage stamps. Later when brought to Mr. Morphis' office, defendant surrendered a pawn ticket for the electric razor which he had pawned and stated he had placed the typewriter in a lock box at the Greyhound bus station in San Diego. His defense at the trial was that on the Saturday night prior to the theft he was in jail for drunkenness; he was released Sunday morning and got drunk again; he remembered nothing thereafter until he awakened in a hotel room in San Diego; he had no reason to steal anything. He had about $65 on Saturday noon; he had a typewriter of his own and didn't need the electric razor which he had pawned for $3. He testified that in his opinion the value of the stamps he returned was approximately $75.

[1] The single assignment of error is that the court orally answered questions of the jury upon their return to the courtroom during their deliberations and did not adequately state the law on the issue of intent and also in answer to a further question did not properly state the evidence respecting the necessity for the People to prove that the value of the goods was at least $200 in order to establish the offense as grand theft. The court fairly stated to the jury that if the defendant was intoxicated to such a degree that he was incapable of forming an intent to steal, this would remove one of the elements of the crime. Defendant does not set out any of the instructions that were given on the

questions of intent and intoxication except to state that he requested and the court gave an instruction in the language of section 22 of the Penal Code. This was an adequate instruction and the oral statement of the court contained nothing that was in conflict with it.

[2] With respect to the value of the property, the court referred to the uncontradicted evidence that there was at least $75 worth of postage stamps taken which manifestly related to the defendant's testimony. The court also stated that there was testimony that $138 worth of postage stamps were taken. Although the court did not in so many words state that the $75 figure had been testified to by the defendant, there is no reason to believe that the jurors would not have had that fact in mind. The court stated that if the value of the goods stolen was found to be more than $200 the crime would be grand theft; otherwise it would be petty theft.

The trial court committed no error. The judgment and order are affirmed.

WOOD and VALLÉE, JJ., concur.



130 Cal.App.2d 849

Walter W. WOODARD, Plaintiff and Respondent,

v.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, and Merchants' National Realty Corporation, a corporation, Defendants,

Merchants' National Realty Corporation, a corporation, Appellant.

Civ. 8509.

District Court of Appeal, Third District, California.

Feb. 18, 1955.

Action for injuries sustained by plaintiff who, after leaving store of one of defendant's tenants, fell over curbing at edge of parking lot on defendant's premises. The Superior Court, Mendocino County, Curtiss E. Wetter, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Finley, J. pro tem., held that evidence sustained findings that plaintiff had been a business invitee, that the curb as constructed and maintained constituted an actionable hazard, and that plaintiff had not been contributorily negligent.

Judgment affirmed.

1. Negligence ⇐134(3)

In action against landowner for injuries sustained when plaintiff, after leaving store of one of landowner's tenants, stumbled over concrete curbing marking edge of parking lot on premises, evidence was sufficient to sustain finding that plaintiff, while passing through parking lot, was a business invitee of tenant and of landowner, even though parking lot was marked for exclusive use of patrons of another tenant.

2. Negligence ⇐32(1)

Landowner had duty to maintain premises in a reasonably safe condition for use by invitees.

3. Negligence ⇐134(3)

In action for injuries sustained by plaintiff who, as a business invitee, stumbled over concrete curbing at edge of parking lot on defendant's premises, evidence sustained finding that the curbing, as constructed and maintained, constituted an actionable hazard.

4. Negligence ⇐135(1)

In action for injuries sustained by plaintiff who, while a business invitee, fell over concrete curbing at edge of parking lot on defendant's premises, breaking his arms, evidence sustained finding that plaintiff had not been contributorily negligent.

Mannon & Brazier, Ukiah, for appellant.

Burke & Rawles, Ukiah, for respondent.

FINLEY, Justice pro tem.

This appeal is by defendant Merchants' National Realty Corporation from a judgment rendered by the court sitting without

a jury in favor of plaintiff and against said defendant alone, in which damages were awarded for injuries sustained by plaintiff when he stumbled and fell over a concrete curbing between a sidewalk in the City of Ukiah, Mendocino County, California, and an adjoining parking lot. The trial court held that there was no liability on the part of defendant Bank of America and said defendant is not involved in this appeal.

Appellant owns a building in the City of Ukiah which fronts to the west on School Street. The lot or strip of land on which it sets runs in an easterly and westerly direction the full width of the block terminating at its easterly end on State Street which is also U. S. Highway 101 through Ukiah. The building occupies only the westerly portion of the lot, leaving the easterly portion free of any structure. This easterly portion is covered with concrete and is used as a parking lot, which borders along State Street for a distance of 90 feet. Marking the northerly and southerly 20-foot portions of the boundary line between this lot and the sidewalk on State Street there are concrete curbings about six inches high, six inches wide and of the same general color as the concrete surrounding. On the center 50 feet of the boundary line between these curbings the concrete covering of the lot is flush with the sidewalk and is used as a means of ingress and egress for automobiles using the parking lot. Iron pipe posts are set in or near the ends of the concrete curbing on each side of this 50-foot opening and at times a chain is stretched across to prevent the passage of automobiles. Automobile parking spaces have been marked off by painting white parallel stripes on the two opposite sides of the lot between th concrete curbings and the rear line of the building so that automobiles using the lot are parked side by side along the north and south sides between these curbings and a line along the rear of the building.

The southerly portion of the building on the lot is occupied by the Bank of America and the northerly portion by Berman's Haberdashery Store. As rear openings from this building a double door leads from the Bank of America and a single door from Berman's store onto the parking lot. Above the latter is a fairly large and rather ornate sign reading *"BERMAN'S"*. Also at prominent and easily viewable places on the parking lot are rectangular white signs on which the following is printed in black letters: "For your convenience—30 minutes free parking—While banking—Bank of America." "Free parking while banking, Bank of America customers only, users use it at their own risk." "Bank of America customer parking." Prior to the accident in question respondent had seen these signs and was aware that they were there.

The lease between Berman's and appellant is in evidence, but no mention is made therein concerning Berman's right to use the parking lot. The only testimony in the record is that Bank of America had exclusive right to the use of the lot while Berman's store had none. But the rear door from Berman's store opening onto the lot and the ornate sign over the door were plainly visible from any point on the parking lot and by those on the sidewalk and in automobiles on the highway, passing by.

On a Saturday afternoon at about 3 or 3:30 respondent entered Berman's store by the front entrance on School Street for the purpose of contacting Mr. Berman. Upon being advised that he was at the Maple restaurant which is located north of the parking lot on State Street, respondent left the store by the rear door, and walked across the parking lot to the northeast corner. There he stumbled over the concrete curbing dividing the parking lot from the sidewalk and fell to the sidewalk, breaking both his arms. He testified he did not see the curbing.

Three questions are presented by appellant on this appeal: 1. Was plaintiff as a pedestrian crossing the parking lot an invitee or a bare licensee? 2. Was the parking lot, due to the existence of the concrete curbing, in such a dangerous or defective condition as to constitute an actionable hazard for which this appellant would be responsible in damages based upon negligence in the event of injury to an invitee or licensee proximately caused by the existence of the concrete curbing with

nothing in the way of difference in color or other safeguard to distinguish it from the surrounding area? 3. Was respondent himself guilty of contributory negligence?

[1, 2] The difference in obligation owing to an invitee and mere licensee has been recently discussed by this Court in Laidlaw v. Perozzi, 130 Cal.App.2d 169, 278 P.2d 523. We cannot say that here respondent was not an invitee upon the premises, for, although nothing in the record clearly establishes just what legal right Berman's store or its customers had with respect to use of the parking lot, the fact remains that appellant permitted the existence and use of a rear door from the store to the parking lot and also the ornate sign reading "Berman's" over this door. From all that appears, we can attribute no other purpose to the existence of the door and the ornate sign over it than that they are intended as an invitation to the public to use the door in connection with patronizing Berman's store, and it could not be so used without entering or leaving it by way of said parking lot. It might be argued that the existence and context of the Bank of America signs would negative this ostensible invitation, but the public cannot be called upon to resolve any such conflicts in appearance. We cannot say as a matter of law that under the circumstances respondent was not an invitee on the premises. The trial court found that he was a business invitee of Berman's and of appellant, which finding is supported by the evidence. Beyond this determination we are not required to go. It was incumbent then upon appellant to maintain the premises in a reasonably safe condition for use by respondent and other invitees. Restatement of the Law of Torts, Sec. 189; Spore v. Washington, 96 Cal.App. 345, 274 P. 407; Hassell v. Denning, 84 Cal.App. 479, 258 P. 426; Bock v. Hamilton Square Baptist Church, 219 Cal. 284, 26 P.2d 7; Harris v. Joffe, 28 Cal.2d 418, 423, 170 P.2d 454.

[3, 4] The trial court found from the testimony and from a personal visit to the premises stipulated to by the parties that the curb as constructed and maintained constituted a hazard to invitees. It also found that respondent was not contributorily negligent. These determinations lie within the province of the finder of fact and unless this Court could say as a matter of law that such findings are without adequate support in the evidence they must stand as found by the trial court. We cannot say here that the proof on any essential point is insufficient.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



131 Cal.App.2d 33

J. W. SHAMEL, Petitioner and Appellant,

v.

LITE PRODUCTS SALES, Inc., a corporation, formerly known as Light Products Supply Co., Inc., a corporation, J. E. Metcalf, Wm. H. Tucker, Jr., T. C. Coleman, and J. E. Moser,

Lite Products Sales, Inc., J. E. Metcalf, Wm. H. Tucker, Jr., and T. C. Coleman, Respondents.

J. W. SHAMEL, Petitioner and Appellant,

v.

LIGHT RENTAL & SUPPLY, Inc., a corporation, J. E. Metcalf, and Wm. H. Tucker, Jr., Defendants and Respondents.

Civ. 20431.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1955.

Hearing Denied April 20, 1955.

Actions, consolidated for trial, to determine validity of election of officers for two corporations. The Superior Court, Los Angeles County, J. F. Goode, J., granted defendants' motion for non-suit, and petitioner appealed. The District Court of Appeal, Doran, J., held, inter alia, that stockholder, in whose name all stock had been issued and escrowed, but who had acknowledged, by his own letter, that respondent was owner of 51% of stock at time respondent voted it, would not be heard to repudiate

his own acknowledgement of such fact, and letter at least constituted a proxy or voting right giving respondent authority to vote 51% of stock at stockholders' meeting.

Judgment affirmed.

1. Corporations ⇐283(3)

In actions to determine validity of election of officers for two corporations, petitioner has burden of proving any irregularity in the election. Corporations Code, §§ 832, 2236.

2. Corporations ⇐196

Minutes of meeting of stockholders created presumption of regularity and correctness. Corporations Code, § 832.

3. Corporations ⇐283(4)

Where stockholder not only attended stockholders' meeting but actually nominated directors and voted, such participation constituted a waiver of any preceding irregularities.

4. Corporations ⇐198

Stockholder, in whose name all stock had been issued and escrowed, but who had acknowledged, by his own letter, that respondent was owner of 51% of stock at time respondent voted it, would not be heard to repudiate his own acknowledgment of such fact, and letter at least constituted a proxy or voting right giving respondent authority to vote 51% of stock at stockholders' meeting.

5. Corporations ⇐283(1)

Where directors' meeting was duly held pursuant to waiver and consent signed by all directors, including petitioning stockholder and such stockholder freely participated in directors' meeting by making nominations and voting with what must have been full knowledge of consequences, stockholder was not improperly excluded or locked out of the corporation. Corporations Code, § 808.

C. P. Von Herzen and Samuel L. Laidig, Los Angeles, Julius A. Leethman, Los Angeles, of counsel, for appellant.

Dunlap, Holmes, Ross & Woodson, Pasadena, for respondents.

DORAN, Justice.

Two separate actions under Section 2236 of the Corporations Code were instituted by appellant to determine the validity of election of directors of two corporations. These actions were consolidated for trial, and after taking the matter under submission, respondents' motion for nonsuit was granted, from which judgment appellant now appeals.

Case No. 615707.

Lite Products Supply Corporation, later named Lite Products Sales, Inc., was incorporated in California on October 6, 1950, and the outstanding capital stock of 500 shares issued, pursuant to permit, was issued in the name of appellant Shamel, and escrowed with J. G. Moser. No application for transfer of any of such stock was made.

On April 30, 1952, appellant gave to Moser, attorney for the corporation, a signed letter stating that "Although stock * * * has been issued in escrow and stands in my name, I hereby transfer, set over and assign to you (respondent Metcalf) fifty-one percent (51%) of such stock and I specifically designate that you are the owner thereof. 2. Should any additional stock be issued * * * it shall be issued on the basis of fifty-one percent (51%) to you and forty-nine (49%) to me. * * * The consideration for the foregoing is the moneys heretofore advanced by you to both companies by way of loan, in accordance with the understanding between us at the time such moneys were advanced".

A stockholders' meeting was held on February 16, 1953, and the minutes of this meeting, introduced in evidence by appellant, recite that petitioner Shamel and respondent Metcalf were present; that the attorney explained the stockholders' voting rights, but stated that "he was not in a position to give anyone the answer as to what the court's opinion might be as to the value of the paper (letter) held by Mr. Metcalf. It was, nevertheless, unnecessary in view of the statement of Mr. Metcalf. Mr. Shamel consented to the foregoing and Mr. Metcalf then called for nominations".

The minutes of the meeting further recite, as stated in respondents' brief, that

petitioner "nominated himself and Metcalf, Watson, Martin and Tucker; that Metcalf nominated Coleman; * * * that in the subsequent voting petitioner voted for himself and Watson as directors; that Metcalf voted for himself, Tucker and Coleman; that Metcalf announced the election of himself, Coleman, Tucker, Petitioner and Watson as directors".

At the trial appellant, after reading the minutes, denied signing any waiver of notice or consent to the holding of the meeting, and stated that "he did not elect" Coleman and Tucker as directors, but voted for Metcalf, appellant, Watson and Martin, and denied giving consent at any time to the holding of the meeting.

Appellant contends that "Metcalf assumed effective control of both corporations and voted in new and additional directors"; that appellant "voiced his objections" to the proceedings and to the nominations, and was thereafter "effectively excluded or 'locked out' ". Appellant's reply brief asserts that there was evidence that "All the stock had been issued to petitioner. None of the stock had been transferred out of petitioner's name"; and that "The documentary evidence (letter) upon which respondents rely as justification for their alleged usurpation was not established as effective by reason of the fulfillment of necessary conditions"; consequently that the nonsuit should not have been granted.

Respondents answer these contentions with the argument that appellant may not contest the election of directors because "(1) petitioner himself initiated and sponsored the events which justified Metcalf in claiming the right to vote 51% of the stock; (2) petitioner attended and participated in the meeting and in the election; (3) petitioner did not protest said election or the election procedure; (4) petitioner, by positive acts, acquiesced in said election; and (5) said letter, Exhibit 5, constitutes a valid transfer or proxy authorizing Metcalf to vote 51% of the stock". It is further contended that, under Section 832, Corporations Code, the minutes of the meeting are "prima facie evidence of the * * * due holding of such meetings, and of the facts or actions stated therein", and the burden was on the petitioner to prove the minutes erroneous.

The order of the trial court granting a nonsuit reads: "The remedy invoked by plaintiff in these cases involves questions of dissipation of assets, possible fraud, equitable rights, complex accounting, and other issues which could not possibly be within the purview of the legislature in providing a summary remedy to determine validity of an election of directors. Whatever dubious legal validity may attach to the attempted transfer of the voting rights to a portion of escrowed stock, without permit, the fact remains that the act was freely performed by plaintiff and he acquiesced therein throughout the various meetings and elections now contested".

[1–3] As hereinbefore indicated, the burden of proving any irregularity in the election of directors rested upon petitioner's shoulders. In this connection Mr. Shamel was obliged to rebut the presumption of regularity and correctness created by the minutes of the meeting in question. Notwithstanding appellant's assertions of failure to give proper notice, the record discloses that appellant not only attended the meeting but actually nominated directors and voted therefor. Such active participation must be deemed, as the trial court indicated, a waiver of any preceding irregularities. That the election did not result as appellant might have desired is of no importance.

[4] Appellant's contention is that Metcalf's voting of 51% of the stock was abortive because Metcalf was not a stockholder of record, all of the stock being issued and escrowed in appellant's name, and that no transfer of any part thereof had been authorized. In this connection, however, it will be recalled that appellant was the person directly responsible for this state of affairs. As said in respondents' brief, appellant can hardly "repudiate his own acknowledgment (by letter) that Metcalf was the owner of 51% of the stock at the time Metcalf voted it", which letter was at least a proxy or voting right giving Metcalf authority to vote 51% of the stock. Viewing the evidence in the most favorable light, this was the situation reflected by appellant's evidence at the time respondents moved for a nonsuit. In this state of the record, the

granting of such a motion cannot be deemed reversible error.

Case No. 615708.

This case involves a similar situation concerning another corporation known as Light Rental and Supply, Inc. "Light Rental", as this corporation is denominated, was incorporated on August 3, 1951. On May 15, 1952, its officers were directed to apply for a permit to sell and issue 20 shares of stock to: Metcalf, 10 shares; Shamel, 9 shares; and Moser, 1 share. However, these directions were not followed, and no stock was issued.

Petitioner and the other directors signed a waiver of notice and consent to the holding of a directors' meeting on February 10, 1953. The minutes of this meeting recite that Shamel, Metcalf, Moser, and Martin, all directors, were present; that Mader, the fifth director, had resigned, and that Moser then resigned as director; that "it was deemed advisable that a new Board of Directors be elected at this meeting". Nominations were then made by appellant and others, and Watson, Shamel, Metcalf, Tucker and Coleman were elected; thereafter, Metcalf, Tucker and Coleman were elected as president, vice-president and secretary, appellant "dissenting". Tucker was then elected general manager, appellant opposing, "for himself and Mr. Watson".

The record indicates that although the attorney, Moser, was not sure of the position of the corporation in view of the fact that no stock had been issued, "he assumed that that is the way it would be all right, so we carried on", according to appellant's testimony; that appellant participated in the meeting, made nominations and voted; that "I didn't know the legal phase of this thing and the attorney wasn't in a position to give me any definite ruling on it"; that "in petitioner's opinion Metcalf was attempting to vote stock that he shouldn't; that petitioner protested the attempt to elect Tucker and Coleman".

The situation, then, in the words of respondents' brief, is that after the resignation of two directors, Moser and Mader, the other directors, appellant, Metcalf and Martin, "proceeded to attempt to elect a full slate of five directors on the assumption that they had authority to do so. But they had authority only to fill vacancies. Corp. Code, § 808. The election resulted in no change in the status of petitioner and Metcalf who were 'reelected'. Three new directors—Watson, Tucker and Coleman—were declared elected, leaving out Martin, who was not nominated for reelection and who participated in the voting that superceded her. She is not complaining of her supercedure".

[5] What has been heretofore said in reference to the stockholders' meeting of Lite Products Sales, Inc., applies with equal force to the directors' meeting of Light Rental and Supply, Inc., just discussed. The record here, as in the other case, does not bear out the contention that appellant was improperly "excluded or 'locked out' of the two corporations". On the contrary, at the time the motion for a nonsuit was made, appellant's own evidence led only to the conclusion that the directors' meeting in question was duly held pursuant to waiver and consent signed by all directors including the appellant; that appellant freely participated in the meeting by making nominations and voting with what must have been full knowledge of the consequences of which complaint is now made. As said in the respondent's brief, "every act of petitioner in said proceeding was given full effect; no act of petitioner was frustrated". Such a showing on the part of one who carried the burden of proof amounted to an almost complete failure of proof, and under such circumstances a trial court would be amply justified in granting a nonsuit.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

131 Cal.App.2d 5

Ralph W. WARNER, Plaintiff, Appellant and Cross-Respondent,

v.

Philip URBACH, Bernard Browton, et al., Defendants,

Philip Urbach, Respondent and Cross-Appellant.

Civ. 4927.

District Court of Appeal, Fourth District, California.

Feb. 18, 1955.

Action arising out of collision in intersection between plaintiff's south bound pickup truck and defendant's east bound automobile. The Superior Court, Kern County, Gordon L. Howden, J., rendered judgment for plaintiff. Plaintiff appealed and defendant cross-appealed. The District Court of Appeal, Mussell, J., held that evidence whether plaintiff had been contributorily negligent was for jury.

Judgment affirmed.

1. Appeal and Error ⇐170(1)

Question of inadequacy of damages could not be raised for first time on appeal.

2. Negligence ⇐136(9, 26)

Question whether a plaintiff has been guilty of contributory negligence is usually one of fact for jury, and it is only when no fact is in doubt, and no deduction or inference other than negligence can be drawn, that court can say contributory negligence is established, even where facts are undisputed but reasonable minds might draw different conclusions.

3. Negligence ⇐65

Whether established facts constitute contributory negligence depends upon existing circumstances in each particular case.

4. Negligence ⇐136(9, 10)

Contributory negligence as a matter of law can be found only where reasonable minds cannot but conclude that a reasonably careful and prudent person situated as was plaintiff would not have acted as he did, and if reasonable minds can differ, or evidence is in conflict, finding of trier of facts is conclusive.

5. Automobiles ⇐245(80)

In action arising out of collision in intersection between plaintiff's south bound pickup truck and defendant's east bound automobile, question of plaintiff's contributory negligence was for jury.

Mack, Bianco & King, Bakersfield, for appellant.

Barr & Hammond, Yreka, Chatburn & Brickner, Merrill, Ore., and R. F. McLaren, Yreka, for respondent.

MUSSELL, Justice.

[1] This is an intersection accident case in which a jury returned a verdict in favor of plaintiff in the sum of $615.00. Judgment was entered in accordance with the verdict and plaintiff appealed from "that portion only of the judgment * * awarding inadequate damages to plaintiff." Plaintiff's injuries included a compression fracture of the third cervical vertebra and a dislocation of the second cervical vertebra on the third. He was in the hospital for 30 days, in a cast for 3 months, and was required to wear a brace for an additional two months. His special damages included $350 for services of a physician, $250 for hospital expenses, and an ambulance charge of $9. The jury awarded plaintiff all of these special damages but did not award him anything for general damages. No motion for a new trial was made by the plaintiff. Since he failed to present the question of inadequacy of damages to the trial court, it cannot be raised for the first time on appeal. Plaintiff has waived his right to have the question of the inadequacy of damages considered and determined by this court. Alexander v. McDonald, 86 Cal.App.2d 670, 671, 195 P.2d 24.

Defendant appeals from "the whole of said judgment" and states his position on appeal to be (1) That plaintiff was guilty of contributory negligence as a matter of law and judgment should be ordered for defendant; (2) If it be determined that plaintiff was not guilty of contributory

negligence as a matter of law, then the judgment for plaintiff for $615 should be affirmed. Defendant then "expressly consents to its affirmance for $615, in the event that judgment is not ordered for defendant under point one above."

Under the facts shown by the record we cannot here hold that plaintiff was guilty of contributory negligence as a matter of law. The accident occurred in the intersection of Scott Road and Osborn Road, about one and one-half miles east of Tulelake in Siskiyou county. Scott Road runs north and south and Osborn road runs east and west. Level fields surround the intersection on all sides and vegetation on these fields was not over two feet high at the time of the accident. Plaintiff, who was a carpenter, was going to work on the morning of September 11, 1951, and was driving his G.M.C. pickup truck south on Scott Road. It was a clear day and the visibility was good in all directions. Plaintiff testified that as he approached the intersection of Scott and Osborn Roads, he was traveling about 30 miles per hour; that "I looked; I slowed down; I shifted into second gear; and at, say, 25 yards back, why, I looked both ways at the intersection. Then, I was going quite slowly. I shifted into second gear. I glanced to my right and I glanced to my left. I had the normal vision you have when you pass an intersection;" that he did not see any traffic coming within the normal distance a person would look approaching that intersection; that there was no stop sign but that he slowed down and proceeded to cross the intersection on the righthand side of the road; that when he was within the intersection, he heard the screeching of brakes and felt the rear end of his truck "get ticked"; that then there was a crash into the side of his car; that "the main crash seemed to be to the front of my front door, my right front door;" that the car which struck him was a Buick being driven by defendant Urbach; that he did not see the Buick sedan before the collision.

Defendant Urbach testified that he was driving a Buick car east on Osborn Road; that two or three hundred feet back from the intersection of Scott Road he was traveling between 35 and 40 miles per hour; that he saw a car coming west on Osborn Road but did not see plaintiff's car until he (Urbach) was just beginning to enter the intersection; that he did not see plaintiff's car long enough to form an estimate of its speed; that the left front fender of his car collided with the rear of the right front fender of plaintiff's car.

A witness (Dugan) who was driving west on Osborn Road testified that he saw the accident and saw the two vehicles approaching the intersection; that he saw that plaintiff had reduced his speed when 150 feet north of the intersection, and at that time defendant's car was approaching and was approximately the same distance west of the intersection; that he estimated the speed of both cars at 35 to 40 miles per hour and that he did not notice whether the defendant reduced the speed of his car.

The point of impact was established by the highway patrol officer as "approximately in line with the prolongation of the west edge of Scott Road and about 400 feet north of the prolongation of the south edge of Osborn Road.

[2] The question of whether or not a plaintiff has been guilty of contributory negligence is usually one of fact for the jury. As was said in Zibbell v. Southern Pacific Co., 160 Cal. 237, 241, 116 P. 513, 515:

> "'It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say as a matter of law that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.'"

[3] As was said in Dennis v. Gonzales, 91 Cal.App.2d 203, 207, 205 P.2d 55, 57:

> "Whether the established facts constitute contributory negligence as a matter of law may not be easily determined. Their solution depends upon 'the existing circumstances in each particular case.'"

[4] Contributory negligence as a matter of law, can only be found where reasonable minds cannot but conclude that a reasonably careful and prudent person situated as was plaintiff would not have acted as he did. If the circumstances are such that reasonable minds can differ, or, if the evidence is in conflict, the finding of the trier of the facts is conclusive. Dickison v. La Thorpe, 124 Cal.App.2d 190, 193, 268 P.2d 164.

[5] In the instant case the question whether plaintiff was guilty of contributory negligence was one of fact for the jury. White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086. Defendant in his brief consented to the affirmance of the judgment for $615 in the event that it is determined that plaintiff was not guilty of contributory negligence as a matter of law.

The judgment is affirmed.

Each party to pay his own costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.



131 Cal.App.2d 47

Willie May EVANS, Plaintiff and Respondent,

v.

Arnold SPATT, Land Realty Company, et al., Defendants and Appellants.

Civ. 20467.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1955.

Purchaser brought action against vendor for rescission of contract for sale of realty, on ground of misrepresentations. The Superior Court of Los Angeles County, John Oliver, J. pro tem., entered judgment for purchaser, and vendor appealed. The District Court of Appeal, Doran, J., held that fact that misrepresentations were not fraudulent would not prevent rescission.

Judgment affirmed

Vendor and Purchaser ⇐33

Fact that misrepresentations made by vendor to purchaser in connection with sale of realty were not fraudulent would not prevent rescission of contract of sale on ground of misrepresentations.

Neil N. Werb, Los Angeles, for appellants.

Xenophon F. Lang, Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from the judgment.

The action is in rescission resulting from a transaction for the sale of real property.

As recited in appellants' brief:

"Appellant and defendant through its agent sold real property to respondent and plaintiff, said real property had improvements thereon which comprised two apartment units and an additional income unit attached to garages in the rear. Each of the two apartment units and the additional unit were occupied as dwelling units by tenants. Representations were made by the seller's agent that the real property was income property, three rental units were on the property, and there was a possibility of improving the garage for income purposes but a building permit would be necessary to make the improvements. The respondent buyer inspected said rental units, observed that three tenants were on the property, and inspected the garages. There was no knowledge on the part of any of the parties involved or their agents that there was any unlawful construction on the property.

"After the consummation of the sale of the real property, the respondent buyer proceeded to do construction work on the garage without obtaining a building permit to do so although having been previously advised by the seller's agent to check with city authorities. Subsequently, the respondent received two notices allegedly from the Department of Building and Safety of Los

Angeles: one notice stated that respondent buyer should stop work and return the garage to original status and use as no permit for construction had been issued, and the second notice stated that maintenance of the additional building be discontinued as it was violation of a Los Angeles Municipal Code.

"Thereupon, the buyer respondent attempted to rescind the sale and this action was brought."

It is contended on appeal that "The court erred in adjudging rescission of the sale of real property with its improvements and also awarding compensation for expenses in remodeling the improvements which were incurred by respondent's unlawful act"; "It is error to admit into evidence, over objection on the ground of hearsay, a notice of the building and safety department of the City of Los Angeles to prove that the maintenance of a building on the property is unlawful"; "There is no evidence in the entire record to show a mutual mistake of law"; "A mutual mistake of law as to the lawful construction of a building is not a ground for rescinding the sale of real property"; "The court erred in making the following findings of fact:

"(1) That the appellants made fraudulent misrepresentation.

"(2) That the plaintiffs and respondents were damaged in the amount of $800.00 in that plaintiffs expended said sum as and for repairs and improvements."

It was not contended by plaintiff that the representations were fraudulent and the court did not so find. Obviously however, the situation that developed was the result of the misrepresentations made by appellant. The fact that they were not fraudulent is beside the issue for although the damage was the result of ignorance and mistake on the part of plaintiff the result was the same. And the fact that plaintiff relied on defendants' representations is beyond question. There is no dispute as to the facts.

Appellants' argument relating to "mutual mistake of law" is without merit. The only issues were questions of fact.

The findings of fact are detailed and itemized. They are supported by the evidence and a review of the record reveals no prejudicial errors.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



131 Cal.App.2d 43

C. T. KALLGREN, also known as Thorsten Kallgren, Gunnar A. Kallgren and Okey P. Kallgren, Plaintiffs and Respondents,

v.

Fred A. STEELE, Individually, and as Administrator of the Estate of Elizabeth E. Steele, Deceased, Defendant and Appellant.

Civ. 20444.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1955.

Action by vendees of resort located upon government land and maintained under special permit issued by federal forest service and subject to termination at any time for any reason, against vendors for fraud in concealing fact that part of improvements were within right-of-way of state highway. From adverse judgment of the Superior Court, Los Angeles County, Harold P. Huls, J., and from orders denying motion to reopen case for taking further testimony, denying motion to enter new and different judgment, and denying motion for new trial, the vendors appealed. The District Court of Appeal, Drapeau, J., held that vendors had duty to divulge such information to vendees.

Judgment affirmed.

1. Appeal and Error ⇐1010(1)

Reviewing court is bound by findings of trial court based on evidence which is

not in conflict, and may not disturb the judgment.

2. Fraud ⇐17

Where vendors of resort, which was located upon government land and maintained under special permit from federal forest service, which had authority to terminate permit at any time and for any reason, had knowledge that resort was in part located within state highway right-of-way, vendors had duty to disclose that information to vendees and were liable in action for fraud for failure to do so. West's Ann. Civ.Code, § 1710, subd. 3.

3. Fraud ⇐9, 16, 59

Fraud may consist in misrepresentation or concealment of material facts, and may be inferred from circumstances and conditions of parties contracting. West's Ann.Civ.Code, § 1710, subd. 3.

4. Fraud ⇐18

Concealment may constitute actionable fraud where seller knows facts which materially affect desirability of property which he knows are unknown to buyer. West's Ann.Civ.Code, § 1710, subd. 3.

5. Appeal and Error ⇐113(1)

An appeal may be taken from an order denying a motion to vacate and substitute another and different judgment.

6. Appeal and Error ⇐106, 110

Order denying motion to reopen case for taking of further testimony and order denying motion for new trial are not appealable.

Sherman, Thompson & McCarthy and Walter W. Heil, Los Angeles, for appellant.

Taylor F. Peterson, San Bernardino, for respondents.

DRAPEAU, Justice.

Plaintiffs purchased from defendant Fred A. Steele and his wife (who is now dead) a resort in the San Bernardino mountains, consisting of a store, gasoline and service equipment, and several cabins. These improvements were located on United States government land in the San Bernardino National Forest, and along the state highway. For many years the resort had been known as "Bear Creek Lodge."

The improvements had been built upon the government land, and maintained there under a special use permit from the federal forest service, with an annual rental of $150. The permit provided that it could be terminated at any time for any reason by the forest service.

The purchase price of the Lodge was $12,000, with $6,000 in cash, and the remainder in monthly installments of $100 or more.

At the time of the negotiations for the sale, the parties went to the office of the forest service and explained what they were doing. The forest service made no objection to the transfer of the permit to plaintiffs. Apparently the permit was continued in Mr. Steele's name until plaintiffs paid him the last installment on the purchase price.

Then the forest service notified plaintiffs that the permit would be revoked at the end of five years. The reasons given for this drastic action were that the store and cabins were too close to the state highway, that they were in very poor condition, and that they impaired scenic values.

This was the first time that plaintiffs learned that any part of Bear Creek Lodge was within or too close to the state right of way. Defendant, Mr. Steele, knew about it all the time, but said nothing about it to plaintiffs. And due to the location of the buildings on the side of a precipitous mountain canyon it is impossible to move them farther away from the state highway.

Thus the forest service put an end to all of plaintiff's rights in and to Bear Creek Lodge, except salvage value of the buildings if the cost of removing them should possibly be less than what they can be sold for.

Nothing in the record indicates that the state highway department was making any complaint about the purpresture.

Plaintiffs brought this action for damages from defendants for fraud in concealing the fact that the improvements were in part within the highway right of way. Findings

in the Superior Court were for plaintiffs, with damages fixed at $6,369.00.

Defendant, Mr. Steele, appeals from the judgment, and from certain orders hereinafter mentioned.

Reading the record, it appears quite likely that none of the parties gave much consideration to what the forest service might or might not do about the permit, or that the improvements would ever have to be moved on account of the state right of way. Bear Creek Lodge had been there for thirty years, and the parties just went ahead, without realizing that the tenancy was subject to the whim of some government officer clothed with a little brief authority.

This case presents an interesting example of the exercise of bureaucratic powers. If the improvements were too close to the highway, if their condition was poor, and if they impaired scenic values, it would seem but fair that the forest service should have advised plaintiffs of the impending revocation of the permit. The forest service knew of the sale, and that plaintiffs were proposing to invest $12,000 in Bear Creek Lodge.

[1] However, the function of evaluating testimony and determining the rights of litigants based upon such testimony is not committed to courts of review in California. It is without conflict in the record that Mr. Steele did not mention the fact that any part of the improvements were within the state right of way, although he knew about it; and it is without conflict that the buyers didn't know about it when they bought the property, and didn't find out about it until just before they made the last installment payment. Therefore, under familiar legal rules on appeal, this Court is bound by the findings of the trial court, and may not disturb the judgment.

[2] Defendant contends that the rule of caveat emptor is applicable in this case, and that there was no duty on his part to divulge any information to the plaintiffs. This contention is untenable in the law of fraud.

[3] Fraud may consist in the misrepresentation or concealment of material facts, and may be inferred from the circumstances and condition of the parties contracting. Belden v. Henriques, 8 Cal. 87.

Deceit (fraud) is the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact. Civil Code, Section 1710, subdivision 3.

[4] As was said in Kuhn v. Gottfried, 103 Cal.App.2d 80, 229 P.2d 137, 141: "Concealment may constitute actionable fraud where the seller knows of facts which materially affect the desirability of the property, which he knows are unknown to the buyer." (See cases digested in West's Annotated California Codes, Civil Code, Section 1710, subdivision 3.

In addition to appealing from the judgment, defendant further appeals from the following orders: (a) from an order denying his motion to reopen the case for the taking of further testimony; (b) from an order denying his motion to enter a new and different judgment; and (c) from an order denying his motion for a new trial.

[5] An appeal may be taken from an order denying a motion to vacate and substitute another and different judgment. Douglas v. Westfall, 113 Cal.App.2d 107, 248 P.2d 68. Therefore, this order is affirmed.

[6] The purported appeal from the other two orders (a and c above) is dismissed, for the reason that neither is appealable. (3 Cal.Jur.2d, pages 468 and 500.)

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

PACIFIC FINANCE CORPORATION,
Plaintiff-Respondent,

v.

Alvin Harrison FAUST, Charles H. Huffman and Alvin Harrison Faust, Charles H. Huffman and William J. Fulwiler, d/b/a Universal Motors, a partnership, Defendants-Appellants.

Civ. 20510.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1955.

Hearing Granted April 20, 1955.*

Loan company's action against automobile dealer to quiet title to automobiles. From an adverse judgment of Superior Court, Ventura County, Walter J. Fourt, J., the automobile dealer appealed. The District Court of Appeal, Drapeau, J., held that where the dealer's factor had sold the automobiles to purchasers who borrowed from the loan company, the dealer could not assail the title of the purchasers or of the loan company though the dealer had retained the pink slips.

Affirmed.

1. Factors ⇐66

In loan company's action against automobile dealer to quiet title to automobiles, evidence sustained finding that another automobile dealer, who sold the automobiles to purchasers who borrowed from loan company, was factor for the defendant dealer. West's Ann.Civ.Code, § 2026; Vehicle Code, § 186.

2. Factors ⇐53

Where factor sold automobiles to purchasers who borrowed from loan company, factor's principal could not assail title of purchasers or of loan company though principal had retained pink slips. West's Ann. Civ.Code, § 2026; Vehicle Code, § 186.

William T. Selby and Glenn C. Garman, Ventura, for appellants.

Hugh M. Foster, Jr., Ivan C. Tagert, Mansfield A. Mills, Los Angeles, William A. Reppy and F. Gile Tiffany, Jr., Oxnard, for respondent.

* Opinion vacated 285 P.2d 632.

DRAPEAU, Justice.

Universal Motors, a copartnership, delivered ten used automobiles to Lonnie's Used Cars, another copartnership. The automobiles were placed on Lonnie's lot and displayed for sale. When sold Lonnie's were to remit to Universal an amount agreed upon for each car. Anything in excess of that amount was Lonnie's profit.

When Lonnie's took delivery of each automobile they signed a writing in which the following recital appears: "It is understood and agreed that the title of ownership does not pass to me until the final cash payment is made."

This, however, was not the entire agreement. The trial court found that the agreement, partly oral and partly in writing, was that Lonnie's could sell the automobiles consigned to them in the regular course of business, on credit pursuant to conditional sales contracts and could assign such contracts.

Lonnie's sold the ten automobiles, but did not pay Universal for them, and finally became insolvent.

As each automobile was sold to individual purchasers by Lonnie's, the plaintiff in this case Pacific Finance Company, a corporation, paid to Lonnie's that part of the purchase price which each purchaser borrowed. These sales to individuals were evidenced by conditional sales agreements, made by Lonnie's as seller, and assigned by Lonnie's to Pacific Finance.

But Universal kept at all times the pink slips for these ten automobiles. They never were turned over to Lonnie's, nor to any purchaser from Lonnie's.

Pacific Finance took Lonnie's agreement to furnish the pink slip for each automobile, showing ownership in Pacific Finance, when issued by the Motor Vehicle Department. Testimony in the record supports a finding that this is a customary practice in the business of selling used automobiles, because it usually takes three to four months to get pink slips through the Motor Vehicle Department.

When Pacific Finance learned that Universal claimed ownership of the automobiles, it brought this action to quiet title.

Findings and judgment were for Pacific Finance, from which judgment Universal appeals. Upon the trial Universal disclaimed any intention to deprive any purchaser of the automobiles of his equity therein. Counsel for Universal stated that the controversy was between Universal and Pacific Finance only.

The trial court found, among other things, that it was the intention of the agreement between Universal and Lonnie's to create a consignment or factorage with respect to the automobiles in question; also that in addition to these ten automobiles, for a number of months the method of selling cars and financing them as above described had been carried on by Universal and Lonnie's with respect to numerous other automobiles.

Universal contends on appeal:

(a) That the title to the automobiles was in Universal until divested in some manner, and that by the terms of the California Motor Vehicle Act the only way in which title could have been transferred was by endorsement and delivery of the pink slips. In support of this contention Universal relies upon the applicable sections of the Vehicle Code, and particularly Section 186.

(b) That the burden of proof was on the plaintiff to show title in itself.

(c) That there is no estoppel.

(d) That the trial court erred in denying a motion for nonsuit.

(e) And that the evidence does not support the findings or conclusions of law.

[1, 2] This Court has determined that the evidence is sufficient to support the finding that Lonnie's was a factor for Universal. Having come to this conclusion, Pacific Finance is in the same position as the individual purchasers of the automobiles, and Universal may not assail the title of either of them.

In the recent case of Siegel v. Bayless, 113 Cal.App.2d 661, 248 P.2d 968 this Court held that a dealer in used automobiles is a factor within the definition of Civil Code, § 2026 when the owner of an automobile put it in the dealer's possession to be sold. Provisions of the Motor Vehicle Act were not pertinent in the Siegel case, for the automobile there in question had not been registered under the Motor Vehicle Act.

Other cases in which the law of factorage has been applied in determining ownership of automobiles are Kenny v. Christianson, 200 Cal. 419, 253 P. 715, 50 A.L.R. 1297; Cass v. Rochester, 174 Cal. 358, 163 P. 212; and Babson v. Salesbury, 46 Cal.App. 521, 189 P. 702. Also see 35 C.J.S., Factors, § 1, p. 390.

Universal's contention that the only way in which title to the automobiles in this case could have been transferred was to strictly comply with the provisions of the Vehicle Code was argued and relied upon in Kenny v. Christianson, supra. In that case our Supreme Court held that while compliance with the Motor Vehicle Act of 1925 was essential to complete a transfer of title to a motor vehicle, the failure of the transferee to procure a registration certificate did not render his right to possession of the vehicle so incomplete as to make the assertion thereof unavailing to him in an action to establish ownership. Transfers of motor vehicles not in accordance with the Motor Vehicle Act are not ineffectual for every purpose. Kompf v. Morrison, 73 Cal.App.2d 284, 166 P.2d 350. Failure to satisfy the registration requirements of the Vehicle Code does not taint with illegality every sale and purchase of motor vehicles. Henry v. General Forming, Ltd., 33 Cal.2d 223, 200 P.2d 785.

Having come to the conclusion stated, it is not necessary to consider the other specifications of error contended for by Universal: burden of proof, estoppel, and error in denying the motion for a nonsuit.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing granted; CARTER, J., not participating.

CALIFORNIA REPORTER

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SECOND SERIES

44 Cal.2d 90

TEMESCAL WATER COMPANY, a corporation; and Elsinore Valley Municipal Water District, a municipal water district, Petitioners and Appellants,

v.

DEPARTMENT OF PUBLIC WORKS: Frank B. Durkee, Director of Department of Public Works; and A. D. Edmonston, State Engineer, Respondents,

Riverside County Flood Control and Water Conservation District, a body politic and corporate, and a political subdivision of the State of California, Intervener and Respondent.

L. A. 23083.

Supreme Court of California.

In Bank.

Feb. 15, 1955.

Mandamus proceeding by water company and water district to compel Department of Public Works to cancel water permit and deny application therefor. The Superior Court, Riverside County, Carl B. Hilliard, J., sustained a demurrer to the petition without leave to amend, and the water company and water district appealed. The District Court of Appeal, Mussell, J., affirmed, 264 P.2d 66. The Supreme Court, Edmonds, J., held that the petition did not state a cause of action under the statute in question where the petition did not allege petitioners had participated in the administrative proceeding upon the application, but that the trial court had erred in sustaining the demurrer without leave to amend.

Reversed with directions to permit amendment.

1. Waters and Water Courses ⇐133

In carrying out its present duty, Department of Public Works exercises broad discretion in determining whether issuance of permit to appropriate water will best service public interest. Water Code, §§ 1253, 1255; West's Ann.Code Civ.Proc. § 1094.5.

2. Waters and Water Courses ⇐133

Determination by Department of Public Works as to whether issuance of permit to appropriate water will best serve public interest, requires administrative adjudication which, in any case in which issuance of permit is protested, may be made only after hearing. Water Code, §§ 1253, 1255, 1340–1353, 1350; West's Ann.Code Civ.Proc. § 1094.5.

3. Mandamus ⇐63

Under statute providing for use of writ of mandate to review administrative orders or decisions, remedy is not limited to review of decisions of those agencies enumerated in Administrative Procedure Act or to agencies which have formally adopted procedure required of those mentioned in the Act and is applicable with respect to any agency which exercises adjudicatory function in considering facts presented in an administrative hearing. Government Code, §§ 11370 et seq., 11500 et seq., 11523; West's Ann.Code Civ.Proc. § 1094.5.

4. Mandamus ⇐70

In this state writ of mandamus is appropriate for purpose of inquiring into validity of any final administrative order or decision made as a result of proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer. Government Code, § 11523; West's Ann.Code Civ.Proc. §§ 1085, 1094.5; Water Code, §§ 1340–1353.

5. Mandamus ⇐87

Under statute authorizing use of writ of mandate for review of administrative or-

ders or decisions and providing that abuse of discretion is established if, inter alia, order or decision is not supported by findings or findings not supported by evidence, alleged insufficiency or want of formal findings of Department of Public Works in proceeding upon application for permit to appropriate water did not preclude use of the writ under the statute. Water Code, § 1375; West's Ann.Code Civ.Proc. § 1094.5.

6. Mandamus ⇐70

Sufficiency of administrative findings does not determine availability of statutory writ of mandate for reviewing administrative decision, but is question to be determined upon review under that statute and if in fact findings are insufficient to allow fair review of decision, defect may be corrected by writ of mandate under that statute. West's Ann.Code Civ.Proc. § 1094.5.

7. Mandamus ⇐172

Water company and water district were not entitled to trial de novo, in independent judicial proceeding, of issue whether there was unappropriated water available to supply applicant, on theory that such availability was jurisdictional fact, where review petition did not establish exhaustion of administrative remedy and, on proper petition, trial de novo could be had without regard to doctrine of jurisdictional facts. Water Code, § 1375; West's Ann.Code Civ.Proc. §§ 1085, 1094.5.

8. Waters and Water Courses ⇐130

Question of what is "unappropriated water" within statute pertaining to issuance of water permit is constantly fluctuating question depending upon seasonal flow of stream, annual rainfall, forfeiture of prior appropriations and default in use of riparian rights. Water Code, § 1375.

See publication Words and Phrases, for other judicial constructions and definitions of "Unappropriated Water".

9. Waters and Water Courses ⇐140

Permit to appropriate water does not itself confer appropriative rights but fixes priority of its recipient over subsequent appropriators, and issuance of permit is subject to vested rights. Water Code, §§ 1375, 1450–1456.

10. Mandamus ⇐87

Proper remedy for reviewing issuance of permit to appropriate water, even where protest is upon ground of alleged unavailability of unappropriated water, is by writ of mandate pursuant to statute providing for use of writ for review of administrative orders or decisions. Water Code, §§ 1360–1363, 1375; West's Ann.Code Civ.Proc. §§ 1085, 1094.5.

11. Mandamus ⇐154(7)

Petition for mandate to review issuance of permit to appropriate water did not state a cause of action under statute authorizing use of writ for review of administrative orders and decisions where it did not allege that petitioners had in any manner participated in proceeding upon application for permit, although brief stated that they had appeared and objected to issuance. Water Code, § 1375; West's Ann.Code Civ.Proc. § 1094.5.

12. Administrative Law and Procedure ⇐229

Where an administrative remedy is provided by statute, relief must be sought from administrative body and this remedy exhausted, before courts will act. West's Ann.Code Civ.Proc. §§ 1085, 1094.5.

13. Mandamus ⇐167

If amended petition by water company and water district to review issuance of water permit by Department of Public Works showed petitioners' participation as "interested parties" in administrative proceeding as quoted phrase is used in statute governing proceeding before Department, they could establish as well their interest in judicial proceeding to review department's determination. Water Code, §§ 1330, 1331; West's Ann.Code Civ.Proc. § 1094.5.

See publication Words and Phrases, for other judicial constructions and definitions of "Interested Parties".

14. Pleading ⇐225(2)

Generally, it is abuse of discretion to sustain without leave to amend a demurrer to an original complaint, unless complaint shows on its face that it cannot be amended so as to become effective.

15. Mandamus ⇐163

Where it did not appear that petition for writ of mandate to review issuance of

water permit by Department of Water Works could not be amended to state cause of action, trial court erred in sustaining demurrer without leave to amend. Water Code, § 1375; West's Ann.Code Civ.Proc. § 1094.5.

Clayson, Stark & Rothrock and Donald D. Stark, Corona, for appellants.

Robert E. Reed, Henry Holsinger, Mark C. Nosler, and Gavin M. Craig, Sacramento, for respondents.

Ray T. Sullivan, Jr., County Counsel, Riverside, and Leo A. Beegan, Dep. County Counsel, Sacramento, for intervener and respondent.

EDMONDS, Justice.

The Division of Water Resources of the Department of Public Works issued a permit authorizing the Riverside County Flood Control and Water Conservation District to appropriate annually a quantity of water from the Bautista Creek, a tributary of the San Jacinto River. By this proceeding in mandamus, Temescal Water Company and the Elsinore Valley Municipal Water District are endeavoring to compel the division to withdraw and cancel the permit and to deny the district's application. The appeal is from a judgment in favor of the conservation district and the department which followed an order sustaining, without leave to amend, demurrers to the petition for writ of mandate.

According to the petition, Temescal is a mutual water company supplying water for domestic use in the City of Corona and for irrigation in the city and its vicinity. To provide for its shareholders, the company has acquired rights in the flow of the San Jacinto River. These rights, based in part upon long appropriative use and also upon a permit from the Department of Public Works, allow the company to appropriate a specified quantity of water by direct diversion and an additional amount by storage. Pursuant to these rights, Temescal has transported substantial quantities of water to Corona and vicinity, where it has been placed to a beneficial use.

The Elsinore Valley Municipal Water District, it was alleged, includes within its boundaries the City of Elsinore, Lake Elsinore and the valley surrounding the lake. Except for a negligible amount of local runoff, the San Jacinto River with its tributaries is the sole source of water to replenish the lake and the underground water supply of the valley. A lowering in the water level of the lake increases its salinity, causing the death of fish and much offensive odor. At the present time, the entire lake is dry and its bed unsightly. Property values and the general prosperity of the municipal district depend upon an adequate supply of fresh water in the lake and the maintenance of the underground water levels in the valley.

Upon application by the conservation district, the petition continued, the Division of Water Resources issued a permit authorizing the district to appropriate "not to exceed 3,070 acre feet of water per annum from the waters of" Bautista Creek. There is no unappropriated water available in the river and the creek to supply the district pursuant to its application. On the contrary, at the present time and for many years past there has not been sufficient water in the river system to satisfy the requirements of the owners of vested riparian and appropriative rights.

The conservation district, as intervener, joined with the other respondents in demurring to the petition upon the ground that no cause of action was stated. The demurrers were sustained and an order entered discharging the alternative writ and denying a peremptory one.

As grounds for reversal of the judgment which followed that order, the water company and the municipal district contend that the petition states facts entitling them to a writ of mandate under section 1085 of the Code of Civil Procedure. Their position is that the Department of Public Works, under section 1375 of the Water Code,[1] is specifi-

1. "As prerequisite to the issuance of a permit to appropriate water the following facts must exist:
"(a) There must be an applicant.

cally enjoined to deny an application for a permit to appropriate water when no unappropriated water is available to the applicant. As they read section 1375, the existence of unappropriated water is a jurisdictional fact which cannot be finally determined by the division, but upon which they are entitled to a trial *de novo*. Assuming that the facts alleged in the petition are insufficient to state a cause of action, the argument continues, the trial court abused its discretion when it sustained the demurrers without leave to amend.

The Department of Public Works concedes that a decision by it upon an application for a permit to appropriate water is subject to judicial review. It agrees, also, that the proper proceeding for that purpose is by way of writ of mandate. However, according to the department, the scope of review should be the qualified one established by section 1094.5 of the Code of Civil Procedure and the decisions construing that statute. The petition of Temescal is attacked as not stating facts sufficient to justify the relief demanded. More particularly, it is claimed, the allegations of the petition clearly show that the petitioners are entitled to no relief, and the trial judge did not abuse his discretion in denying leave to amend.

Authority for the Division of Water Resources of the Department of Public Works to administer the appropriation and use of unappropriated water, now included in Divisions 1 and 2 of the Water Code, stems from the Water Commission Act of 1913. Stats.1913, c. 586, p. 1012. The main purpose of that legislation was to provide an orderly method for the appropriation of such waters, Bloss v. Rahilly, 16 Cal.2d 70, 75, 104 P.2d 1049, and substantial changes were made in the procedure by which an appropriation was initiated.

The statute was construed in Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874. There, the company's application for a permit to appropriate water from the flow of the Kern River was denied without a hearing, and the company sought writs of mandate and certiorari to compel the commission to issue it. General demurrers to the petitions were sustained without leave to amend.

Upon appeal, the company contended that, when an application in due form was filed, it became the duty of the commission, as a ministerial act, to issue a permit, and mandate was the proper remedy to compel it to do so. In the alternative, it was suggested that if the commission considered an application and determined rights as a judicial function, it had refused to exercise its authority and the refusal to do so was reviewable by certiorari.

The court assumed, on the basis of the pleadings, a full compliance with the prescribed conditions for obtaining a permit and that there was unappropriated water in the river to supply the petitioner's demands. It then pointed out the mandatory nature of the language of the sections of the act governing the issuance of a permit. After quoting in part sections 17 and 15 of the statute,[2] the court said:

"If any discretion was vested in the Commission, or any matter submitted for judicial consideration, it was to determine whether there was any unappropriated water in the Kern river at that time subject to this proposed appropriation.

"The Commission surely does not possess and could not be invested with power to arbitrarily deny an application made in con-

"(b) The application must contain the matter and information prescribed by this division and be in the form required by the department.

"(c) The intended use must be beneficial.

"(d) There must be unappropriated water available to supply the applicant.

"(e) All fees due must be paid."

2. Section 17: "'Any person * * * may apply for and secure from the state water commission, in conformity with this act and in conformity with reasonable rules and regulations * * * [of] the state water commission, a permit for any unappropriated water * * *.'"

Section 15: "'The State Water Commission shall allow, under the provisions of this act, the appropriation of unappropriated water or of the use thereof * * *.'"

formity to the law for the appropriation of water that was subject to appropriation.

"The purpose of the act is clearly to permit any person or corporation desiring to make any of the enumerated beneficial uses of waters of the state, not otherwise utilized, to avail itself of this right of appropriation.

"Under the law in force prior to the adoption of this act (Civ.Code, §§ 1410–1422) no permission was required for the appropriation of waters of the state. All that was required to create a preferential right to such water was to actually appropriate it to some authorized beneficial use, or to make a water filing to be followed with due diligence by an actual user.

"The obvious aim of the Water Commission Act was not to abolish, but to regulate and administer, this privilege.

"The positive right to such permit is granted by section 17 of the act to any person who makes application as provided by the act and the rules of the Commission." 187 Cal. at page 536, 202 P. at page 876.

The court then considered the nature of the commission's function in determining whether the water claimed was subject to appropriation. It pointed out that by section 10 of the act,[3] the commission was authorized to investigate the water source to which a claim was made, to take testimony with regard to the rights existing in it, and to "'ascertain whether or not such water * * * is appropriated under the laws of this state.'" The court said:

"While it appears from the provisions above quoted that the act is intended to authorize an investigation, and the exercise of some degree of discretion by the Water Commission as to the sufficiency of the application, and as to the existence of water subject to appropriation, no formal hearing is prescribed, and no authority granted to judicially determine the fact as to unappropriated water, or to adjudicate conflicting claims that might exist thereto. Even if a hearing could be required, the Commission is without jurisdiction to finally determine the existence or nonexistence of water subject to appropriation, and in such a case its denial of an application, if held to be a judicial determination of the right, would leave the petitioner without remedy, as no appeal is provided for, and *certiorari* would only go to the regularity of the proceeding, and not to the merits of the ruling.

"In view of the several other powers and duties devolving upon the Water Commission under this act in the supervision of the distribution of water subject to appropriation, and in determining the rights and obligations of interested parties, in which hearings of a judicial nature are provided for with much particularity, and provision is made for review of action of the Water Commission by the courts, it is fair to conclude that it was not intended to grant to the Commission in the matter of this preliminary permit to file upon unappropriated water more than a supervisorial discretion in the matter of granting such permits." 187 Cal. at page 537, 202 P. at page 876.

Mandamus was held to be a proper remedy to compel "a reasonable exercise of such discretionary powers as are granted by the act", because, traditionally that writ lies to correct an abuse of discretion. The court said: "As in all cases of ministerial duty, the obligation to perform depends upon the determination of the existence of certain prerequisite facts, but, where such facts exist, the duty is mandatory.

"Mere authority to decide as to the existence of a given fact does not necessarily take the official or board so deciding beyond the reach of a writ of mandate, especially where there is no remedy by appeal." 187 Cal. at page 538, 202 P. at page 876.

In a concurring opinion, Chief Justice Shaw took the position that, in exercising

3. Section 10: "The state water commission is hereby authorized and empowered to investigate for the purpose of this act all streams * * * or other bodies of water, and to take testimony in regard to the rights to water or the use of water thereon or therein, and to ascertain whether or not such water, or any portion thereof, or the use of said water or any portion thereof, heretofore filed upon or attempted to be appropriated by any person, firm, association, or corporation, is appropriated under the laws of this state."

the statutory powers conferred upon it, the commission performed no judicial function. The only basis for construing the statute as authorizing judicial action, he said, was the provision requiring it to make an investigation in regard to the amount, if any, of unappropriated water. However, any attempt by the Legislature to invest the commission with the power to adjudicate rights in the flow of the stream would be contrary to section 1 of article VI of the Constitution and beyond its power. "For this reason", he concluded, "I am of the opinion that the act confers no judicial power upon the Water Commission, and, if it purported to do and so far as it may purport to do so, it would be and is without effect. The consequence is that any award it assumed to make in the exercise of such purported judicial power would be absolutely void, and that *certiorari* would not lie to review its action in that regard." 187 Cal. at page 543, 202 P. at page 879.

In Department of Public Works, etc. v. Superior Court, 197 Cal. 215, 239 P. 1076, 1079, the Division of Water Rights issued a certificate under section 12 of the act.[4] A protestant sought to review the department's determination by certiorari, and the department then commenced a proceeding to prohibit the superior court from hearing the matter. One basis of the decision which ordered the issuance of a writ of prohibition was similar to the reasoning in the Tulare case. In response to the contention that the department acted judicially when determining "due diligence", "good faith" and "good cause shown", the court said: "In a certain sense the determination of those matters involves the weighing of facts and arriving at conclusions from those facts, and while, such matters are common in a judicial proceeding, we think their determination under that section is of an administrative or ministerial character only. The section provides for no notice to parties interested, contains no provision for a hearing or for procedure looking to the adjudication of the rights of any one. The conclusions which the petitioners arrive at under whatever investigation they may see fit to make pursuant to the application are merely for their own guidance in the administration of their duties under the section. Their conclusions and determinations in that respect are ineffectual for any other purpose, and their action under the section does not constitute a hearing and a determination of a controversy in a judicial sense."

Considering the availability of certiorari to review the department's determination, the court reasoned that the use of that writ requires the exercise of a judicial function by the inferior tribunal, board or officer. The concurring opinion of Chief Justice Shaw in the Tulare case was cited as supporting the proposition that the Legislature is not empowered to vest judicial power in the department because it could not constitutionally "give judicial power to any general state board or tribunal." For that reason, it was held, "the proceeding for the writ of review * * * lacks one of the elements essential to its proper determination." 197 Cal. at pages 220, 221, 222, 239 P. at page 1078.

The appellants contend that, under the Tulare and Department of Public Works cases, the proper procedure for determining whether there is unappropriated water available to an applicant is the traditional writ of mandate. The respondents point out that there have been several amendments to the sections of the act considered in the Tulare case, and the duty of the department with regard to the issuance of a permit no longer is the purely ministerial one provided by the original statute. As they read these changes, it was the intention of the Legislature to create a proceeding which, essen-

4. Section 12: "The state water commission shall have authority to, and may, for good cause shown, upon the application of any appropriator or user of water under an appropriation made and maintained according to law prior to the passage of this act, prescribe the time within which the full amount of the water appropriated shall be applied to a useful or beneficial purpose; *provided*, that said appropriator or user shall have proceeded, with due diligence * * * to carry on the work necessary to put the water to a beneficial use; and in determining said time said commission shall * * * take into consideration * * * the good faith of the appropriator * * *."

tially, is the administrative hearing contemplated by section 1094.5 of the Code of Civil Procedure, and that section should govern a review of the department's determination.

In 1917, section 15 of the act, which was deemed controlling in the Tulare case, was amended to provide that the commission shall allow "the appropriation for beneficial purposes of unappropriated water unless, in the opinion of the said commission, such appropriation would be detrimental to the public welfare." Stats.1917, ch. 133, p. 194. Again, in 1921, section 15 was amended to require the commission to allow the appropriation of unappropriated water "under such terms and conditions as in the judgment of the commission will best develop, conserve and utilize in the public interest the water sought to be appropriated. * * * The commission shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest." Stats.1921, ch. 329, p. 443; now Water Code, §§ 1253, 1255.

In 1923, the Legislature added sections 1a, 1b, 1c, and 1d. Stats.1923, chs. 36, 37, pp. 161, 162. The first one provided that the Water Commission should have authority "to grant, or to refuse to grant a permit and to reject any application, *after hearing.*" Emphasis added; now Water Code, §§ 1340–1353. Section 1d stated the provisions which now form section 1375 of the Water Code. Section 1b established a method of review of an order of the State Water Commission issuing or refusing to issue a permit, by bringing an action in the superior court. In Mojave River Irrigation District v. Superior Court, 202 Cal. 717, 726, 262 P. 724, section 1b was held to be unconstitutional. Despite this decision, the section was reenacted without substantial change as sections 1360 to 1363 of the Water Code and the appellants and the respondents agree that they are unconstitutional.

[1, 2] The cumulative effect of the statutory changes is to create a type of proceeding greatly different from that which was authorized by the legislation considered in the Tulare case. At that time, the commission had no discretion to issue or deny a permit, but, depending upon the availability of unappropriated water and the sufficiency of an application, its duty to grant or to deny a permit was mandatory. Under that procedure, the commission exercised only a supervisorial function in the issuance of permits. Tulare Water Co. v. State Water Commission, supra, 187 Cal. at page 537, 202 P. at page 876. In carrying out its present duty, the department exercises a broad discretion in determining whether the issuance of a permit will best serve the public interest. Water Code, §§ 1253, 1255. That determination requires an administrative adjudication, which, in any case in which the issuance of a permit is protested, may be made only after a hearing. Water Code, § 1350. Ample provision is made for notifying anyone who may have an interest in the rights claimed or to be considered upon the hearing of such application. Water Code, §§ 1300–1323.

Section 1094.5 of the Code of Civil Procedure specifies the procedure to be followed upon inquiry "into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer * * *." The respondents take the position that the procedure required by the Water Code upon an application for a permit to appropriate water comes within the scope of this section.

[3, 4] The appellants argue that the statute can apply only to the agencies enumerated in the Administrative Procedure Act, Gov.Code, Title 2, Div. 3, Chaps. 4 and 5, to local boards or agencies or to state-wide administrative agencies which have complied voluntarily with the act. However, although specific provision is made for the use of the writ to review the proceedings of the particular agencies specified by the Legislature, Gov.Code, § 11523, the remedy is not limited to a review of the decisions of those agencies or to agencies having formally adopted the procedure required of those mentioned in the act. The framers of section 1094.5 intended it to set forth "the procedure by which judicial review can be had by the writ of

mandate after a formal adjudicatory decision by *any* administrative agency." Emphasis added; see Tenth Biennial Report of the Judicial Council of California, Appendix A, p. 45. The decisive question is whether the agency exercises an adjudicatory function in considering facts presented in an administrative hearing. As noted in Boren v. State Personnel Board, 37 Cal. 2d 634, 234 P.2d 981, a case involving an agency not included within the Administrative Procedure Act but having functions specified by constitutional provisions, "[s]ince the enactment of section 1094.5 of the Code of Civil Procedure, it is no longer open to question that in this state the writ of mandamus is appropriate 'for the purpose of inquiring into the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer * * *.'" 37 Cal.2d at page 637, 234 P.2d at page 982.

[5, 6] The water company and the municipal district assert, however, that the proceedings before the Division of Water Resources are not formally sufficient to allow the review authorized by section 1094.5. They point out that under subdivision (b) of that section, "[a]buse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." In acting upon an application for a permit to appropriate water, it is said, the department takes the matter under submission and then records its determination by an endorsement upon the application without making formal findings of fact or preparing a formal order or decision. The respondents claim that this is not the established procedure. According to them the judicial notice which properly may be taken by this court of the records of the division will show that "every decision after hearing is announced by a formal written order of the State Engineer which is accomplished by an opinion containing a statement of the procedural steps that have been taken in the proceedings and the facts and conclusions upon which the decision and order are based. These are all public records and open to inspection."

The general principles with regard to the necessity of findings of fact by an administrative body were reviewed in Swars v. Council of City of Vallejo, 33 Cal.2d 867, 206 P.2d 355, where it was pointed out that although such findings "must conform to the statutes governing the particular agency, they need not be stated with the formality required in judicial proceedings." 33 Cal.2d at page 872, 206 P.2d at page 358. Their basic purpose is to enable the reviewing court to determine whether they are supported by sufficient evidence or a proper principle and to apprise the parties as to the reason for the administrative action in order that they may decide whether, and upon what grounds, additional proceedings should be initiated. The sufficiency of the administrative findings does not determine the availability of section 1094.5 of the Code of Civil Procedure as a method of reviewing the administrative decision, but is a question to be determined upon a review under that section. If in fact the findings are insufficient to allow a fair review of the decision, the defect may be corrected by a writ of mandate under section 1094.5. Cf. English v. City of Long Beach, 35 Cal. 2d 155, 158–160, 217 P.2d 22, 18 A.L.R.2d 547.

Another argument against the availability of a writ of mandate pursuant to section 1094.5 of the Code of Civil Procedure is that the legislative history of the enactments relating to proceedings before the Water Commission and Division of Water Resources demonstrates an intention that this method of review shall not apply. One contention is that such an intention is manifest from the retention and reenactment of the provisions which were held unconstitutional in the Mojave River Irrigation District case. However, that action of the Legislature demonstrates only an intention to provide a particular remedy and does not show a purpose to choose between other available remedies in the event the selected one were unconstitutional. Extended to its logical conclusion, the appellants' argument

would deny the availability of the particular remedy that they seek and, for that matter, any other remedy to review the department's decision. Such a result would be inconsistent with any reasonable legislative purpose.

[7] The appellants also contend that a distinction should be made between the function of determining whether there is unappropriated water available to an applicant and the right to decide, when such water is available, as to whether the proposed use will best serve the public interest. They concede that since the Tulare case the department has been given a broad discretion in determining the latter issue. But they regard that decision as a holding, not affected by any subsequent legislation, that the department has no discretion with regard to the former one. On the contrary, they argue, section 1375 of the Water Code, by providing that as a prerequisite to the issuance of a permit "[t]here must be unappropriated water available to supply the applicant", in effect codifies the Tulare decision and makes the fact as to the availability of such water the basis of the department's authority. The appellant's position is that section 1094.5 may be used to review a decision as to whether a permit should issue when there is unappropriated water in a stream, but the availability of such water must be determined *de novo* in an independent judicial proceeding.

However, in the Tulare case the court said: "If any discretion was vested in the commission, or any matter submitted for judicial consideration, it was to determine whether there was any unappropriated water * * * at that time subject to this proposed appropriation." 187 Cal. at page 536, 202 P. at page 876. But under the statute there construed, the duty to issue a permit was mandatory if water was available and the applicant had followed the prescribed procedure. The applicant in that situation, it was said, had a statutory right to unappropriated water, and the statute conferred no judicial power upon the commission to conclude that right. Also, the court observed that "it is manifestly impracticable for the Water Commission to authoritatively determine that there is not water in a given stream subject to appropriation. What is unappropriated water is a constantly fluctuating question, depending upon the seasonal flow of the stream, the annual rainfall, the forfeiture of prior appropriations, and default in the use of riparian rights. To conclude the rights of would-be appropriators, by the extrajudicial, and perhaps arbitrary action of a board of water commissioners, would be to deprive such applicant of a valuable property right without due process of law." 187 Cal. 537, 202 P. 876.

Under the present procedure, the department's determination as to the availability of unappropriated water concludes no *right* to a permit to appropriate water but merely decides a fact upon which the department bases the exercise of its discretion. Necessarily, the department must make that determination as a prerequisite to any exercise of its discretion in the issuance of a permit.

The argument that the existence of unappropriated water is a jurisdictional issue is based upon the apparently mandatory wording of section 1375 of the Water Code, declaring "As prerequisite to the issuance of a permit to appropriate water * * * [t]here *must* be unappropriated water available to supply the applicant." (Emphasis added.) But under the same section it is equally mandatory that the application contain all the information prescribed by the Water Code in the form required by the department, subd. (b); that the intended use be beneficial, subd. (c); and that all fees be paid, subd. (e). There appears to be little reason to conclude that the requirement that unappropriated water exist is any more "jurisdictional" than any other fact necessary to be established as a condition for obtaining a permit.

The so-called "jurisdictional fact" doctrine originated in Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 287, 76 L.Ed. 598, which concerned the enforcement of a compensation award made under the Longshoremen's and Harbor Workers' Compensation Act. Title 33 U.S.C.A. §§ 901–950. By the enabling act which is the basis of that statute, compensation may be allowed only to a person whose disability or death

results from " 'an injury occurring upon the navigable waters of the United States' " 33 U.S.C.A. § 903, where the relationship of master and servant exists. These conditions were declared to be "indispensable to the application of the statute, not only because the Congress has so provided explicitly * * * but also because the power of the Congress to enact the legislation turns upon the existence of these conditions." 285 U.S. at page 55, 52 S.Ct. at page 294. It was suggested that a determination by the deputy commissioner before whom such a proceeding is conducted might involve constitutional rights which earlier decisions had held require judicial determination in order to satisfy the requirements of due process of law. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289, 40 S.Ct. 527, 64 L.Ed. 908; Ng Fung Ho. v. White, 259 U.S. 276, 284–285, 42 S.Ct. 492, 66 L.Ed. 938. It was concluded that no provision of the statute confined a reviewing court to the record before the deputy commissioner, but instead, an aggrieved party could require a trial *de novo*.

Crowell v. Benson has never been overruled, but both the vitality of the rule stated by it and, the authority of the cases upon which that rule rests, have been greatly diminished by subsequent decisions. See Davis, Administrative Law (1951), § 255, pp. 918–922. The rule generally has been limited to cases arising under the specific act construed in that decision. See Schwartz, Does the Ghost of Crowell v. Benson Still Walk? 98 Univ. of Pa.L. Rev. 163 (1949).

It is questionable whether California has accepted the rule of Crowell v. Benson. That case was cited by this court as authority for the statement that "if the courts in reviewing the administrative board's actions do not exercise an independent judgment on the facts as well as on the law, then the party adversely affected, at least where constitutional rights are involved, has been deprived of due process." Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 84, 87 P.2d 848, 853. But no distinction was made between "jurisdictional facts" and other factual determinations made by an administrative agency, the court holding that, where a state-wide agency not created by the Constitution is concerned, an aggrieved party is entitled to a trial *de novo* on all issues. And in the Laisne case the weakness of the rule of Crowell v. Benson was expressly recognized. Laisne v. California State Board of Optometry, 19 Cal.2d 831, 845–846, 123 P.2d 457.

Section 1094.5 is a codification of the procedure devised for reviewing the adjudications of state-wide administrative agencies in the series of cases beginning with Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119, which arose before the enactment of the Administrative Procedure Act. Those decisions held that such a review required a trial *de novo* in the superior court, Laisne v. California State Board of Optometry, 19 Cal.2d 831, 845, 123 P.2d 457, or a procedure which the court concluded was substantially the equivalent of such a trial. Cf. Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304. A majority of the court has held that the scope of review under the new statute is the same as that specified in those cases. Southern California Jockey Club v. California, etc., Racing Board, 36 Cal.2d 167, 173–174, 223 P.2d 1; cf. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20. That conclusion makes it unnecessary to distinguish between so-called jurisdictional facts and other facts upon which administrative adjudication depends when, as here, the review is of a determination of a state-wide administrative agency.

The suggested "practical" reasons advanced for requiring the issue of the availability of unappropriated water to be decided in an independent judicial proceeding, rather than after a hearing before the department, are unconvincing. The appellants suggest that, in such a proceeding, instituted according to the traditional uses of the writ of mandate, a judicial determination of that issue could be made simply by comparing the aggregate of existing rights with estimated supplies. By that means, it is said, the issue could be deter-

mined and the expense of numerous hearings upon applications for permits before the department avoided. The basis for this position is the desirability of protecting the holders of prior rights against the danger of subsequent appropriative claims beyond available supplies. As the appellants state the problem, the State should not issue "more hunting licenses that there is game to satisfy the hunters."

[8, 9] As stated in the Tulare case, however, "[w]hat is unappropriated water is a constantly fluctuating question, depending upon the seasonal flow of the stream, the annual rainfall, the forfeiture of prior appropriations, and default in the use of riparian rights." 187 Cal. at page 537, 202 P. at page 876. A judicial determination as to existing appropriative and riparian rights rests upon then present uses which may be quite different at a later time, and a determination as to the future availability of water necessarily can be only an estimate. A permit itself confers no appropriative rights but fixes the priority of its recipient over subsequent appropriaters, Water Code, §§ 1450–1456; it expressly provides that its issuance is subject to vested rights. If the department erroneously concludes that unappropriated water is available to supply an applicant when there is no reasonable expectation of such a supply, the error may be corrected upon a review of the determination. But a holding that such a danger is so imminent as to justify an independent judicial proceeding to determine the availability of unappropriated water before the department considers an application, would deprive the administrative proceeding of all of its proper functions in the issuance of a permit. No such danger will be presumed.

[10–12] The proper remedy for reviewing the issuance of a permit despite protest upon the ground of the unavailability of unappropriated water is by a writ of mandate pursuant to section 1094.5 of the Code of Civil Procedure. The respondents correctly contend that the petition for mandate does not state a cause of action under that section. "[W]here an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." Abelleira v. District Court of Appeal, 17 Cal.2d 280, 292, 109 P.2d 942, 949, 132 A.L.R. 715. The petition for mandate does not allege that the appellants have in any manner participated in the proceeding upon the application, although in their brief they state that they appeared and objected to the issuance of a permit.

[13] The respondents also assert that the petition is defective in that it does not allege a beneficial interest of the petitioners. However, statutory authority allows them to present a protest to the application before the department, Water Code, §§ 1330, 1331; and, if upon amendment to their petition they show their participation as interested parties in that proceeding, they may establish as well their interest in a judicial proceeding to review the department's determination. Bodinson Mfg. Co. v. California Employment Comm., 17 Cal. 2d 321, 330, 109 P.2d 935.

[14, 15] Generally, it is held to be an abuse of discretion to sustain without leave to amend a demurrer to an original complaint, unless the complaint shows on its face that it is incapable of amendment. King v. Mortimer, 83 Cal.App.2d 153, 158, 188 P.2d 502. It does not appear that the present petition could not be amended to state a cause of action.

The judgment is reversed with directions to the trial court to permit the appellants to amend their petition, if they be so advised.

SHENK, Acting C. J., CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., and BRAY, J. pro tem., concur.

In the Matter of the ESTATE of Ida Anna RICHARTZ, also known as Ida A. Richartz, Deceased.

Robert C. KIRKWOOD, State Controller, Appellant and Petitioner,

v.

Margaret KELLY, Contestant and Respondent.

Civ. 15995.

District Court of Appeal, First District, Division 2, California.

Feb. 23, 1955.

Hearing Granted April 20, 1955.*

Proceeding on petition by State Controller for determination that certain benefits payable at death of school teacher under city and state retirement systems were subject to inheritance tax. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered order adverse to petitioner, and he appealed. The District Court of Appeal, Kaufman, J., held that city and state retirement benefits which were payable on death of school teacher, which did not vary in relation to amount of contributions paid in, which were based on contributions varying in amount from time to time as actuarial computations dictated and which obligated city and state to pay without regard to length of time teacher had been member of system, constituted insurance benefits and not annuities, and were not subject to inheritance tax.

Order affirmed.

Taxation ⇐872

City and state retirement benefits which were payable on death of school teacher, which did not vary in relation to amount of contributions paid in, which were based on contributions varying in amount from time to time as actuarial computations dictated and which obligated city and state to pay without regard to length of time teacher had been member of system, constituted insurance benefits and not annuities, and were not subject to inheritance tax. Government Code, § 31452; Revenue and Taxation Code, §§ 13721, 13724.

* Opinion vacated 288 P.2d 857.

James W. Hickey, Charles J. Barry and John D. O'Hara, San Francisco, for appellant.

Graham & Morse and Francis L. Tetreault, San Francisco, for respondent.

KAUFMAN, Justice.

The appellant Controller is appealing from an order dated May 27, 1953 entered in the Superior Court of the State of California in and for the City and County of San Francisco excluding from the properties of the decedent subject to inheritance tax the sum of $8,895.05 and fixing the total inheritance payable at the sum of $52.07 rather than the sum of $496.82. The dispute between the parties concerns a total tax of $444.75. The sum of $8,895.05 is the sum, as stated by the Controller in his opening brief, which was paid to respondent, Margaret Kelly, as death benefits by the San Francisco and the State of California Retirement Systems.

An Agreed Statement on Appeal has been filed herein. This Statement on Appeal includes a stipulation as to certain pertinent and material facts.

The stipulation is as follows:

(1) The portion of the San Francisco death benefit consisting of the equivalent of six months' compensation becomes payable immediately a teacher becomes a member of the system.

(2) No part of the total sum of $8,895.05 would have been payable to Mrs. Kelly if Miss Richartz' death had occurred after retirement.

(3) The San Francisco Teachers' Retirement Fund is supported one-half from tax revenues and one-half by contributions by the members. The amount of the respective contributions are adjusted from time to time as actuarial computations dictate to maintain the fund in solvent condition to meet all future liabilities as actuarially computed.

(4) Many private employers in the San Francisco area provide group life insurance for their employees. In some cases the premiums are paid by the employer; in some cases the premium cost is shared by

employer and employee; in some cases the employer self-insures. In such private group life insurance programs the insurance is "term" insurance and covers only during the period of employment. In the majority of such private group life insurance programs the amount of coverage is graduated by ranges to the level of the employee's earnings.

(5) In "term" life insurance issued by commercial insurance companies it is not unusual, assuming identical yearly premium payments, for the amount payable on death to vary from year to year.

Respondent contends that the payment of the total death benefits of $8,895.05 to Mrs. Kelly as designated beneficiary of Miss Richartz under the State of California and the San Francisco retirement plans is exempt from inheritance taxation (1) as proceeds of a life insurance policy or policies under Sections 13721 and 13724 of the Revenue and Taxation Code and (2) as a "death benefit" or other right accruing under a retirement law and exempt from taxation as provided in Section 31452 of the California Government Code.

The question as to whether the death benefits are exempt from State Inheritance Taxation under Section 31452 of the California Government Code has been determined by our Supreme Court in the In re Estate of Simpson, 43 Cal.2d 594, 275 P.2d 467. It was there held that this exemption clause only applies to property taxation and does not provide exemption from the Inheritance Tax.

In the In re Estate of Simpson the Supreme Court did not have the factual situation that is here presented by the stipulation of the parties, namely,—Were the payments in the nature of life insurance and as such exempt under Sections 13721–13724 of the Revenue and Taxation Code. Nor was this point presented to, or at issue in, the Supreme Court in the In re Estate of Simpson.

Appellant contends that the amounts payable to respondent are not in the nature of insurance; that no element of hazard or risk is involved. We can not agree. Here the named beneficiary of the teacher if said teacher died before retirement would receive a death benefit regardless of the teacher's length of service and regardless of the amount of the teacher's own contributions to the fund. Furthermore, each of the retirement systems and the funds set up thereunder are set up on an actuarial basis and it is the duty of the officials in charge of the retirement systems to keep the funds solvent. Both hazard and risk are involved based on the length of the teacher's life and service. See subdivisions (2) and (3) of Agreed Statement on Appeal.

Insurance has been defined as the substitution of a certain loss for an uncertain loss. The uncertainty here involved is the length of the teacher's life because the retirement systems here involved are based on actuarial experiences.

It is clear that the entire San Francisco death benefit of $8,048.55, as well as the state death benefit of $846.56, represent disbursements from retirement funds which must be considered in the actuarial computations made by the managers of the funds to determine the amount of contributions necessary to maintain the funds in the solvent condition.

It is our view that the inclusion in the formula for determining the amount of death benefits of an amount equivalent to the employee's contributions plus interest thereon, represents an additional life insurance risk assumed by the retirement plan and is in no sense merely an undertaking to return to the employee contributions plus interest.

In the In re Estate of Barr, 104 Cal.App. 2d 506, 231 P.2d 876, the court distinguished between a Contract of Insurance and an Annuity Contract. It was there held that the risk assumed in an insurance policy is to pay on the insured's death and that the essence of such a Contract of Insurance requires that it cover a hazard and distribute or shift the risk involved.

On the other hand in an Annuity Contract there is no risk of loss assumed only an investment risk. Under such a contract on the death of the annuitant the company will pay to a beneficiary the portion of

decedent's money which had not been repaid prior to death.

Applying these rules to the facts of the case at bar, it is clear that the death benefits here involved were not annuities but were insurance. There was no mere investment involved but the payment by both the teacher [decedent] and the county of contributions which vary in amount from time to time as actuarial computations dictate. Further the death benefit payable at the time of the teacher's death bears no relation to the amount of contributions paid in. Here is the hazard and shifting of and distribution of the risk referred to in the In re Estate of Barr, supra. On the death of the teacher the county was obligated to pay the equivalent of six months compensation plus contributions by the teacher to the named beneficiary and this without regard to the length of time the teacher was a member of the system. Clearly this bears none of the features of an annuity which only repays on death the amount of the contributions plus earned interest thereon.

The In re Estate of O'Donnell, 153 Misc. 480, 275 N.Y.S. 445, 447, concerned a death benefit payable to the estate of the decedent under the New York City retirement plan and if the death benefit constituted insurance it was subject to New York State Inheritance Tax since it was payable to the decedent's estate rather than to a designated beneficiary. The court held the amount of the death benefit subject to inheritance tax saying:

> "Since a benefit of the variety here received by the executor is in the nature of insurance payable to an estate, it is obvious that it would be taxable except for the charter provision quoted."

The court then proceeded to hold that the charter provision in question (which had nothing to do with insurance) was not applicable.

In the In re Estate of Fitzsimmons, 158 Misc. 789, 287 N.Y.S. 171, 173, the question before the court was whether the total amount paid to the designated beneficiary was insurance (and exempt from inheritance taxation under a provision similar to that before this court). The court held that the total amount was a payment in the nature of an insurance payment and exempt from tax, saying: "That this particular system was enacted by provisions of the Greater New York Charter and not under section 229 of the Insurance Law, which authorizes pension and retirement systems, in no way detracts from its character as insurance. The moneys received by Florence R. Fitzsimmons from the Teachers' Retirement System of the City of New York are, therefore, exempt from taxation and the appeal of the State Tax Commission is denied."

In Shaw v. Board of Administration, 109 Cal.App.2d 770, 241 P.2d 635, 637, the District Court of Appeal for the Second Appellate District in considering the rights of a previously divorced widow to death benefits under the California State Employees Retirement System held that the total death benefits payable under the retirement system were insurance, saying: "The provisions of the Retirement Law providing for a death benefit are in the nature of a contract of life insurance to be governed generally by the principles applicable to such contracts."

We conclude that the proceeds in question came within the insurance exemptions provided by Section 13724 of the Revenue and Taxation Code and that the lower court's order allowing the exemption and fixing the inheritance tax is correct.

Order fixing inheritance tax affirmed.

NOURSE, P. J., and DOOLING, J., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John James BURT, Defendant and Appellant.

Cr. 5267.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1955.

Rehearing Denied March 7, 1955.

Hearing Granted March 22, 1955. *

Defendant was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of solicitation to commit extortion, and he appealed from order granting conditional probation and from order denying motion for new trial. The District Court of Appeal, White, P. J., held that evidence, including corroborative evidence, was sufficient to sustain conviction.

Orders affirmed.

1. Criminal Law ⇐45

Although agreement does not amount to criminal conspiracy unless some act in furtherance thereof be done in state, crime of solicitation to commit felony does not require that overt act be done in furtherance thereof, or that criminal offense solicited to be committed be in fact committed, or that person to whom solicitation is addressed accept the importunity, but crime is complete when unilateral act of solicitation takes place, without anything further being done. Pen.Code, § 653f.

2. Criminal Law ⇐112(1)

The offense of solicitation to commit felony is committed at time and place when and where accused makes solicitation, and it suffices if that place is within jurisdiction of court, regardless of whether places suggested by solicitor for evil doing be within or without state. Pen.Code, § 653f.

3. Criminal Law ⇐45

Evidence, including corroborative evidence, was sufficient to sustain conviction of solicitation to commit extortion. Pen.Code, §§ 518, 519, 653f.

4. Criminal Law ⇐511(2)

Corroborative evidence need not be strong nor even sufficient in itself, without aid of other evidence, to establish fact in issue, and if it tends to connect defendant with commission of crime, it is unnecessary that it extend to all elements of the offense or to every fact and detail included in testimony to be corroborated.

5. Criminal Law ⇐511(1, 7)

Sufficient corroboration may be furnished by defendant's own testimony or by admissions made by him.

Martha Malone Jefferson, Bernard S. Jefferson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of a violation of section 653f of the Penal Code, in that he solicited another to commit and join in the commission of the crime of extortion. Defendant pleaded not guilty, trial by jury was waived and the cause was tried by the court. The People's case was submitted upon the testimony adduced at the preliminary examination and further evidence presented at the trial. Defendant was adjudged guilty and his motion for a new trial denied. Proceedings were suspended and defendant granted conditional probation.

From the "judgment" (see Penal Code, Sec. 1237), and the order denying his motion for a new trial defendant prosecutes this appeal.

The factual background surrounding this prosecution may be epitomized as follows:

On March 8, 1954, at about 4:00 o'clock in the afternoon, defendant approached Joyce Hampton and her sister at an Owl Drug Store in the city of Los Angeles. He asked Joyce Hampton if she would be interested in a position paying approximately $400 a week. He asked her if he could call her or suggested that she might call him. Mrs. Hampton said she would prefer calling him. He gave her the name of the hotel where he was staying and told her she could reach him there.

* Opinion vacated 288 P.2d 503.

On March 10, 1954, at about 8:00 in the evening, the defendant and Joyce Hampton met at her home. He told her he wanted her to go to various hotels and meet middle-aged men, and attract their attention so that they would want to make dates with her. She was then to suggest to them the idea of taking her to Tijuana. Once there, she was to contact a man in Tijuana, and then she and her escort would register at a motel. In the motel, the man she had contacted was to represent himself as a police officer. He was to come into the room and when he discovered Joyce Hampton was supposed to be a minor, he would accept money as a bribe very reluctantly. On Friday, the 12th of March, the defendant called Joyce Hampton on the telephone and said he had made arrangements for her to go out with the defendant's supervisor on Monday night, the 15th. The defendant informed her not to feel sorry for the supervisor, that he would be "set up as the first victim".

The defendant and Joyce Hampton met again the following Monday, the 15th, at her home. At that time, the defendant told her that the supervisor had been called out of town and that he would not be going along that evening. Joyce Hampton then asked him to give her the details of how he wanted her to go through with the "job". He told her she was to meet middle-aged men and go down to Tijuana. He told her he had made definite arrangements over the previous weekend with his contact in Tijuana. Upon reaching Tijuana, Joyce Hampton was to call the contact, Arnold. The rest of the scheme can best be told by the testimony of Joyce Hampton:

"The Witness: He told me—he said 'When you get down to Tijuana, you call Arnold and then when you go to have dinner or what not, then he will come in to where you are and he will know that you are there. Then when you go to the hotel,' he said, 'You and your victim will be in the room.' He said, 'You might possibly have to remove your dress in order to make it look more logical,' He said, 'and once there then Arnold will come in and knock on the door and he will come inside.'

"Then he told me that Arnold would ask for identification and I was to tell him that I was 21 or 22, and then this Arnold was to ask for identification and I was to show him any card at all and he was to say, 'Well, you are a minor. I am very sorry, but we will have to take you in,' and then if the man didn't—if the victim didn't think of bribing or attempting to bribe the police officer, I was supposed to become hysterical and tell him to pay him off, tell him to 'Pay him off. Pay him off. I can't go to jail. I can't,' and then very reluctantly the policeman, or Arnold, was supposed to accept the bribe."

Joyce Hampton's sister was present at the conversation at the Owl Drug Store on March 8, 1954, and the conversation of March 15, 1954.

On March 13, 1954, Joyce Hampton made contact with the Police Department. Arthur E. Winter of the Bunco-Fugitive Division, Los Angeles Police Department, was one of the investigating officers in this case. On March 15, 1954, he was at Joyce Hampton's house at 5626 Smiley Drive, Los Angeles. He was present at the house when a listening device was installed at approximately 4:30 p. m. The microphone was attached to the rear of the television set in the living room. The recording device was in the bedroom, adjacent to the living room. It was possible to listen to what was being said through the microphone at the time it was being recorded. The device was in working condition at the time it was installed.

Officer Winter heard the conversation by means of the device, and identified the voices of the persons involved in the conversation as the defendant, Mr. Burt, Mrs. Hampton and her sister, Mrs. Ryan. The conversation took place on the same day the device was installed, at approximately ten minutes after 7:00 and ended approximately at a quarter to 8:00 The substance of the conversation, in the words of Officer Winter, is as follows:

"A. Well, there was a knock on the door and somebody opened the door and the defendant said, 'Hello there,' and Mrs. Hampton said, 'Good evening, Mr. Burt.' They then went into the room and the defendant said, 'Everything is all fixed.' He says, 'We can't miss,' and she went on.

She asked him 'How do we go about it?' He says, 'Oh, by the way.' He said, 'My boss won't be with us tonight. We will be alone.' And he then said that he would talk to her further in his car while they were driving downtown. She said, 'No.' She said, 'Let's get the thing straightened out here and go over the details and then we will go downtown and go out and have a time,' and he started to relate that he had a Mexican by the name of Arnold in Tijuana who was a former police officer and who had a gun and a badge, and that he would pose as a police officer and that she was to induce her client to go to Tijuana with her. As they reached Tijuana, why, she was to contact Mr. Arnold; that he was coming to the cafe, if they were having a drink, that she could have a drink with a man and not suggest what cafe they would go to, but if the client suggested having a drink she was to go along with him.

"While at the cafe she was to excuse herself and call Mr. Arnold. He was to come in and take a look at she and the cli*ne* (client?) and then he would go to a designated hotel, and to make it look natural, that he would be talking with the desk clerk at the time they registered in the hotel or motel. He named off a couple of hotels and motels that were in Tijuana, and he said he couldn't see how the deal would possibly miss, and that he would, at a given signal, why, his friend Arnold would come into the room and place the man under arrest; that they would get the money from the man on the promise of not arresting him, and that he had a man lined up who was his supervisor, and his name was Bob Eldred, and that he knew he would be a good victim because he had some property and some money in the bank, and they discussed how much they could get out of it, and he said, 'Well, at least $1,000.00' He said, 'I will have this Arnold come in at the right time,' and he said, 'then when the agreement is made to get the money,' he said, 'we will have Arnold tell the client that he will let him go,' but that he will detain Mrs. Hampton, hold her as hostage in case the client would give Arnold a check and didn't have enough cash with him, and give him a check, why, they would hold Mrs. Hampton as a hostage until the check cleared the bank, and that Arnold would take the client and see that he left Tijuana.

"He said, 'He might even follow him as far as the border,' and that everything was fixed in Tijuana, the Chief of Police was taken care of, and there was no possibility of them getting into any trouble.

"He said, 'We will start on a small scale. We will just rent one room in a motel, and pretty soon we will be able to rent the whole motel when things get going.' "

The tape recording was offered and received in evidence as People's Exhibit 1.

After listening to the foregoing conversation the police officer placed defendant under arrest and interrogated him as to when he "conceived the idea of taking middle-aged men to Tijuana", to which defendant replied that about four months previously, that "he had been working on different schemes for approximately a year, and about four months ago he had gone to Tijuana and while there he got to thinking that American people didn't have any rights there and that it would be a perfect spot to commit this type of shakedown. He couldn't see how he could possibly go wrong, and that he contacted a *m*exican cab driver there by the name of Arnold, and that Arnold had agreed to pose as a police officer."

Testifying in his own behalf, defendant admitted having talked with Joyce Hampton and having suggested to her the matter of going to Tijuana with various men and obtaining money through some police officer in Tijuana, but that he did not intend to have her carry through those conversations or perform the acts suggested in the conversations. Rather, his intention was to know Mrs. Hampton socially. He wanted to know her socially because for about seven or eight months previous to his meeting Mrs. Hampton his wife had been pregnant and it had not been possible for him to have sexual relations with his wife during that period. That he began noticing young ladies and was particularly attracted by Joyce Hampton; so he wanted to

meet her and know her rather intimately. That he concocted this scheme as a means of impressing her. That he did not intend at any time to permit her actually to go to Mexico with someone and carry through this plan. That when he was asked questions by Mrs. Hampton as to how the plan would work out, he "developed the logic of the thing in my mind to satisfy the questions". Defendant further testified that at no time did he tell Sergeant Winter that he did not intend to have Joyce Hampton "go through with the plan". That he did not do so because he (defendant) "was dumb with fear".

As grounds for reversal appellant first contends that the evidence is not sufficient to sustain the judgment of conviction because it establishes only that he solicited Joyce Hampton in California to join in the commission of the crime of extortion in the Republic of Mexico. That the only acts relating to the crime of extortion which took place in the State of California were that Joyce Hampton was to make a "date" with a man and then suggest to this man that he take her to Tijuana, Mexico, where all the acts with reference to extorting money from the victim were to take place. That the crime of extortion in California is defined and prohibited by sections 518 and 519 of the Penal Code, neither of which sections make reference to the place of commission of the offense of extortion. That therefore, it must be assumed that "the Legislature did not intend to regulate conduct taking place outside the borders of the state." People v. Buffum, 40 Cal. 2d 709, 715, 256 P.2d 317, 320.

Appellant relies heavily upon the case just cited. Therein the accused were charged with a violation of section 182 of the Penal Code in that they conspired to use certain means to induce miscarriages, contrary to section 274 of the Penal Code. As to the factual background, it appears that four pregnant women went to the office of the defendant Dr. Buffum to solicit his aid in inducing miscarriages. Dr. Buffum refused to perform the abortions but took the telephone numbers of three of the women and told each she would receive a call. Later Dr. Rankin telephoned the women, told them the price they must pay, arranged to meet them at a designated place in Long Beach, California, and indicated that he would transport them to the place where the abortions were to be performed. The fourth woman made similar arrangements with Rankin. The latter met the women at the appointed time and place and drove them in his automobile to Tijuana, Mexico. And, with the assistance of Dr. Rankin, another man performed an operation upon each of the women. Recognizing that under the law of this state no agreement amounts to a conspiracy unless some act in furtherance of the corrupt agreement be done within this state, the Supreme Court pointed out that the object of defendants' agreement as alleged in the indictment was " 'to violate section 274, Penal Code of the State of California.' " That no other unlawful purpose being stated in the indictment defendants could not be punished for conspiracy unless the doing of the thing agreed upon did amount to a violation of section 274. That the statute making no reference to the place of performance of an abortion, it must be assumed that the legislature did not intend to regulate conduct taking place outside the borders of this state, and that for the same reason, section 182 of the Penal Code should not be read as applying to a conspiracy to commit a crime in another jurisdiction. Under the peculiar factual situation present in the Buffum case, the court concluded that the acts of the accused shown in evidence amounted only to "preparation" and not "part" of the crime itself. That to read a statute as authorizing the punishment by one state of acts which do not amount to an attempt to commit a crime, but are merely preparatory to the commission of a crime in another state would seem tantamount to an effort to regulate conduct in the other jurisdiction.

[1] The cause now engaging our attention, is manifestly distinguishable from the foregoing case relied upon by appellant. While, as heretofore pointed out, our law provides that no agreement amounts to a criminal conspiracy unless some act in furtherance thereof be done in this state, the solicitation charged in the instant case

under section 653f requires no overt act in furtherance thereof. The crime is complete when the unilateral act of solicitation takes place, without anything further being done. The gist of the offense is the *solicitation* of another to commit one of the offenses mentioned in section 653f, and does not envision the actual commission of the crime. A person who solicits another to commit or to join in the commission of one of the offenses mentioned in section 653f is guilty of a violation of that section even though the criminal offense solicited to be committed is never in fact committed, and guilt would attach at the time the solicitation was made even though the other person to whom it was addressed rejects the importunity. People v. Humphrey, 27 Cal. App.2d 631, 637, 81 P.2d 588; People v. Haley, 102 Cal.App.2d 159, 164, 165, 227 P.2d 48.

[2] The offense denounced by section 653f of the Penal Code is committed at the time and place when and where the accused makes the solicitation and it suffices if that place is within the jurisdiction of the court. Manifestly, the legislative purpose in enacting the code section here in question was to protect the inhabitants of this state from being led into the paths of evil doing and transgression of law and order. In the accomplishment of that purpose it matters not whether the places suggested by the solicitor for evil doing be within or without the borders of this state. The acts and conduct of appellant herein cannot be regarded as merely preparatory and as not constituting a direct unequivocal act done toward the commission of the offense specified in section 653f, because the gist of the offense is the solicitation, and once that occurs nothing remains to be done to establish a violation of the pertinent code section. Contrary to appellant's contention, the section does not seek to impose punishment for acts done outside the boundaries of California but, for acts done within the state, and no extraterritorial issue is involved.

Appellant further urges that had the legislature intended by section 653f to cover solicitations to commit crimes outside of this state appropriate language would have been used to so indicate as was done in the "Gambling Ship Regulation Law," adopted in 1929, Deering's California General Laws, Act 2862, wherein it was made unlawful for a person within this state to solicit another to visit any gambling ship and where there was added the phrase, "whether such gambling ship be within or without the jurisdiction of the state of California". However, when viewed in the light of the objectives to be accomplished and the evils sought to be remedied, we are persuaded, for the reasons hereinbefore stated, that a reasonable interpretation of section 653f of the Penal Code here involved, makes manifest the conclusion that it was the legislative intent to denounce as a crime, complete in itself, the solicitation within this State of a person to commit any of the crimes mentioned in said section regardless of the locale where the solicited crime was to be committed. To hold otherwise would, in our opinion, do violence to reason and challenge credulity.

[3] Finally, appellant insists that the evidence is not sufficient to sustain the judgment of conviction because the alleged offense was not proved by the testimony of two witnesses or one witness and corroborating circumstances, as required by Penal Code section 653f. This contention cannot be sustained. There is in the record other corroborating evidence in addition to the testimony of Sergeant Winter and Joyce Hampton. There is the tape recording of the conversation on March 15, 1954, between appellant and Mrs. Hampton in the latter's home, fortified by the testimony of appellant himself at the trial, in which he admits having suggested to Joyce Hampton the plan heretofore outlined, of her going to Tijuana, Mexico, with various men and extorting money from them.

[4, 5] It is a recognized principle of law that the corroborative evidence need not be strong nor even sufficient in itself, without the aid of other evidence, to establish the fact in issue. People v. Tinnin, 136 Cal. App. 301, 305, 28 P.2d 951; People v. Martin, 19 Cal.App. 295, 301, 125 P. 919. And, if the corroborating evidence tends to connect the defendant with the commission of the crime it is unnecessary that it extend to

all the elements of the offense or to every fact and detail included in the testimony to be corroborated. People v. Andrew, 43 Cal.App.2d 126, 129, 110 P.2d 459; People v. Black, 45 Cal.App.2d 87, 101, 113 P.2d 746; People v. Martinez, 19 Cal.App.2d 599, 603, 66 P.2d 161. Though the corroborating evidence be slight and circumstantial, it is sufficient if the connection of the accused with the alleged crime may be reasonably inferred from it. People v. Whittaker, 18 Cal.App.2d 396, 399, 63 P.2d 1202; People v. Suter, 43 Cal.App.2d 444, 452, 111 P.2d 23; People v. Wilson, 25 Cal.2d 341, 347, 153 P.2d 720. And, sufficient corroboration may be furnished by the defendant's own testimony or by admissions made by him. People v. Griffin, 98 Cal.App.2d 1, 25, 219 P.2d 519 and cases therein cited. Under the rules just enunciated the corroborative evidence reflected in the record before us answers the demand of section 653f, Penal Code.

For the foregoing reasons the "judgment" (i.e., the order granting probation, see Penal Code, Sec. 1237), and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and DRAPEAU, JJ., concur.



Alice Araxie SAYEGH, Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR THE COUNTY OF LOS ANGELES, Respondent.

Civ. 20696.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1955.

Hearing Granted April 20, 1955. *

Proceeding upon petition for writ of prohibition to restrain Superior Court from retrying issue of fact relative to validity or invalidity of ante-nuptial agreement between petitioner and decedent. The District Court of Appeal, McComb, J., held that the guardians ad litem for minor beneficiaries of testamentary trust were in privity with executors under the will creating trust, so that where the executors had unsuccessfully sought, in proceeding upon the widow's application for family allowance, to defend validity of the ante-nuptial agreement, the issue was res judicata in the proceeding by the guardian ad litem to determine heirship.

Writ issued.

1. Judgment ⇐678(1)

Guardians ad litem for minor beneficiaries of testamentary trust were in privity with executors under will creating trust, so that where executors had unsuccessfully sought, in proceeding upon widow's application for family allowance, to defend validity of ante-nuptial agreement, the issue was res judicata in proceeding by guardian ad litem to establish heirship. West's Ann. Code Civ.Proc. § 369.

2. Judgment ⇐540

Doctrine of res judicata is applicable when (1) an issue decided in prior adjudication is identical with one in action in question, (2) there is a final judgment on the matter, and (3) when party against whom plea is asserted was party, or in privity with party, to the prior adjudication.

3. Judgment ⇐691

Where action is prosecuted by and in name of trust for benefit of beneficiaries, whoever they may be, beneficiaries thereof not named as parties to record or privities thereto, are estopped by doctrine of res judicata in absence of fraud. West's Ann. Code Civ.Proc. § 369.

4. Prohibition ⇐3(3)

Where trial court set for trial a case in which the validity of ante-nuptial agreement was controlling issue and was issue to which rule of res judicata was applicable by reason of decision in prior case, respondent who had prevailed in prior case had no adequate remedy at law and prohibition was proper remedy.

5. Prohibition ⇐3(5)

Remedy in ordinary course of law by appeal from judgment at end of trial is not adequate so as to preclude issuance of writ of prohibition when petitioner would be

* Opinion vacated 285 P.2d 267.

subjected to vicissitudes of an unnecessary trial.

A. G. Ritter, Los Angeles, for petitioner.

Louis P. Pink and J. Perry Langford, Los Angeles, for respondent.

McCOMB, Justice.

This is an application for a writ of prohibition to restrain respondent court from retrying an issue of fact relative to the validity or invalidity of an ante-nuptial agreement between petitioner and her husband now deceased.

Chronology

1. February 16, 1948, Gabriel N. Sayegh, now deceased, executed his last will and testament; on February 18, 1952, he entered into a written ante-nuptial agreement with petitioner, then known as Alice Araxie Bakurjian. Within an hour or so after the agreement was entered into, petitioner and Gabriel N. Sayegh were married.

2. February 24, 1952, Mr. Sayegh died, and on March 13, 1952, a petition for admission to probate of the last will and testament of Gabriel N. Sayegh, and for appointment of executors was filed in the probate court.

3. On the 17th of March, 1952, notice of the filing of said petition to probate will, etc., and of the time and place of hearing of the same were mailed to the widow, designated heirs and beneficiaries of the will.

4. April 2, 1952, an order was made admitting the will to probate.

5. April 3, 1952, John Sayegh and George Sayegh, brothers of decedent were appointed executors of the estate. The will contained in part the following provisions:

"*Seventh:* I give, devise and bequeath the rest, residue and remainder of my estate, real, personal or mixed, and wheresoever situate, of which I die possessed, to my brother, John Sayegh and George Sayegh, *In Trust,* for the following uses and purposes:

"(A) Distribution of Income and Principal:

"(1) The trustees shall divide the trust estate into two equal trusts as follows: one trust for the lawful issue of my brother, John Sayegh, living at the time of my death, in equal shares; and the other trust for the lawful issue of my brother, George Sayegh, living at the time of my death, in equal shares.

"(2) The net income from each undistributed share shall be accumulated or distributed in monthly or other convenient installments to, or used for the benefit of, the child for whom the share was set aside, in the sole and absolute discretion of my Trustees.

"(3) Each share set aside for a living child, including accumulated income, if any, shall be distributed to such child to the extent of one-third of the share if the child has attained the age of twenty-one years; the remaining two-thirds of the corpus of each share, together with accumulated income, if any, shall be distributed to each child at such time as my Trustees, in their sole discretion, may deem advisable, but in any event on or before each child respectively attains the age of thirty years.

"(4) Should any of my nephews and nieces who are beneficiaries under either of these trusts die before becoming entitled to receive distribution of the entire share set aside for him or her, such share, or its undistributed remainder, shall go to augment equally the shares then held for the benefit of, and those previously distributed to, his or her surviving brothers and/or sisters. Any addition to a partially distributed share shall augment proportionately the distributed and the undistributed parts of that share.

"(5) Unless terminated at an earlier date under the foregoing provisions, this trust shall cease upon the death of the last survivor of the following named of my nephews and nieces: Mary Agnes Sayegh, Claire Sayegh, Jeanette Sayegh, James Sayegh, Richard Sayegh and Lorraine Sayegh."

6. May 5, 1952, petitioner filed a petition for a widow's allowance to which the executors filed their answer and objections, claiming that the pre-nuptial agreement en-

tered into between decedent and petitioner barred her from any share in decedent's estate, including a widow's allowance. After a hearing the trial court held that the ante-nuptial agreement was invalid, void and of no effect, and awarded petitioner a widow's allowance. The executors appealed and thereafter the appellate court affirmed the ruling of the trial court. (In re Estate of Sayegh, 118 Cal.App.2d 327, 257 P.2d 995.)

7. October 14, 1953, Marie Sayegh, as Guardian ad Litem of Richard Thomas Sayegh, a minor, Lorraine Marie Sayegh, a minor, and Rebecca Sayegh, as Guardian ad Litem of Claire Cecilia Sayegh, a minor, Jeannette Catherine Sayegh, a minor, and James Francis Sayegh, a minor, and Mary Agnes Raheb, filed a petition for determination of heirship, claiming to be the sole and exclusive heirs of decedent, and that petitioner had no interest in decedent's estate because of the ante-nuptial agreement above mentioned.

8. November 20, 1953, petitioner filed her answer to the petition for determination of heirship.

9. June 11, 1954, the matter came on regularly for hearing and petitioner through her attorney contended that the judgment which had become final in connection with the family allowance proceedings, holding that the ante-nuptial agreement was void, was binding upon the minor children and testamentary trustees so far as the validity or invalidity of that agreement was concerned; that the matter was *res judicata,* and asked the trial judge to so determine as a matter of law which would thus end the matters involved in the heirship proceedings. The petitioners on the application for determination of heirship asserted that the former judgment was not binding upon them and they were entitled to set up the ante-nuptial agreement as a defense to the widow's claim of heirship. After argument the trial judge refused to pass upon the question and transferred the case to the master calendar department of the superior court for setting and trial.

These are the questions presented for determination:

[1, 2] First: *Was the holding on the petition for a widow's allowance that the ante-nuptial agreement between decedent and petitioner herein was void binding upon the legatees under the trust created by decedent's will and thus res judicata?*

Yes. The doctrine of res judicata is applicable when the following elements exist:

(1) An issue was decided in a prior adjudication identical with the one present in the action in question;

(2) A final judgment on the matter; and

(3) When the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication. (Bernhard v. Bank of America, 19 Cal.2d 807, 813 [5], 122 P.2d 892.)

In the instant case it is conceded that the issue decided in the prior adjudication (the petition for a widow's allowance) is identical with the one presented in the present matter (petition for determination of heirship), and that the determination of the issue has become final. (In re Estate of Sayegh, 118 Cal.App.2d 327, 257 P.2d 995.)

This leaves as the sole matter for determination the question of whether the parties against whom the plea is asserted were parties or in privity with the party to the prior adjudication. We believe they are, and that the issue is controlled by the following statement in Bernhard v. Bank of America, supra, 19 Cal.2d at page 813, 122 P.2d at page 895: "The plaintiff has brought the present action in the capacity of administratrix of the estate. In this capacity she represents the very same persons and interests that were represented in the earlier hearing on the executor's account. In that proceeding plaintiff and the other legatees who objected to the executor's account represented the estate of the decedent. They were seeking not a personal recovery but, like the plaintiff in the present action, as administratrix, a recovery for the benefit of the legatees and creditors of the estate, all of whom were bound by the order settling the account. Cal.Prob.Code, sec. 931. See cases cited in 12 Cal.Jur. 62, 63. The plea of res judicata is therefore avail-

able against plaintiff as a party to the former proceeding, despite her formal change of capacity. 'Where a party though appearing in two suits in different capacities is in fact litigating the same right, the judgment in one estops him in the other.' (Citing cases.)"

The foregoing decision of our Supreme Court may be paraphrased as applicable to the question before this court as follows: "The petitioners in the proceedings for determination of heirship brought such action in the capacity of guardians ad litem for beneficiaries of a trust created by the will of decedent. In this capacity they represented the very same persons and interests that were represented in the earlier hearing on the petition for a widow's allowance. In that proceeding the executors who objected to the widow's petition for a family allowance represented the estate of decedent. They were seeking not a personal recovery but, like the petitioners in in the proceeding for determination of heirship as guardians ad litem, a recovery for the benefit of legatees and creditors of the estate either of whom were bound by the order determining that the widow was entitled to a family allowance. The plea of res judicata is therefore available against petitioners for determination of heirship as parties to the former proceeding despite their formal change of capacity. Where a party though appearing in two suits in different capacities is in fact litigating the same right, the judgment in one estops him in the other."

[3] In the present case the executors were also the trustees under the will of decedent for the beneficiaries here involved, and the rule is established that where an action is prosecuted by and in the name of the trust for the benefit of the beneficiaries, whoever they may be, the beneficiaries thereof not named as parties to the record or privities thereto, are estopped by the doctrine of res judicata in the absence of fraud. (Section 369, Code Civ.Proc.; Glide v. Dwyer, 83 Cal. 477, 486, 23 P. 706.)

The cases relied on by respondent are all factually distinguishable from the present case. For example, In re Estate of Blake, 157 Cal. 448, 457, 108 P. 287, 291, wherein the doctrine of res judicata was found to be inapplicable, it was held that, "* * * *the decree did not operate as a bar to the remaindermen or beneficiaries to maintain this proceeding affecting other and different property.*" (Italics added.)

It is to be noted that in the instant case the prior judgment affected the same identical property as is involved in the latter proceedings.

In re Estate of Rath, 10 Cal.2d 399, 406, 75 P.2d 509, 115 A.L.R. 836, it was expressly held that questions which had been incidentally determined in a previous hearing were not res judicata. In the case at bar the matters previously determined on the petition for a widow's allowance were not incidental, but were the main issues involved, and were the same as those on the petition for determination of heirship.

It would serve no useful purpose to analyze in detail each of the cases cited by respondent, such as, County of Los Angeles v. Morrison, 15 Cal.2d 368, 101 P.2d 470, 129 A.L.R. 443; Johnston v. Long, 30 Cal.2d 54, 181 P.2d 645; Stoops v. Woods, 45 Cal. 439; Elliott v. Hudson, 18 Cal.App. 642, 124 P. 103, 124 P. 108; Stockton Building & Loan Ass'n v. Chalmers, 75 Cal. 332, 17 P. 229; Travis Glass Co. v. Ibbetson, 186 Cal. 724, 200 P. 595, and Goad v. Montgomery, 119 Cal. 552, 51 P. 681, where from a reading of each it is patent there is a different factual situation from that now presented for determination.

Second: *Does petitioner here have an adequate remedy by appeal, thus precluding the issuance of a writ of prohibition by this court?*

[4, 5] *No.* The remedy in the ordinary course of law by appeal from the judgment at the end of a trial is not adequate so as to preclude the issuance of a writ of prohibition when petitioner would be subjected to the vicissitudes of an unnecessary trial. (Hampton v. Superior Court, 38 Cal.2d 652, 657 [11–12], 242 P.2d 1; cf. Providence Baptist Church of San Francisco v. Superior Court, 40 Cal.2d 55, 60 [7], 251 P.2d 10.)

In the present case it is clear that the determination of the proceedings on the questions raised in the heirship proceedings could be legally only in favor of petitioner, here, and that if required to stand trial upon the issue it would involve unnecessary expense, delay and prejudice to petitioner. Therefore prohibition is the proper remedy.

In view of our conclusions discussion of other questions raised by counsel is unnecessary.

Let a writ of prohibition issue as prayed.

MOORE, P. J., and FOX, J., concur.



131 Cal.App.2d 19

A. Bruce McDONALD, Plaintiff, Cross-Defendant and Respondent,

v.

D. Fraser McDONALD, Defendant, Cross-Complainant and Appellant.

Civ. 20180.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1955.

Rehearing Denied March 21, 1955.

Hearing Denied April 20, 1955.

Plaintiff brought action to recover money allegedly due for services rendered by plaintiff for defendant as business or office manager. The Superior Court of Los Angeles County, J. T. B. Warne, J., entered judgment for plaintiff and an order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence sustained findings in favor of plaintiff.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

Master and Servant ⇐80(10)

In action for money allegedly due for services rendered defendant by plaintiff as business or office manager, evidence sustained findings in favor of plaintiff.

Leonard J. Meyberg, C. Thomas Fizzolio, Coit I. Hughes, Los Angeles, for appellant.

John B. Watts, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment.

The plaintiff and defendant are brothers. Plaintiff worked as business or office manager for several years from 1946 to February 11, 1949. The action herein was filed March, 1950.

The action is for money due for services rendered. The complaint, which alleges eight causes of action, prays for $6,700. The judgment is for $4,863.68 and $789.30 costs.

Appellant's cross-complaint was, in effect, merely a counterclaim.

It is contended by appellant that,

"I. The trial court erroneously found defendant became indebted to plaintiff on a mutual open and current account for work, labor and services rendered by deducting from said indebtedness the amount found to be due defendant on his cross-complaint for misappropriation by plaintiff of cross-complainant's funds, to support plaintiff's Fourth cause of action for a balance alleged to have accrued on an open mutual and current book account for services rendered.

"(a) Can misappropriation of funds alone be a sufficient demand for the establishment of any agreement or expression of mutuality necessary for a mutual open and current book account and/or any other mutual open and current account?

"II. Can plaintiff recover on his Fourth cause of action for a balance due on a mutual open and current book account, for work, labor and services rendered, without a Finding or evidence to support a Finding that a book account or record existed containing entries for work, labor or services accrued or unpaid?

"(a) Can plaintiff after preparing in his own handwriting checks plaintiff drew on defendant's bank account, whereon plaintiff wrote 'Compensation to 1/15/49'; 'Compensation to 1/31/49'; and 'Compen-

sation to 2/15/49', after which his services were terminated, thereafter and without prior demand therefor, recover against defendant for additional salary and wages from 1946 to February 11, 1949 on a mutual open and current account in view of his testimony in this case?

"III. Can plaintiff recover for salary and wages for the years 1946 and 1947 whether on an 'open, mutual and current', or otherwise, where, in an affidavit for a subpoena *duces tecum* to obtain and produce at the trial, books of appellant, respondent's attorney of record stated: 'Plaintiff concedes that the recovery of salary or wages for the years 1946 and 1947 is not involved in this trial'?

"IV. The court erred in failing to give Judgment for cross-complainant on his cross-complaint which alleged misapplication and misappropriation of his funds after finding that cross-defendant (plaintiff-respondent) was indebted to cross-complainant therefor.

"(a) Is cross-complainant entitled to costs, including expense of Referee, if he (appellant) recovers on his cross-complaint?

"V. Can plaintiff herein recover Judgment for the reasonable value of work, labor and services rendered (Second cause of action) to which the demurrer of defendant (appellant) was sustained on the grounds of the bar of the Statute of Limitations (C.C.P. Section 339(1)) without amending the same and after it was expressly withdrawn by plaintiff prior to the trial?"

As recited in respondent's brief, "Respondent admitted that he had no books containing an account, but contended that appellant was in possession of books which recorded a mutual, open and current account. That appellant produced records to substantiate his set-off was apparent from the referee's report, and respondent conceded it. The referee also found entries showing the amount paid respondent each year set up in an account labelled Business Management or Business Manager's Expenses. Counsel for both sides stipulated that the Referee's Report would be accepted and would constitute a finding of fact binding on both sides as to those items so stipulated, each side reserving certain items for the introduction of evidence and for testimony as to their truth or falsity; that the said report would serve to establish what the books, ledgers and other records showed, without bearing on the veracity of entries. As the trial court has made its finding the appellant may not now be heard in derogation of his stipulation."

Appellant's contentions are highly technical. It would serve no useful purpose to detail the record with regard thereto. It is sufficient to note that careful review of the record reveals no errors of law. Actually the only question is one of fact. There is substantial evidence to support the findings hence, as a matter of law, the judgment must be affirmed. It is so ordered. Appeal from order denying motion for new trial dismissed.

WHITE, P. J., and DRAPEAU, J., concur.

131 Cal.App.2d 106

Andrew J. METRO, Plaintiff and Respondent,

v.

O. C. DICKERSON, E. M. Hale, O. C. Dickerson and E. M. Hale, copartners doing business as The Hub City Structural Steel Company, Defendants and Appellants.

Civ. 5020.

District Court of Appeal, Fourth District, California.

Feb. 24, 1955.

Action by former employee against former employers for amounts allegedly due under employment contract. The Superior Court, San Bernardino County, A. D. Mitchell, J., entered judgment for former employee, and former employers appealed. The District Court of Appeal, Griffin, J., held that, where trial court had accepted as true evidence offered in behalf of prevailing former employee and had de-

nied new trial, and there was substantial evidence supporting trial court's findings and judgment, the District Court of Appeal would not interfere, even though it might be of an opposite opinion.

Judgment affirmed.

1. Accord and Satisfaction ⇐26(1), 27

Burden of establishing an accord and satisfaction rests upon parties asserting it, and question of existence of such accord and satisfaction is usually one of fact to be determined by trial court.

2. Appeal and Error ⇐1010(1)

Where, in action by former employee against employers for amount allegedly due under employment contract, trial court had accepted as true evidence offered in behalf of prevailing former employee and had denied new trial, and there was substantial evidence supporting trial court's findings and judgment, the District Court of Appeal would not interfere, even though it might be of an opposite opinion.

Joseph V. Mazziotta, San Bernardino, for appellants.

Robert Ritchie, Fontana, and Rex W. Cranmer, Redlands, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent brought this action against defendants and appellants to recover commissions claimed due upon a written contract which was set up in the complaint.

Plaintiff was an engineer. Defendants owned and operated a business known as The Hub City Structural Steel Company, and were desirous of obtaining the services of plaintiff for the purpose of "estimating, expediting, and to help in the operations of the company." Plaintiff entered upon his duties in August, 1947, under some oral arrangements. On January 29, 1948, there was a signed agreement, prepared by defendants, setting out the wages and commissions to be paid to plaintiff for the period of one year. By its terms plaintiff was to be paid a salary of $400 per month, plus 5 per cent of the net proceeds from the operation of the company, to be "obtained" at the time of the fiscal audit of the company's books. For this compensation plaintiff agreed to perform the services indicated. Provision was made therein whereby the contract could be canceled on a 30-day notice by either party. If canceled by plaintiff, the net profits were waived by him; if by the company, the net profits, as of that time, were to be determined and plaintiff was to be paid according to the percentage indicated.

The agreement then set out that the defendant company "agrees to pay * * Mr. Metro the commissions *he has earned on the following* contracts" (italics ours) when the company receives payment for them. Then follows a list of those contracts and the commissions due. Among them was the Haxton contract for the steel construction work in the Palm Springs Gymnasium, fixed at $1349.39, and the Haddock Engineers' contract for the erection of an armory, totaling $180. The complaint seeks recovery for these two items. Plaintiff admitted receiving payment on the other contracts listed.

The answer alleges that plaintiff never earned the commissions here in question; and that there were no profits accruing to defendants under the contracts alleged. As a defense, defendants allege that plaintiff so negligently performed the work required of him that defendants were damaged in the sum of $5,000 as a result thereof; that the agreement referred to was canceled on July 9, 1948, and fully discharged by accord and satisfaction, in that plaintiff accepted $200 from defendants in discharge of said contract.

The court found generally in favor of plaintiff and against defendants on their claimed defenses and that under the written agreement defendants promised to pay the amounts therein set forth. Judgment was rendered accordingly.

There is some dispute as to when the Palm Springs contract was entered into and as to when it was completed. The court found it was completed on January 17, 1949; that final payment was made on March 17, 1949; that the armory contract was completed before July 20, 1948; and final payment was made on that date.

It appears from the testimony of defendants that plaintiff estimated the Palm Springs job for bid by defendant company and the work started in February, 1948. A few days before it was completed the general contractor inquired of defendant company about 27 hollow steel doors which were to be mounted on that job and defendants claimed that they were not in the plans and specifications but, upon examination, it was found they were there and that plaintiff had overlooked this item in the bid. Plaintiff was approached on the subject and after looking at the plans and specifications he "threw up his hands and he said 'Pay me, give me my check'". Defendants testified they lost about $9,000 on the contract as a result of plaintiff's error. On July 9, 1948, plaintiff severed connections with the defendant company. There is a conflict in the evidence as to what occurred at that time. Defendants claim that plaintiff was paid two weeks salary in advance and was told that he was paid in full; that plaintiff accepted the check and at that time defendants told him "that he forfeited all his rights he had to the profits" or commissions from the Hub City Structural Steel Company. They then testified that thereafter plaintiff left without saying anything further.

Plaintiff admitted receiving a check for $196, which he claimed was for one week's wages past due, plus one extra week. He denied the conversation above related in reference to the claimed forfeiture and said he told defendants he was through and finished and wanted his time, and told defendants they still owed him for the two items sued upon. He testified that 30 days later he made demand upon defendants for this amount and they told him he had nothing coming.

[1] This action followed, and the principal argument on appeal is that the evidence conclusively shows, as a matter of law, that the contract sued upon had been abandoned and rescinded by the respective parties, by mutual consent, and accordingly there was an accord and satisfaction on July 9, 1948, when plaintiff accepted defendants' check; that since the employment provision of the contract had been mutually abandoned, the provision therein in reference to the commission was inseparable and accordingly must be considered as abandoned; and that justice preponderates so greatly on the side of defendants, a new trial should be granted, citing such cases as Haberman v. Sawall, 72 Cal.App. 576, 581, 237 P. 776; Tompkins v. Davidow, 27 Cal. App. 327, 149 P. 788; and Herbert v. Lankershim, 9 Cal.2d 409, 476, 71 P.2d 220. It does appear that the contract of employment and the written agreement sued upon in which it was agreed that these specific items *were due when the written agreement was signed* were severable. Sterling v. Gregory, 149 Cal. 117, 85 P. 305; Gross v. Maytex Knitting Mills, 116 Cal.App.2d 705, 254 P.2d 163. The burden of establishing an accord and satisfaction rests upon the defendants and is usually a question of fact to be determined by the trial court. Russell v. Riley & Peterson, 82 Cal.App. 728, 256 P. 557; 1 Cal.Jur.2d 287, sec. 44.

Had the trial court found in favor of defendants on these issues a different question would here arise. The finding is that the alleged defenses set forth in defendants' answer were untrue, and the findings on other issues were in favor of plaintiff's contentions and judgment was entered in accordance therewith.

[2] It is an established principle of law that where the evidence is conflicting, as it is here, contradictions and inconsistencies in the testimony of a witness go to the weight of his evidence and to his credibility, and are matters settled before the case reaches the appellate court. Where the court has accepted the evidence offered in behalf of the prevailing party as true, where a new trial has been denied, as it was here, and where there is substantial evidence supporting the findings and judgment, the appellate court cannot interfere, even though it may be of an opposite opinion. High v. Pacific Gas & Electric Co., 52 Cal.App.2d 701, 702, 126 P.2d 911, 127 P.2d 588.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

131 Cal.App.2d 69

PEOPLE of the State of California, Plaintiff and Respondent,

v.

LOUIE GEM HANG and Joe Dee Wing, Defendants and Appellants.

Cr. 3059.

District Court of Appeal, First District, Division 2, California.

Feb. 23, 1955.

Defendants were convicted of conspiracy to possess and transport narcotics. The Superior Court, City and County of San Francisco, Twain Michelsen, J., entered judgment of conviction and defendants appealed. The District Court of Appeal, Nourse, P. J., held that admissions of defendants before trial, corroborated by evidence of other witnesses at trial, was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law ⇐406(1)

Extrajudicial admissions of defendant can be used against him when there is independent prima facie evidence of corpus delicti.

2. Conspiracy ⇐24

Unlawful agreement which is gist of conspiracy need not be explicit or expressed in words, but may consist of any tacit mutual understanding to commit crime.

3. Criminal Law ⇐409

In prosecution for conspiracy to possess and transport narcotics, admissions of defendants before trial, corroborated by evidence of other witnesses at trial, was sufficient to sustain conviction. Health and Safety Code, § 11500; Pen.Code, § 182; Code Civ.Proc. § 1870, subd. 3.

Sol A. Abrams, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendants, charged jointly in an information in three counts with (1) possession of narcotics, to wit, heroin, § 11500, Health and Safety Code, (2) transportation of the same (same section), (3) conspiracy to possess and transport the same, § 182, Penal Code, and each with a prior conviction, which was admitted, were found guilty by the court on the first and third count, jury trial having been waived and the second count having been dismissed. They were sentenced to San Quentin, the sentences on the two counts to run consecutively. On appeal from said judgment their only contention is that the evidence is insufficient to sustain the conviction on the conspiracy charge. The contention is devoid of all merit.

The evidence shows, among other things, the following without conflict: On December 17, 1953, heroin was found in defendant Wing's room in a Chinese rooming house at 912 Grant Avenue, part of it concealed in secret compartments of two large hand carved oriental camphor chests. Part of the wrapping of the heroin consisted of Hongkong newspapers. In the office of the Bureau of Narcotics the same evening, Wing stated in the presence of defendant Hang, who had been arrested, and of narcotics agents, that Hang asked him that afternoon to keep the two chests, in which Hang said narcotics were concealed, in his room and that he would come early next day to take the narcotics from the premises; that he had known Hang for a year and a half and had made several trips with him aboard the S. S. President Cleveland; that Hang had the chests in his car and that, together with Hang, he carried the chests up to his room; that Wing had told Hang that he did not like to keep the chests around the room, that it was Hang's stuff. When the above statement was made in his presence defendant Hang stood mute. Thereafter Hang stated in the presence of Wing that he had received the two chests from a certain Leong who had asked him at Hong Kong if he would take the two chests to San Francisco; that he took the two chests on board the S. S. President Cleveland, paid the purser $20 to store them and left them aboard when on December 15, 1953, he arrived with the ship in San Francisco; that

on December 17 he cleared the chests through the customs and put them in his car with the help of a longshoreman; that he then picked up Wing and drove to 912 Grant Avenue where they carried the chests to Wing's room; that he knew Wing from sailing together on the S. S. President Cleveland. The clearance of the chests from the S. S. President Cleveland by Hang and the putting of them in his car was corroborated by testimony of a U. S. customs inspector and a longshoreman.

[1–3] Appellants' argument is based on the contention that their stated admissions cannot be used to prove a conspiracy. This is not sound. Extrajudicial admissions of a defendant can be used against him when there is independent prima facie evidence of the corpus delicti. People v. Cullen, 37 Cal.2d 614, 624, 234 P.2d 1; People v. Selby, 198 Cal. 426, 438, 245 P. 426. Slight proof of the corpus delicti is sufficient for this preliminary purpose. People v. Mehaffey, 32 Cal.2d 535, 545, 197 P.2d 12; People v. Paps, 125 Cal.App.2d 28, 33, 269 P.2d 932. Under this rule the independent evidence of the fact that heroin was found secreted in the chests in Wing's room packed in Hongkong newspapers, that the chests were cleared through the customs by Hang on the same day from the S. S. President Cleveland, and put in a taxi and that Hang and Wing knew each other from working together on the S. S. President Cleveland is sufficient preliminary proof of the corpus delicti, to wit, the unlawful agreement to commit the substantive acts charged. The unlawful agreement which is the gist of the conspiracy need not be explicit or expressed in words; it may consist of any tacit mutual understanding to commit a crime. People v. Yeager, 194 Cal. 452, 484, 229 P. 40. When in this manner the admissions had become admissible they were sufficient to raise the quantity of proof beyond a reasonable doubt. As to Wing, his own admissions together with the independent evidence had this effect; as to Hang, it resulted from his standing mute when Wing made the accusatory statements in his presence, § 1870, subd. 3, Code of Civil Procedure; People v. Simmons, 28 Cal.2d 699, 712, 172 P.2d 18, after both had been arrested (especially the statements as to their conversation concerning the heroin in the chests), Hang's own admissions and the independent evidence. None of this evidence so used was inadmissible hearsay.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.



131 Cal.App.2d 58

Blanche WILSON, Plaintiff and Appellant,

v.

Arthur L. GREY and Hazel Grey, Defendants and Respondents.

Civ. No. 16170.

District Court of Appeal, First District, Division 2, California.

Feb. 23, 1955.

Action in nature of a creditor's bill to subject realty held by judgment debtor's wife under deed from husband, executed prior to transactions leading to judgment but recorded subsequent thereto and prior to judgment, to lien of a revived execution. The Superior Court, County of Santa Clara, John D. Foley, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Kaufman, J., held, inter alia, that evidence supported findings that deed had been for full cash consideration, that it had not been withheld from record to protect property from creditors, and that it had not been made with intent to defraud.

Judgment affirmed.

1. Husband and Wife ⇐129(4)

Generally, when a wife allows husband to hold record title to her property in his name, she is estopped to assert her title thereto as against anyone who has extended credit to husband in reliance on such ownership.

2. Husband and Wife ⇐129(4)

In suit by judgment creditor to enforce judgment against realty held by debtor's wife, evidence was sufficient to support finding that creditor had not entered into transactions leading to judgment in reliance on debtor's apparent ownership of property, which debtor had conveyed to wife by deed recorded subsequent to transaction and prior to judgment.

3. Fraudulent Conveyances ⇐298(3), 299(12), 300(1), 301(4)

In suit by judgment creditor to enforce judgment against realty which wife held under deed from husband, executed prior to transactions leading to judgment but recorded subsequent thereto and prior to judgment, evidence supported findings that deed had been for full cash consideration, that it had not been withheld from record to protect property from creditors, and that it had not been made with intent to defraud.

4. Husband and Wife ⇐270(11)

Separate property of wife was not subject to execution under judgment against husband.

5. Husband and Wife ⇐270(11)

A wife who permits community property to be applied to her separate property may not assert title against a creditor armed with process.

6. Husband and Wife ⇐270(11)

In suit by judgment creditor to enforce judgment against realty held by debtor's wife under deed from debtor, evidence supported finding that encumbrances on property had been discharged with wife's separate property, rather than with community property.

7. Judgment ⇐867

Return of a writ of execution unsatisfied did not revive cause of action. West's Ann.Code Civ.Proc. § 343.

8. Creditors' Suit ⇐48

In suit by creditor to enforce judgment against realty held by debtor's wife under deed from debtor, trial court's determination that creditor had not been negligent in attempting to locate debtor's assets and consequent issuance of writ of execution was not, where question of title of property in question was not before trial court, a determination that creditor had not been guilty of laches in attempting to execute on property in question.

9. Creditors' Suit ⇐46

In suit by judgment creditor to enforce judgment against property held by debtor's wife under deed from debtor, evidence whether creditor's delay in attempting execution against this property disabled debtor from presenting favorable evidence on issue was sufficient to support defense of laches.

10. Appeal and Error ⇐996
Equity ⇐84

The question of laches must be determined in each case on basis of facts, and where there are facts from which trial court may infer that there has been an unreasonable delay, finding will not be disturbed on appeal.

Charles Reagh, San Francisco, for appellant.

Rea, Frasse & Anastasi, San Jose, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court of Santa Clara County in favor of defendants in an action in the nature of a creditor's bill attempting to subject certain real property to the lien of a revived execution.

Appellant Blanche Wilson recovered judgment against respondent Arthur L. Grey in the sum of $5,000 Costs, and interest, on August 3, 1933 in the Superior Court of the City and County of San Francisco, which judgment remains unsatisfied except for the sum of $56.18.

On May 8, 1951, another writ of execution was issued on the motion of the plaintiff directed to the Sheriff of Santa Clara County and delivered to him on May 9, 1951. This was subsequently returned unsatisfied.

The complaint herein, a creditor's suit in aid of execution was filed July 5, 1951 and named Arthur L. Grey and his wife,

Hazel as defendants. It alleged that long after the transactions which culminated in the judgment, Arthur L. Grey transferred to his wife Hazel A. Grey, the real property in Santa Clara County which she sought to subject to the judgment. This transfer was alleged to have been by a deed executed by Arthur L. Grey on November 8, 1920, which was without consideration other than love and affection, and which was not recorded until July 3, 1933. It was alleged that the deed was withheld from record for the purpose of giving to Arthur L. Grey the fictitious appearance of possessing assets which might be subjected to the claims of creditors and to arrange property matters so that the property could not be subjected to the debts of either husband or wife. Appellant also charged that the deed was made with intent to hinder, delay and defraud the future creditors of either husband or wife. There were allegations that at the time the deed was recorded the land was subject to encumbrances of approximately $5,000, which have since been discharged by community funds of Arthur L. and Hazel Grey, which would otherwise have been subject to execution on the judgment in favor of appellant.

Appellant claimed an estoppel in that she relied upon the appearance of title in Arthur Grey in trusting him in the transactions which led to the judgment. It was finally alleged that the title to the real property was at all times held in trust for the community.

Respondents in their answer pleaded that Arthur L. Grey was only one of the defendants in the action in San Francisco; that he had dealt with plaintiff only in his capacity as president of the Alviso Greyhound Breeders' Association, that the $56.18 received on execution was from the assets of that corporation; that the deed from husband to wife was for a valuable consideration. It was admitted that the deed was not recorded until July 3, 1933. Also admitted was the entry of judgment, the revivor, the execution and its return unsatisfied. All other allegations of the complaint were denied, and special defenses of statute of limitations, laches, and homestead exemption were pleaded.

At the trial Mrs. Hazel Grey testified that about three months after their marriage, her husband deeded the property here in question to her for a consideration of $4,100 cash which was realized from property which had been owned by her previous to her marriage. At the time she purchased it from her husband there was a mortgage of $4,500 on the property, and at the time of recording the transfer, it was encumbered in the same amount, as well as a $500 encumbrance on the back lot. It was later refinanced. Mrs. Grey paid off the encumbrances with sums of $1,200 and $1,500 received from her mother, and $2,000 which she received in 1949 from her mother's estate. At the time she used her personal funds to pay off the encumbrances, Mrs. Grey knew that the remittitur in the prior action of Wilson v. Grey, 49 Cal.App. 2d 228, 121 P.2d 514, had been filed many years before. She would not have used her personal funds to pay off the encumbrances if she had not believed that appellant had abandoned her attempt to attack this property. During these years Mrs. Grey worked occasionally, once taking the census for which she received $100 which she paid out on a loan to a Mrs. Feigion. Her home was used frequently for elections since the time of her marriage and she was usually on the election board.

Appellant Blanche Wilson testified that prior to loaning the $5,000 to Arthur Grey in 1933, she had her son and a Mr. Ryan investigate him. They reported to her that he had real property in his own name. If she had not received this information she would not have loaned him the $5,000 which was for the purpose of making change at the dog track operated by the Alviso Greyhound Breeders' Association of which Arthur Grey was president. Appellant stated that she would not have loaned the money if she had not had the report that he owned realty. She did not recall that her son or Mr. Ryan told her about any encumbrances on the property.

Respondent Arthur Grey admitted making an affidavit in opposition to the motion for execution in the Superior Court of San Francisco in which he averred that he had at all times mentioned in the affidavit of

plaintiff resided in San Jose and had been continuously engaged in the real estate business there, had been listed in Telephone and City directories, had been at all times available for examination under oath; that an examination of the Telephone and City directories would have disclosed that affiant was engaged as a salesman with the Cooper-Challen Realty Company; that his commissions would have been subject to garnishment, and that at no time had appellant made any attempt to garnish or levy execution on the earnings of affiant. It was further averred that he had at all times owned automobiles registered in his name, which were used openly for business and pleasure and garaged at his home in San Jose, and that if they had been levied upon in the five years following judgment, an amount would have been realized which would have satisfied the judgment at least to a substantial degree.

Arthur Grey testified that he had never told appellant that he owned property, nor had he assured her that she would never lose the money. He stated that the arrangement for advancing the money was made with Mrs. Wilson by a Mr. Post. He had made an effort to locate Mr. Post in Los Angeles, where he was last heard of but had been unable to locate him. Counsel for appellant also admitted that his efforts to locate Mr. Post had been in vain.

An agreement covering the arrangement for the advancement of funds by Blanche Wilson was signed by Blanche Wilson, T. M. Ryan, agent, and Alviso Greyhound Breeders' Association by Arthur L. Grey, President.

Appellant did not produce her son or Mr. Ryan to testify concerning the investigation which they were supposed to have made of Arthur Grey's personal resources, nor was there any showing made that these witnesses were not available.

Appellant contends that whatever the actual intent of the parties, it is a constructive fraud for the wife to leave her husband clad with the indicia of ownership. She says that the same parties have been before this court once before and that the estoppel of the wife to contend that this property was her husband's has been set at rest. Appellant apparently has so interpreted the opinion in Wilson v. Grey, 49 Cal.App.2d 228, 121 P.2d 514.

[1, 2] It is true that the court therein cited the general rule stated in 10 R.C.L. 743 to the effect that when a wife allows her husband to hold the record title of her property in his name she is estopped to assert her title thereto as against any one who has extended credit to the husband *in reliance on such ownership*. The case was reversed because the trial court had failed to make a finding on the issue of estoppel. It was said that evidence introduced at the trial would support a finding of estoppel *if believed by the trial judge*. However, evidence similar to that introduced at the first trial was evidently *not* believed by the trial judge at the second trial for he found "that at no time did the plaintiff rely in any manner whatsoever on the apparent ownership of such real property by said defendant Arthur L. Grey because the record title to said real property was in said Arthur L. Grey; that it is not true that plaintiff made any investigation that showed that said Arthur L. Grey was the owner of said real property." Even though Mrs. Wilson's testimony that she relied upon the fact that title to the property was in Mr. Grey was uncontradicted, the trial court is not bound to believe her testimony. There were circumstances which might have impaired her credibility in the eyes of the trial judge. He might well have concluded that if the testimony of Ryan and appellant's son had been produced, it would have been adverse. See 27 Cal.Jur. 179, 180; Langley v. Pacific G. & E. Co., 41 Cal.2d 655, 262 P.2d 846; Royal Indemnity Co. v. Sherman, 124 Cal.App.2d 512, 269 P.2d 123.

[3] The trial court also found that the deed from husband to wife was for a full cash consideration; that it was not withheld from record to protect the property from creditors of either husband or wife; that it was not made with the intent to defraud creditors.

[4] Since all of the above findings are adequately supported by the record it must be taken as established that the property was the separate property of Mrs. Grey

which was not subject to execution under the judgment against her husband.

[5, 6] Appellant urges that at least part of the encumbrances and the property were paid from community property which was sufficient to have paid the judgment. A wife who permits community property to be applied to her separate property may not assert title against a creditor armed with process. Bank of America Nat. Trust & Savings Ass'n v. Mantz, 4 Cal.2d 322, 49 P.2d 279; Bales v. Farley, 107 Cal.App. 2d 642, 237 P.2d 686. The evidence herein was that at least $4,700 of the approximately $5,000 of encumbrance was paid off with the separate property of Hazel Grey, received from her mother, and from her mother's estate. There is only one statement in Mrs. Grey's testimony which can be clearly interpreted as meaning that she at one time used $100 of community earnings toward the payment of the encumbrance. There is no other evidence which conclusively shows that any community funds were used to pay off the encumbrance. The amount received for the use of the house for elections each year would be separate property, and this could account for the balance of the encumbrance above the sum of $4,700.

[7] The trial court found that the cause of action set forth in the complaint was barred by section 343 of the Code of Civil Procedure. Appellant appears to contend that the return of a writ of execution unsatisfied revives the cause of action, but admits to finding no California case in point. The deed in the present case was recorded on July 3, 1933, and judgment was entered on August 3, 1933. A writ of execution was sued out on October 9, 1933, three months after recordation of the deed. It is now appellant's contention that in making the loan, she relied upon this particular real property which she had her investigators report on. If this were true, then she was certainly aware, after October 9, 1933, the date when the writ of execution was returned unsatisfied except in the amount of $56.18 with the report that the sheriff was unable to find any other property of the defendant in the County of Santa Clara not exempt from execution, that a fraudulent transfer had been made of this property. In the prior case of Wilson v. Grey, supra, in which complaint was filed in 1935, she attacked the transfer as fraudulent. Nine years elapsed between the reversal of that decision and the filing of this action.

Respondent suggests that a return of an execution unsatisfied is not necessarily a prerequisite to a suit in the nature of a creditor's bill to set aside a fraudulent conveyance, citing Richardson v. Michel, 45 Cal.App.2d 188, 113 P.2d 916, in which it is held that the period of limitation is not extended by delay in issuing execution. The case of Sherman v. S. K. D. Oil Co., 185 Cal. 534, 197 P. 799, is not in point. It is concerned with the right of action against stockholders of a corporation on their liability in equity as holders of watered stock. In such cases execution must be returned unsatisfied to give the creditor notice of the insolvency of the corporation in order that he may know that he has the right to proceed against the stockholders on their subscription liabilities.

[8] Appellant argues that any question of laches in applying for the writ of execution was settled by the Superior Court when it granted the writ of execution in 1951. Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205. That court at that time only decided that appellant was entitled to a writ in that he had not been negligent in attempting to locate assets of the respondent Arthur Grey on which he was entitled to levy in satisfaction of the judgment. The question of the title of this property was not before the court in that proceeding. The matter was before the court on an affidavit of appellant in which he alleged that he was unable with due diligence to locate assets of respondent Grey on which he could levy.

[9, 10] Appellant maintains that there is no evidence to support the defense of laches. He admits that the Notary who took the acknowledgment of the deed is dead, but says that appellant did not dispute the date of the deed nor its acknowledgment. He contends that there is no claim that any witness who could testify to any material thing could not be produced

or that any material document is missing. However, as noted above, diligent search was made by both parties in vain for Mr. Post, a key witness, who was supposed to have been one of the parties who made the arrangements for the loan of the money. The trial judge's finding that witnesses who would have been favorable to defendant have died or moved beyond the jurisdiction since the previous trial between these parties is supported by the record. Also supported is his finding that "records of the Bank of America National Trust and Savings Association, Santa Clara Branch, which made the loan to plaintiff out of which transaction her judgment against the defendant Arthur L. Grey and Greyhound Breeders' Association arose have been lost or destroyed, and the manager of that bank cannot now recall the details of said transaction because of said lapse of time." The question of laches must be determined in each case on the basis of its facts, and where there are facts from which the trial court may infer that there has been an unreasonable delay, that finding will not be disturbed on appeal. Gedstad v. Ellichman, 124 Cal.App.2d 831, 269 P.2d 661.

When the decision was rendered in 1942, reversing the decision of the trial court in favor of respondents herein, appellant did nothing toward getting the matter set for a new trial within a reasonable time, but allowed 9 years to elapse, after which time the case was dismissed. Hazel Grey testified that she relied on the apparent abandonment of the action in applying her separate property to the discharge of the encumbrances on the property here in question. In view of the long period of inaction on the part of appellant, it cannot be said that she was unreasonable in concluding that the attempt to attack this property had been abandoned.

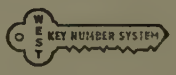
Appellant does not attack the finding that the Fifth Defense of respondents, namely, that the property here involved is a homestead. At the trial appellant's counsel stipulated that the declaration of homestead was a valid homestead.

At any rate, appellant has made no showing that he followed the statutory procedure which is a prerequisite to an attack on property duly homesteaded, and this perhaps is the reason why the finding that the defense that his homesteaded property is true, is not challenged. Arighi v. Rule & Sons, Inc., 41 Cal.App.2d 852, 107 P.2d 970.

We conclude that the findings of the trial court are supported by evidence and that there is no prejudicial error in the record before us.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.



130 Cal.App.2d 664

H. T. GOODWIN, Appellant,

v.

Elwood ALSTON et al., Respondents.

Civ. 5039.

District Court of Appeal, Fourth District, California.

Feb. 10, 1955.

Hearing Denied April 6, 1955.

Action to foreclose trust deeds and crop mortgage wherein a defendant filed a counterclaim based upon the usury law. From a judgment of the Superior Court, Riverside County, Hilton H. McCabe, J., in favor of the counterclaimant, the plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to sustain finding that transactions constituted loans made by purported assignee of notes and trust deeds to payee of notes and that such payments as were made were made by the payee but that where there was bitter controversy over nature of transactions, whether they were loans and to whom loans were made and as to who had made any payments, allowance of interest after the payee had received benefit of payment by reduction of his indebtedness was not justified. Civil Code, § 1916 et seq.

Judgment modified and as modified affirmed.

1. Appeal and Error ⇐172(1)

Where assignee of notes and trust deeds and holder of crop mortgage brought foreclosure action on theory that he was purchaser and owner of securities and not on theory that he was a trustee foreclosing for benefit of assignor, he could not on appeal rely on theory that he was trustee foreclosing for benefit of assignor.

2. Chattel Mortgages ⇐282
Mortgages ⇐476

Where foreclosure action by assignee of notes and trust deed and holder of crop mortgage against assignor and maker involved dispute as to whether transactions were loans, as to who borrower was if they were loans, and as to who made such payments as were made, court could properly determine all issues and settle entire controversy between all parties who were before the court.

3. Mortgages ⇐319(3), 463
Usury ⇐142(4)

In foreclosure action by assignee of notes and trust deed against maker and against assignee who filed counterclaim charging usury, evidence sustained finding that transactions were loans made by assignee to assignor and that such payments as were made were made by the assignor.

4. Usury ⇐143

In foreclosure action by assignee of notes and trust deed against maker and against assignor who filed counterclaim charging usury, the counterclaim was proper. West's Ann.Code Civ.Proc. §§ 438, 440.

5. Limitation of Actions ⇐129

In foreclosure action by purported assignee of notes and trust deed against maker and against assignor, assignor's counterclaim charging usury was not barred where statutory period had not run on it at time action was commenced.

6. Usury ⇐140

In foreclosure action by purported assignee of notes and trust deeds against maker and against assignor, the assignor who had made all payments that had been made could maintain counterclaim for usury.

7. Usury ⇐138

Amount which had been allocated to usurious interest by lender was properly used as basis for treble penalty. West's Ann.Civ.Code, § 1479.

8. Usury ⇐138

Where 4,000 sacks of potatoes were demanded by lender and received by him purely as a bonus for making of crop loan, and without which loan would not have been made, the bonus came within Usury Law and was proper basis for assessment of treble penalty. West's Ann.Civ.Code, § 1479.

9. Usury ⇐142(5)

Where counterclaim for usury contained a prayer for other and general equitable relief and usurious character of $673.-33 interest item, made about six months before action was instituted, was gone into at trial, the court properly trebled that item notwithstanding it was not alleged or prayed for specifically in the counterclaim. West's Ann.Civ.Code, § 1479.

10. Interest ⇐19(1)

Generally, unliquidated claims bear no interest prior to date they are fixed and determined.

11. Interest ⇐19(1)

A claim is liquidated, for purpose of computing interest, when amount due or to become due is fixed by law or by agreement between the parties.

12. Interest ⇐39(1)

Where there was bitter controversy whether the transactions constituted loans, to whom any loans were made and as to who had made any payments, debtor who received benefit of usurious interest payment by allowance of offset and reduction of indebtedness was not entitled to interest from date of payment to date of judgment. West's Ann.Civ.Code, § 3287.

Albert Lee Stephens, Jr., Guy Richards Crump, Los Angeles, for appellant.

Best, Best & Krieger, James H. Krieger, Arthur L. Littleworth, Riverside, for respondents.

BARNARD, Presiding Justice.

This is a foreclosure action, with a counterclaim based upon the usury law.

The defendant Alston owned 400 acres of land on which the defendant Fleming held a trust deed securing a note for $50,000, dated December 12, 1946. In 1948, in two transactions, the plaintiff advanced funds for the purpose of financing the raising of potatoes on this land. In March, he advanced $40,000 and Fleming assigned to him the $50,000 note and trust deed and Alston gave him a crop mortgage in that amount as additional security. Goodwin received $51,544.90 from the proceeds of the potatoes, the last payment being made on September 11, 1948, and on that day he satisfied the crop mortgage and reassigned the trust deed to Fleming. On the same day the parties entered into a second transaction, in order to finance a fall crop, and Goodwin advanced another $65,000, receiving a crop mortgage for $70,000 executed by the Alstons in his favor, a reassignment to him of the $50,000 note and trust deed held by Fleming, an assignment of another note and trust deed for $20,000 executed on that day by Alston in favor of Fleming, and an order on the potato broker for 4,000 sacks of potatoes. Admittedly, Goodwin received $15,958 in March, 1949 from the sale of the 4,000 sacks of potatoes. He also received in March and April, 1949, an additional $18,136.92 from the proceeds of the crop.

This action was brought in October, 1949, to foreclose these trust deeds and the crop mortgage, the plaintiff alleging that he had purchased the notes and trust deeds from Fleming and that Alston had conveyed the land to Fleming. Alston defaulted but Fleming filed an answer and cross-complaint on December 30, 1949, which was superseded by an answer and counterclaim filed on November 1, 1950, in which usury was charged and treble damages sought. With respect to the first transaction, the counterclaim alleged that usurious interest amounting to $11,544.90 had been collected by Goodwin. As to the second transaction, it was alleged that Goodwin had required a bonus of $5,000 for the $65,000 loan, and also a bonus of 4,000 sacks of potatoes for which he had received $15,958. It was also alleged that Goodwin had received $17,463.59 on account of the principal of the $65,000 obligation.

On the first trial of the action a jury found that both of these transactions were loans instead of sales of securities, and the trial court found them to be usurious and entered a judgment cancelling Goodwin's right to the trust deeds and crop mortgage and awarding Fleming a judgment for $50,293.62. On appeal that judgment was reversed, Goodwin v. Alston, 114 Cal.App.2d 713, 250 P.2d 722, one of the grounds being that the $11,544.90 collected as interest and bonus on the first transaction could not be trebled since the action was filed more than a year after the payment was made. It was also pointed out that while the jury had found these transactions to be loans it was not found whether the loans were made to Fleming or to Alston. Some of the facts are more fully stated there, and need not be here repeated.

On September 9, 1948, Alston and his wife conveyed an undivided one-half interest in this ranch to Fleming and on February 26, 1949, the Alstons deeded the entire ranch to Fleming. Prior to the new trial Fleming was adjudicated a bankrupt, and the trustee was ordered to defend this action and to prosecute Fleming's counterclaim on behalf of the bankrupt estate.

On the second trial, the jury specially found that both of these transactions were loans and not sales; that both loans were made to Fleming; that with respect to both loans it was Fleming who repaid the money which was paid; and that the 4,000 sacks of potatoes constituted a bonus for the $65,000 loan and was not a purchase of that amount of potatoes, as claimed by Goodwin. The court made findings accordingly and entered a judgment decreeing that Goodwin has no right, title or interest in the trust deeds and crop mortgage involved in the second transaction, and awarding Fleming a judgment against Goodwin in the amount of $18,261.65. In arriving at this result Fleming was given credit for the bonus and interest paid on the first transaction, $11,544.90; for interest on that amount at 7% from September 11, 1948 to date of judgment, $4,359.17; for the potato bonus $15,958 trebled, $47,874;

and for $2,019, being treble the $673.33 allocated by Goodwin to interest when the general payment of $18,136.92 was paid in March and April of 1949. Plaintiff has appealed from this judgment.

It is first contended that Fleming has no right to any counterclaim or offset in this action since the action is one by Goodwin as a pledgee to collect a pledge; that section 440 of the Code of Civil Procedure does not authorize such a setoff since Goodwin did not sue either Fleming or Alston on the $65,000 loan; that Fleming did not counterclaim against Goodwin "as trustee" and therefore Fleming's claim could neither defeat nor diminish Alston's debt on the pledged securities, as required by section 438 of the Code of Civil Procedure; and that Goodwin was entitled to a decree of foreclosure and to an award of attorney's fees even though, as trustee, he would be obliged to turn over all proceeds to Fleming.

[1–5] Goodwin brought this action to enforce his right under the transaction, and it has been twice tried on the theory that he was the purchaser and owner of these securities, and not on the theory that he was a trustee foreclosing for the benefit of Fleming. He now contends that since the jury found, in effect, that these securities were pledged to him the law authorizes him to foreclose them and turn the proceeds over to Fleming. In our opinion, the general law with respect to pledges does not require such a useless and inconsistent procedure, and such a change in position on appeal is not justified. There was a dispute throughout both trials as to whether or not these were loans, as to who the borrower was if they were loans, and as to who made such payments as were made. These matters, with other issues, were decided on conflicting evidence, all parties were before the court, Fleming was then the owner of the land subject to the trust deeds, and the court in this equitable action could properly determine all issues and settle the entire controversy. It having been found that these were loans which had been made to Fleming and that Fleming had made the payments thereon, the necessary basis for a setoff and counterclaim existed. The evidence, while conflicting, is sufficient to sustain the findings made that these were loans made by Goodwin to Fleming, and that such payments as were made were made by Fleming. All payments made were from the proceeds of potatoes grown and the evidence justifies the inference that these proceeds would otherwise have gone to Fleming. A counterclaim was proper in this action. Stock v. Meek, 35 Cal.2d 809, 221 P.2d 15. This counterclaim was not barred since the period had not run on it at the time this action was commenced. Jones v. Mortimer, 28 Cal.2d 627, 170 P.2d 893.

[6] It is further contended that Alston made all of the payments to Goodwin which were made, and that since no payments were made by Fleming he cannot recover on his counterclaim. It is pointed out that it was alleged in the first cross-complaint and the later counterclaim that the "defendants" paid these various amounts to Goodwin, and that in another action Fleming testified, in connection with these two transactions, that he considered himself a guarantor and not one of the parties borrowing the money. While the evidence was conflicting with respect to the person to whom the loan was made, and the person who made such repayments as were made, these were questions of fact which were resolved against the appellant. The payments all came from potatoes raised on this ranch delivered to the potato broker, who turned over the proceeds to Goodwin. Nothing had been paid on the trust deed prior to 1948, and the trust deed gave Fleming the right, in case of any default, to take the proceeds of the crops. The evidence, with the reasonable inferences therefrom, supports the findings and conclusions to the effect that Fleming was financing the project in the hope of collecting on his trust deed, that he took charge of the venture, conducted the negotiations, and entered into these various agreements, and that he was in full and complete control of what was to be done with the proceeds from the crops grown. While the jury could have found otherwise, its finding that the payments were made by Fleming is sufficiently supported by the evidence.

[7, 8] It is further contended that, assuming that all payments made were made by Fleming, they should have been allocated to principal, leaving no basis for a penalty of treble the amount paid. It is argued that neither the $15,958, the proceeds from the 4,000 sacks of potatoes, nor the sum of $673.33, the amounts which were trebled, were allocated as interest by any of the parties to the transaction, and that since there was no legal obligation here these amounts should have been allocated to principal under Section 1479 of the Civil Code. There was evidence that the amount of $673.33 was allocated to interest by the appellant himself when the general payments from the potatoes were received in March or April, 1949. With respect to the proceeds from the 4,000 sacks of potatoes, while again the evidence is conflicting, it supports the finding that these 4,000 sacks of potatoes were demanded by Goodwin and received by him purely as a bonus for the making of the loan, and without which the loan would not have been made. As such a bonus it comes within the meaning of the provisions of the usury Law and was properly regarded as interest collected in violation of that law. While this was an unprofitable deal for the appellant and the penalties are harsh, he entered into these transactions for the purpose of taking profits not permitted by the statute and is subject to such penalties as are properly applicable.

[9] It is next contended that the court erred in trebling the item of $673.33 allocated as interest when the general payment of $18,136.92 was made about April 1, 1949. It is argued that this item was not alleged or prayed for in the counterclaim. There was a prayer for other and general equitable relief and the matter was gone into at the trial. There was written evidence signed by Goodwin showing that when this payment was made he allocated $673.33 to interest and $17,463.59 to principal. This payment was made about six months before this action was begun. No reversible error appears in this connection.

Finally, it is contended that Fleming could not claim as an offset the overpayment of $11,544.90 in connection with the first transaction and at the same time claim interest on that amount at 7% from the date of its payment on September 11, 1948, to the date of the judgment, and that the court erred in allowing such interest in the amount of $4,359.17.

[10–12] This contention must be sustained. The general rule is that unliquidated claims bear no interest prior to the time they are fixed and determined. McNutt v. City of Los Angeles, 187 Cal. 245, 201 P. 592. A claim is liquidated when the amount due or to become due is fixed by law or by agreement between the parties. United States Fidelity & Guaranty Co. v. American B., etc., Co., 7 Cal.App.2d 683, 46 P.2d 984. The fact that the amount owed is certain or capable of being made certain by calculation, and the right to recover it is vested upon a particular date is an important consideration in determining whether a party is entitled to interest. Civil Code, Sec. 3287. There was a bitter controversy here over the nature of these transactions, whether or not they were loans, to whom any loans were made and as to who had made any payments. These were close questions which could have been decided either way and they were not all decided until after a second trial. Moreover, immediately after the $11,544.90 was paid Fleming owed the appellant another item of $65,000. This $11,544.90 item could be, and was by the judgment, applied to the amount owed by Fleming. He got the benefit of the payment, reducing his debt, and he is not entitled to interest on that payment over the next 4½ years. Assuming that interest on such a payment might be proper under some circumstances, it was not allowable under the facts of this case. The amount thus allowed as interest should be deducted from the judgment as rendered.

That part of the judgment awarding the defendant Fleming the sum of $18,261.65 is modified by deducting therefrom the sum of $4,359.17, leaving a balance of $13,902.48. As so modified the judgment is affirmed, the appellant to recover his costs on appeal.

GRIFFIN and MUSSELL, JJ., concur.

130 Cal.App.2d 765

Francis STEPHENS, Plaintiff and Respondent,

v.

BAKER & BAKER ROOFING CO. and Russell R. Baker, Defendants and Appellants.

Civ. 16236.

District Court of Appeal, First District, Division 1, California.

Feb. 15, 1955.

Attachment action. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., after ordering dismissal, entered order vacating and setting aside the order of dismissal and setting aside a portion of the order of dismissal, and defendants appealed. The District Court of Appeal, Bray, J., held that where it appeared that plaintiff's delay in prosecution had been occasioned by negotiations, and failure to present affidavits in opposition to defendant's motion to dismiss was due to mistake, surprise, inadvertence and excusable neglect, order vacating order of dismissal was proper.

Orders affirmed.

1. Judgment ⇐363
Motions ⇐59(1)

Purpose of statute providing for relief from judgments or orders is to give a party opportunity of repairing damage done because of his failure or that of his counsel to make showing he could have made, provided that such failure was due to mistake, inadvertence, surprise or excusable neglect. West's Ann.Code Civ.Proc. § 473.

2. Dismissal and Nonsuit ⇐81(6)

Where it appeared that plaintiff's delay in prosecution had been due to negotiations, and failure to present affidavits in opposition to defendant's motion to dismiss was due to mistake, surprise, inadvertence and excusable neglect, order vacating order of dismissal was proper. West's Ann.Code Civ.Proc. § 473.

3. Appeal and Error ⇐982(1)
Dismissal and Nonsuit ⇐81(2)

Question of vacating an order of dismissal rests almost entirely in lower court's discretion, and reviewing court will rarely interfere, and never, especially where result is to compel trial on merits, unless it clearly appears that there has been a plain abuse of discretion.

4. Judgment ⇐368
Motions ⇐59(1)

Even negligence of attorney will, under some circumstances, justify trial court in granting relief against a judgment or order.

5. Appeal and Error ⇐982(1)

Where facts justify either granting of motion to vacate an order of dismissal or a denial of such motion, reviewing court invariably sustains action of lower court.

6. Dismissal and Nonsuit ⇐81(7)

In proceeding on motion to vacate an order of dismissal, any doubt that may exist should be resolved in favor of application, to end of securing a trial upon merits.

7. Dismissal and Nonsuit ⇐81(2)

Where it appeared that, due to emotional distress, surprise and inadvertence, true facts were not present before judge who entered order of dismissal, that motion to vacate the order was heard by a judge other than one who heard motion to dismiss did not affect validity of second judge's order to vacate.

8. Dismissal and Nonsuit ⇐81(1)

Order of dismissal could be attacked by motion to vacate, even though the order was appealable.

9. Attachment ⇐278

Where order of dismissal in attachment case directs that money paid into court be returned to defendant, and order is not inadvertently made, court has no jurisdiction thereafter to require repayment of the money, but if inadvertently made, the court has inherent power to correct the inadvertence. West's Ann.Code Civ. Proc. § 542b.

10. Dismissal and Nonsuit ⇐81(7)

Recital, in order setting aside a portion of an order of dismissal, that original order was made through inadvertence, etc., was not conclusive of that fact. West's Ann. Code Civ.Proc. § 473.

11. Appeal and Error ⇐907(1)

Reviewing court must presume regularity of trial court's actions.

12. Appeal and Error ⇐935(1)

In absence of evidence to contrary, reviewing court was bound by trial court's recital, in order setting aside part of order of dismissal, that original order had been made through inadvertence, ex parte and without notice to plaintiff or counsel for plaintiff. West's Ann.Code Civ.Proc. §§ 473, 937.

Ralph Leon Isaacs, Albert J. McGuire, San Francisco, for appellants.

Marshall E. Leahy, John F. O'Dea, San Francisco, for respondent.

BRAY, Justice.

Defendants appeal from (1) "Order Vacating and Setting Aside Order of Dismissal" [1] and (2) "Order Setting Aside Portion of Order of Dismissal." [2]

Question Presented.

Was there an abuse of discretion in making either order?

Record.

Plaintiff sued defendants for a money judgment and attached defendants' $1,200 bank account and $3,000 due defendants from one Capabianco. The latter intervened, offering to pay that amount into court. On stipulation of the parties it was deposited with the superior court clerk "pending the determination of the action * * *." After three years, the court released the attachment of the bank account, pursuant to section 542b, Code of Civil Procedure, which requires such release after three years. December 10, 1953, plaintiff filed "Notice of Motion to Advance on Trial Calendar" to be heard December 18th. December 16, 1953, more than three and three-quarters years after suit filed, defendant served and filed "Notice of Motion for Order Dismissing Action for Lack of Prosecution," to be heard two days later, December 18th (the same day that the motion to advance was to be heard). December 16th an order shortening time was made permitting the notice to be served any time prior to five o'clock of the same day. December 18th, the motion to dismiss, because of the engagements of the judge of that department, was continued to the following Monday, December 21st. December 18th, in the department of the presiding judge, the motion to advance was granted and the case set for trial for January 27, 1954. On December 21, 1953, the motion to dismiss was heard, taken under submission, and on December 23rd an "Order Granting Motion Dismissing Action for Lack of Prosecution and Directing Payment of Money" was made and entered. This dismissed the action and ordered the $3,000 on deposit with the clerk to be returned to defendants.

December 24th a telegraphic notice of motion for an order setting aside the last mentioned order, to be heard December 28th, and stating that the notice and the setting of the hearing was pursuant to the personal direction of the judge who made that order, was received by defendants. This was followed on December 29th with a formal "Notice of Motion to Vacate and Set Aside Order of Dismissal" on the grounds set forth in section 473, Code of Civil Procedure, to be heard January 5, 1954. December 28, 1953, the judge who made the order of December 23rd dismissing the action and returning the $3,000, made an "Order Setting Aside Portion of Order of Dismissal." This stated that that portion of the order of December 23rd, ordering the return of the money, "was made through the inadvertence of Court, ex parte and without notice to plaintiff or counsel for plaintiff * * *." It set aside said portion of said order and ordered defendants to redeposit said moneys in court, to be held subject to the further order of the court.[3] January 5, 1954, the motion to vacate the order of dismissal was

1. Hereafter referred to as the second order.

2. Hereafter referred to as the first order.

3. This is the "first order" from which appeal was taken.

heard by a different judge than the one who made the order to dismiss and on January 22nd an "Order Vacating and Setting Aside Order of Dismissal" was made.[4]

1. Discretion—Second Order.

The motion to set aside the order of dismissal was heard on conflicting affidavits, that of plaintiff's attorney O'Dea and that of defendants' attorney McGuire. O'Dea's affidavit recited that the complaint was filed March, 1950, and defendants' answer September 26th. October 6th plaintiff filed memorandum to set the cause for trial. Defendants then filed demand for jury trial. The case was not called for setting until June 12, 1951. It was then set for trial on July 31st. June 28th defendants moved to inspect plaintiff's books to which plaintiff consented. At defendants' request the trial was continued by written stipulation to September 12th or such time thereafter as was convenient to the court. Defendants requested this continuance to take plaintiff's deposition. Plaintiff voluntarily appeared at defendants' attorney's office August 24th for that purpose. Plaintiff then requested that defendant Russell Baker be produced so that plaintiff might take his deposition. Defendants agreed. Defendants suggested that the deposition not be written up and no further expense incurred until settlement negotiations were exhausted. Plaintiff's deposition was not completed until approximately January 9, 1952. The affidavit then details negotiations for settlement, starting with defendants' offer of $2,250 prior to August 24th, an offer of $2,500 on that day, one of $3,000 on January 4, 1952, another of $3,500 on February 14th; "that it was the agreement and understanding of all parties and counsel that the matter would not be brought to trial as long as there was a possibility of settlement * * *." March 10th plaintiff's counsel notified defendants by letter that defendants' offers of settlement were not acceptable and asked when defendant Russell might be available for deposition. Prior requests had been made. It was not until April 29, 1953, that defendant Russell's deposition was taken. The deposition has never been signed despite defendants' counsel's agreement that it would be signed and despite requests made by the notary public. In September, 1952, plaintiff's counsel phoned defendants' counsel asking for a stipulation as to date of trial. The latter entreated that a trial not be had as the evidence produced would be favorable to Capabianco in a suit in the municipal court against plaintiff and defendants; that plaintiff acquiesced, until he could investigate the facts of that suit. Summons in it was served upon plaintiff, and in preparing plaintiff's defense, affiant determined that defendants' fears of the effect of evidence in the instant case on the Capabianco case were groundless; that in June 1953, affiant called defendants' counsel asking him to stipulate to a trial date; that defendants' counsel requested that the trial be deferred until a fall date as he was "heavily engrossed in preparations" for the annual convention of The State Bar. To accommodate counsel affiant agreed. August 12th affiant wrote counsel that it was now apparent a settlement was not probable, and asked what date for trial would be agreeable. August 25th counsel answered, suggesting mid-November. On that day, by telephone, both counsel agreed on November 18th as the trial date, the case to be tried without a jury. September 1st affiant forwarded counsel a stipulation designating November 18th for trial, asking that it be signed and returned. Receiving no reply, affiant again wrote counsel reminding him of the stipulation, and suggesting that if the date was not satisfactory to advise affiant what date would meet counsel's convenience. November 4th, defendants' counsel by letter acknowledged receipt of plaintiff's letter and stated that the Capabianco case and this one should be tried together and therefore "steps are now being initiated for a consolidation of both of these actions to be tried at the same time. With kindest regards * * *." Failing to obtain the orally agreed stipulation, plaintiff filed the notice of motion to advance hereinbefore mentioned. Plaintiff on December 16th received the notice to dismiss set for December 18th. Defendants' counsel with

4. This is the "second order" from which appeal was taken.

whom plaintiff had dealt did not appear on the motion to advance but sent Attorney McGuire. After argument of counsel the motion to advance was granted and the case set for trial for January 26, 1954. Affiant appeared at the hearing of the motion to dismiss for the purpose of having the motion dropped off calendar, "assuming that the proceedings before the Honorable Presiding Judge had disposed of the matter; by reason of such assumption, by reason of the lack of time to prepare counteraffidavits, and sincerely believing that the motion to dismiss had been filed by counsel for defendants at a tactical move and that counsel for defendants having been the cause of the complained of delay, could not in good faith prosecute a motion to dismiss, affiant filed no affidavits in opposition to the motion to dismiss, however, to the surprise and shock of affiant, appearance was made by Albert J. McGuire, Esq. and the motion to dismiss was pressed; affiant attempted to orally set forth the matters herein recited but neither time nor the mental attitude of affiant permitted a proper presentation of these facts; [t]hat upon the hearing of the motion to dismiss Albert J. McGuire, Esq., represented to the Court that Charles Rickenbach had died 'a year and a half ago', that he had been the principal witness for defendants and that by reason of the delay in prosecuting this action the testimony of Rickenbach had been lost; the facts are that Rickenbach died so close to the date of filing of the complaint that he was never served and was never involved in any of these proceedings; * * *." Referring to the $3,000 then on deposit, affiant stated "that a dismissal of this action fails to make an equitable disposition of such funds but facilitates the unjust enrichment of the defendants at the expense of materialmen who furnished the material for the jobs * * *."

In opposition, there is no affidavit by the defendants' counsel who dealt with plaintiff's counsel nor any denial of the matters in plaintiff's counsel's affidavit. The only affidavits were those of defendants' counsel filed with the notice of motion to dismiss and that of the counsel who appeared for defendants on that motion. The first affidavit alleges the bald conclusion that plaintiff had failed to prosecute the action and had not acted with due diligence. It alleged that nothing had been done to bring the case to trial since August, 1951. It alleged in effect that because of plaintiff's lack of diligence, defendants would be unable to present their defense due to the death of one Charles Rickenbach. (It is significant that the affidavit does not state when he died. Plaintiff's affidavit that he died close to the filing of the suit is nowhere denied.) Practically all the other matters alleged in this affidavit are matters of record which could not be denied but which in nowise negative the allegations of plaintiff's later affidavit showing the reasons for delay. The affidavit of the second attorney states that he appeared in opposition to the motion to advance and gave as his grounds the pending of the motion to dismiss, requested the deferring of the motion to advance until the motion to dismiss had been heard, that on the hearing of the motion to dismiss he pointed out that plaintiff had filed no affidavit in answer to defendants' affidavit accompanying the notice of motion to dismiss, and that plaintiff did not request an opportunity to file counter affidavits. It is obvious that were the facts as to the delay in bringing the action to trial as set forth in plaintiff's affidavit on the motion to vacate, and not denied, fully before the court on the motion to dismiss, the court would not have dismissed the action. "* * * when there have been mutual bona fide efforts to compromise and the plaintiff has delayed bringing the action to trial because of a reasonable belief, induced by the nature of the negotiations, that a trial could probably be avoided, it would be an abuse of discretion to dismiss the action." Cameron v. Cameron, 110 Cal.App.2d 258, 261, 242 P.2d 408, 409. Defendants' position here is a very technical one, namely, that because plaintiff on the motion to vacate did not make the showing he could have made, or did not ask for a continuance to do so, the court had no right to vacate the order. This failure, say defendants, was a mistake of plaintiff's attorney for which plaintiff

has no redress; therefore, as a matter of law plaintiff cannot bring himself within the provisions of section 473, Code of Civil Procedure.

[1] We do not agree with defendants' contentions. The very purpose of section 473 is to give a party the opportunity of repairing the damage done because of his failure or that of his counsel to make the showing he could have made, provided, of course, that that failure is due either to mistake, inadvertence, surprise or excusable neglect. There was such situation here. It should be pointed out, too, that the undenied fact is that most of the delay in bringing the case to trial was due to plaintiff's acquiescence in defendants' requests and that while defendants' affidavit upon which the court apparently acted in dismissing the case, stated that plaintiff was not diligent, the correspondence between the maker of the affidavit and plaintiff's counsel in the latter half of 1953 belied that statement. Moreover, defendants were not fair with the court in drawing the affidavit in such a way that it is made to appear, without saying so, that a witness who died about the time the suit was filed died a long time thereafter. It definitely is made to appear in the affidavit that defendant's inability to use that witness was due to plaintiff's delay in bringing the case to trial.

[2–4] While plaintiff could have, and should have, asked time on the motion to dismiss to prepare proper affidavits, nevertheless, in view of the history of the case, the negotiations between counsel, the writings and all the circumstances of the case and the inadvertence of plaintiff's counsel, it clearly appears that the order of dismissal was granted by the judge through the mistake, surprise, inadvertence and excusable neglect of plaintiff's counsel, and therefore plaintiff was entitled to have his day in court on the merits. As the court said in O'Brien v. Leach, 139 Cal. 220, 222, 72 P. 1004, 1005, "In matters of this sort the proper decision of the case rests almost entirely in the discretion of the court below, and this court will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion. This court will usually sustain the action of the court below upon the same facts, whether that decision is for or against the motion; but it is much more disposed to affirm an order, when the result is to compel a trial upon the merits, than it is when the judgment by default is allowed to stand, and it appears that a substantial defense could be made. This will explain what would otherwise seem to be a conflict in the decisions." See also Dineen v. City and County of San Francisco, 38 Cal.App.2d 486, 101 P.2d 736. Even "negligence on the part of the attorney will, under some circumstances, justify the trial court in granting relief." Vartanian v. Croll, 117 Cal.App.2d 639, 645, 256 P.2d 1022, 1026. See cases there discussed. Also see Stub v. Harrison, 35 Cal.App.2d 685, 96 P.2d 979, where the attorney failed to file an answer because he forgot the case because of accumulated work when he returned to his office after an accident to his son.

[5] There are many cases in California dealing with the granting or the denial of relief under section 473. It is well settled that a motion under that section is "addressed to the sound discretion of the trial court. Its determination will not be disturbed in the absence of a clear showing that this discretion has been abused. See for a good statement of the rule, Beard v. Beard, 16 Cal.2d 645, 107 P.2d 385." Vartanian v. Croll, supra, 117 Cal.App.2d 639, 644, 256 P.2d 1026. In many instances the facts might justify either a granting of the motion or a denial of it, in which event the reviewing court invariably sustains the action of the lower court. For that reason cases upholding denials, many of which are cited by defendant, are not determinative of the question here. As said in the Vartanian case, supra, 117 Cal.App.2d at page 644, 256 P.2d at page 1026: "There are relatively few reversals in this field. Of course, where there has been the entry of a default and the trial court sets it aside the appellate courts seldom reverse because of the strong public policy favoring trials on their merits."

[6] The following language from Proulx v. De Moti, 106 Cal.App.2d 265, at page 269, 234 P.2d 1009, at page 1011,

is particularly applicable to the situation here: "The action or inaction of plaintiffs' attorney, criticized by appellant as constituting non-excusable neglect, must be considered in the light of the entire circumstances shown by the record. Whether the neglect was, in the circumstances, excusable, was a question addressed primarily, and indeed, almost entirely, to the discretion of the court below. Moreover, in the consideration of an application for relief under section 473 of the Code of Civil Procedure, the law favors such action as will result in a trial on the merits." "It is only in extreme cases that an appellate court will interfere with the action of a trial court in refusing or granting an order of this character. * * *" Hecq v. Conner, 203 Cal. 504, 509, 265 P. 180, 183. "Any doubt that may exist should be resolved in favor of the application, *to the end of securing a trial upon the merits.*" Jergins v. Schenck, 162 Cal. 747, 748, 124 P. 426; emphasis added. See also Garcia v. Garcia, 105 Cal.App.2d 289, 291, 233 P.2d 23; Proulx v. De Moti, supra, 106 Cal.App.2d 265, 270, 234 P.2d 1009.

[7] Nor is the fact that the motion to vacate was heard by a judge other than the one who heard the motion to dismiss significant. A reading of the affidavits on the motion to vacate shows conclusively that the true facts were not present before the first judge due to the emotional distress, surprise and inadvertence of plaintiff's counsel.

[8] Defendants' contention that as the order of dismissal is an appealable one, and no appeal was taken, no other relief can be obtained is answered by Harth v. Ten Eyck, 16 Cal.2d 829, 832, 108 P.2d 675, 677:

> "It is argued by the defendant Olinger that since said order was appealable the power of the court was exhausted when it denied the motion to set aside the order of April 18th dismissing Olinger from the case. But the fact that the order of dismissal was appealable would not make an appeal therefrom the exclusive method of attacking it. The trial court on a proper motion, timely made, could set it aside.
>
> "That the court had jurisdiction to entertain the motion under section 473 of the Code of Civil Procedure may not successfully be questioned."

2. The First Order.

[9–12] Five days after making the order of dismissal the judge who made it signed an order, of his own motion, setting aside the portion returning the $3,000 to defendants, stating that that portion "was made through the inadvertence of Court, ex parte and without notice to plaintiff or counsel for plaintiff * * *." Defendants point out that as to the $3,000, the court at the time of the dismissal had the power to do one of three things: (1) order payment to defendants; (2) as in Lord v. Superior Court, 27 Cal.2d 855, 168 P.2d 14, retain the fund to await disposition thereof; and (3) do nothing about it, leaving its disposal to be determined in another action. Having followed the first course, defendants say the court lost jurisdiction to do anything more. This would be true, if the order were not inadvertently made. If so made it is an inherent power of the court that it can correct the inadvertence. Burbank v. Continental Life Ins. Co., 2 Cal.App.2d 664, 667, 38 P.2d 451; Robson v. Superior Court, 171 Cal. 588, 593, 154 P. 8. Moreover, section 937, Code of Civil Procedure, provides: "An order made out of Court, without notice to the adverse party, may be vacated or modified, without notice * * *." While the recital in the order that it was made through inadvertence, etc., is not conclusive of that fact, Triplett v. Superior Court, 57 Cal. App.2d 536, 541, 135 P.2d 4, no showing is made here that the recital is not true. There was nothing in defendants' notice of motion to dismiss which indicated that defendants were going to ask for disposition of the fund in addition to a dismissal. While defendants' affidavit shows the motion to dismiss was argued, it does not indicate that there was any discussion of the disposition of the fund. As we must presume the regularity of the trial court's actions, in the absence of evidence to the

contrary, we are bound by its statement that the order was inadvertently made and without notice. It should be pointed out that even though the court erred in making this order (which we hold it did not) and we should reverse the order, such action would be of no benefit to defendants for the reason that we have held that the court properly set aside the dismissal order which this latter order modifies.

The orders are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



130 Cal.App.2d 818

Melvin STERN and I. Grossman, Plaintiffs and Respondents,

v.

Marcus KRASNE and Martha Krasne, Defendants and Appellants.

Civ. 20524.

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1955.

Action by tenants for damages for breach of covenant to renew lease. Landlords pleaded res judicata by reason of dismissal in previous slander of title action between the same parties. The Superior Court, Los Angeles County, H. Burton Noble, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Doran, J., held that there being no similarity between actions, dismissal of previous action for slander of title would not be res judicata of action for breach of covenant to renew lease, even though both actions had arisen out of the same general transaction.

Judgment affirmed.

1. Judgment ⇐585(1)

Doctrine of res judicata may not be invoked merely because rights, claims or demands arise out of same subject-matter involved in prior litigation so long as they constitute separate or distinct causes of action which were not placed in issue in former case.

2. Libel and Slander ⇐130

Slander of title is a tort involving unprivileged publication of false matter disparaging to another's property rights.

3. Landlord and Tenant ⇐83(5)

Action for breach of covenant to renew lease is simple contract action seeking damages which have resulted from breach.

4. Judgment ⇐585(3)

There being no similarity between action for slander of title and action for breach of covenant, dismissal of previous action for slander of title could not be res judicata of action for breach of covenant to renew lease, even though such actions arose out of the same general transaction.

5. Landlord and Tenant ⇐83(5)

In action for breach of covenant to renew lease, evidence sustained finding that lessees had not by their conduct retracted, or waived their written notice to extend term of leasehold.

6. Evidence ⇐570

Weight to be accorded expert testimony is for trier of fact.

7. Landlord and Tenant ⇐83(5)

In action for breach of covenant to renew lease, evidence sustained finding that leasehold value for five year period was $350 per month.

Walter B. Gieselman, Burbank, for appellants.

Charles C. Blaskower, Beverly Hills, for respondents.

DORAN, Justice.

On June 15, 1946, plaintiffs leased from the defendants certain real property for a term of five years, the written lease containing a covenant to extend the term for an additional five years. About five months prior to its termination, on January 20, 1951, plaintiffs' agent sent a letter to appellants, electing to renew the lease. Plaintiff's check for $300 representing the rental from April 15 to May 15, 1951, was returned by the defendants, with a

letter stating that same "cannot be accepted as you have advised me that there will be no extension of the lease, which terminates on the 15th day of June, 1951. And to this we have agreed. The rent for the last two months of this five year lease has been paid".

Four days prior to the end of the term of the lease, plaintiffs, as tenants, filed an action for declaratory relief, asking the court to declare that the term had been extended. Subsequently, after a voluntary dismissal of the declaratory relief action, plaintiffs filed an action against defendants for slander of title in reference to the leased premises, and recovered a judgment for $6,500. After a motion by defendants for a new trial, this judgment and the supporting findings were vacated and a judgment of dismissal with prejudice entered, after plaintiffs had informed the court that the defendants' motion for dismissal would not be opposed.

Plaintiffs thereafter filed the present action for damages for breach of the covenant to extend the term of the lease, this breach being alleged to have occurred some two months after the slander of title complained of in the previous action. In this present action plaintiffs again recovered judgment against the defendants in the sum of $3,000, from which judgment defendants now appeal. In the trial court the defendants pleaded res adjudicata but the court concluded that the present action was not barred by the judgment of dismissal in the previous slander of title action.

It is appellants' contention that the present action is barred by the previous judgment for the reason that "A judgment between the parties is res judicata not only as to all issues raised in the former action, but also as to all issues which were by implication included or could have been included, in the trial of the former action". In this connection appellants' brief maintains that "the issues raised by the allegations in the prior action of Slander of Title were identical with those in the present action, save and except the issue of damages which was, of course, different".

[1] Respondents' brief, however, correctly points out that "The doctrine of res judicata may not be invoked merely because the rights, claims or demands arise out of the same subject matter involved in a prior litigation so long as they constitute separate or distinct causes of action which were not placed in issue in the former case". Although the two causes of action arose out of the same general transaction in the instant case, the essential elements of slander of title, a tort, are entirely different from those involved in the present action, contract in nature, seeking damages for breach of a covenant to renew the lease.

[2–4] Slander of title is a tort involving the unprivileged publication of false matter disparaging to another's property rights. An action for breach of a covenant to renew a lease, involves none of these elements, and is a simple contract action seeking damages which have resulted from the breach. There is no similarity between the two, and the fact that both actions have to do with the same transaction between the parties is of no consequence. Appellants' statement that "the issues in the two cases * * * are identical up to the matter involving damages", is not borne out by the record, and the present action cannot be deemed a mere "attempted readjudication" of the issues in the previous action.

It is conceded that the judgment of dismissal with prejudice in the earlier action amounts to a judgment on the merits and a final disposition of the issues in that case. But the question in the previous case was whether there had been a slander of plaintiff's title. The issue in the second case concerned a mere breach of covenant by the defendant, an issue which was neither directly nor by implication involved in the previous litigation. Moreover, as respondents aver, a judgment is not conclusive on immaterial or collateral matters brought up in a previous action. Nor is there any "uncertainty or conjecture as to what was necessarily involved and decided in the slander of title action."

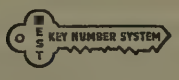
[5] Appellants' argument that "The evidence shows that the plaintiffs were estopped by their course of conduct after receiving notice from the defendants that they understood the plaintiffs did not intend to extend the lease", is untenable. The trial court found that "It is not true that Plain-

tiffs by their conduct * * * retracted, or waived their written notice to extend the term of the aforesaid leasehold", and the record disclosed substantial evidence in support of this finding. There was, for example, as noted in respondents' brief, the testimony of Mr. Stern that "when he found out that a for rent sign had been placed on the property by the defendants he ordered the sign removed and the same was removed".

[6, 7] The contention that "The evidence does not support the judgment wherein the Court found that the leasehold value of the five year period was Three Hundred Fifty ($350.00) per month", cannot be sustained. It is true that there was a difference of opinion between expert witnesses as to the matter of value, but the weight to be accorded expert testimony is a matter to be determined by the trier of fact and not by an appellate tribunal. There is substantial evidence in the record in support of the amount arrived at by the trial court.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



130 Cal.App.2d 833

Susana S. RIOS, Administratrix of the Estate of Salomon Trujillo Rios, deceased, and Susana S. Rios, Individually, Plaintiff and Respondent,

v.

Karam CHAND, Defendant and Appellant.

Civ. 8519.

District Court of Appeal, Third District, California.

Feb. 17, 1955.

Hearing Denied April 13, 1955.

Wrongful death action by widow against man who fatally shot her husband. The Superior Court, Sutter County, Thomas Maul, J., gave judgment for widow. Defendant appealed. The District Court of Appeal, Schottky, J., held that where widow testified defendant walked up to her husband and shot him, and defendant testified that he fired in self-defense, and there were no other eyewitnesses, evidence was sufficient to support verdict.

Judgment affirmed.

1. Death ⇐75

In wrongful death action by widow against man who fatally shot her husband, where widow testified defendant walked up to her husband and shot him, and defendant testified that he fired in self-defense, and there were no other eyewitnesses, evidence was sufficient to support verdict for widow.

2. Evidence ⇐271(6)

In wrongful death action by widow against man who shot her husband, statement by defendant in application for permit to carry gun, of reason why he desired to carry gun was a self-serving declaration, and testimony as to such statement was properly excluded.

3. Appeal and Error ⇐1048(6)
Witnesses ⇐372(2)

In wrongful death action by widow against man who fatally shot her husband, refusal to allow defendant to cross-examine widow to show she had a strong bias and prejudice against defendant because he reported the illegal presence of her husband in this country to immigration authorities, was error, but was not prejudicial, where defendant had testified that he had reported such facts.

4. Witnesses ⇐37(4)

If a witness states he knows the general reputation of a person in the community in which such person resides, he should be permitted to answer question as to whether such reputation is good or bad, although witness does not reside in the same community. West's Ann.Code Civ.Proc. § 2051.

5. Witnesses ⇐274(1)

Where a witness has testified as to general reputation of a person in a community in which such person resides, upon cross-examination he may be questioned as to the basis of his opinion, and if it appears that he has no knowledge upon which to base his opinion his testimony may be

stricken. West's Ann.Code Civ.Proc. § 2051.

6. Appeal and Error ⇐1057(1)

In wrongful death action by widow against man who shot her husband, where case was tried by court without jury, and evidence of immigration officer as to widow's bad reputation for truth would have been cumulative, exclusion of such evidence, though erroneous, was not prejudicial. West's Ann.Code Civ.Proc. § 2051.

7. Trial ⇐29(1)

In wrongful death action by widow against man who shot her husband, where case was tried by judge without jury, and accused had been previously convicted of murder of husband, and judge had been informed of such conviction by defendant's motions for continuance, and defendant made no assignment of prejudice or misconduct at time judge commented on fact he knew of conviction, defendant was not denied fair trial.

8. Death ⇐99(1)

Award of $15,000 damages for death of 28-year-old farm laborer earning up to $1 per hour was not excessive.

Guy A. Ciocca, San Rafael, for appellant.

Manwell & Manwell, Marysville, for respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action against defendant for the alleged wrongful death of her husband. The action was tried before the court without a jury and the court found in favor of plaintiff and awarded her damages in the sum of $15,000. Defendant's motion for a new trial was denied and he has appealed from the judgment.

Appellant makes three major contentions in arguing for a reversal of the judgment: (1) That the findings of the court are contrary to the evidence; (2) that the court erred in excluding certain evidence offered by appellant; (3) that the amount of damages awarded is excessive. Before discussing these contentions we shall give a brief summary of the evidence as shown by the record.

Appellant Karam Chand was a native of India and his wife, Cirila, was a Mexican, by whom he had four children, the oldest being 17 years of age. On December 27, 1951, he was living on a farm owned by himself and his wife and on this property he also conducted a store. He and his wife, because of marital difficulties, had separated, but both were living on the farm, Chand with the children in the farmhouse and Cirila, his wife, in a small detached dwelling. Cirila's sister Susie and her husband, Salomon Rios, were visiting her and had spent the afternoon there. About 7 o'clock in the evening they started to drive away. Their car became mired in the mud and they were unable to leave. They asked one Harry Tabata, a Japanese employee of Chand, to help them and he went to look at the situation. While he, Salomon, Susie and Cirila were grouped about the car, Chand came walking toward them. He had been in the house a considerable time and on entering had early learned of the presence of Salomon and Susie on the property despite his having frequently told Salomon not to come there. He took action, however, but ate dinner with his family, then retired to his living room when another employee, Jack Yokum, came in and told him that there was a car stuck outside. He put on his jacket in which there was a small flashlight and a loaded automatic pistol and walked outside through the yard and to the group around the car.

From that point on the testimony as to what occurred is much in conflict. Susie testified that she saw Chand approach the group, heard him curse Salomon and declare his intention to kill him, saw him walk directly up to Salomon, shine the light in his eyes and, at point-blank range, fire two bullets into his chest. She said Salomon turned and ran and Chand pursued him, declaring his intention to "finish" him "now." Salomon disappeared in the darkness and Susie sought him, finding him close to Tabata's house some little distance from where his car was mired. She then phoned for an ambulance and returning to the scene heard Cirila talking to Chand, telling him to forget everything and call a doctor, and she heard Chand reply "Who care," whereupon he walked to the house.

Appellant's former wife, Cirila, from whom he had been divorced between the date of the shooting and the trial of the instant case, was called as a witness for respondent, but, upon objection being made by appellant, was not permitted to testify.

Appellant did not deny the shooting but claimed that he was acting in self-defense. He testified that he merely left his house and went into the yard to see if he could help about the mired car; that he carried the flashlight in his hand, leaving the pistol in his pocket; that he reached the group around the car; that he walked directly toward Salomon, saying, "What are you doing here?"; that Susie said something in Spanish he could not understand and then Salomon, saying, "I am going to fix you up now, Karam," grasped Chand's throat, stopping his breathing and causing blindness; that he tried to break Salomon's grasp, but could not, then reached for his gun and shot; that he fired to save his own life, which he was in fear of losing; that Salomon did not release his hold after the first shot and that he, Chand, fired again; that he did not know if he had hit Salomon, but Salomon released his hold after the second shot was fired and went away; that as soon as he got his breath he, Chand, called for help and his four children came out of the house and ran to him; that he said nothing to Susie at any time and had never said during the entire affair that he was going to finish Salomon; that he returned to his house to call the sheriff, but on taking down the telephone heard someone on an extension line calling that officer; that he ordered a doctor called for Salomon.

Salomon lived about 36 hours after the shooting. His attending physician testified that he died from a bullet wound which had caused a paralyzed bowel, a paralytic ileus.

There was other evidence tending to support the testimony of respondent. Sheriff Carpenter and Deputy Sheriff Blackburn who went to the scene of shooting very shortly thereafter both testified that they observed the appearance of appellant and that his necktie and collar were in place and that they noticed no bruises or scratches on his face or neck, which testimony might cast some doubt on appellant's testimony that Salomon Rios grasped him by the throat and choked him, stopping his breathing and causing blindness.

[1] Respondent and appellant were the only witnesses who were in a position to see what took place at the time of the shooting. It is at once apparent that there was a sharp conflict in the evidence which it was the duty of the trial court to resolve. Appellant calls attention to the fact that appellant was a small man, 5 feet, 3 inches, in height and weighing only 130 pounds, while respondent's deceased husband was 6 feet tall and weighed 215 pounds, and also calls attention to other parts of the testimony which he contends supports his contention that he acted in self-defense. The following quotation from appellant's opening brief is sufficient to demonstrate that appellant's contention as to the insufficiency of the evidence is devoid of any merit:

> "It is of the utmost importance that it be here noted that the record as to what happened on the evening of December 27, 1951 at or about the hour of 8:30 p.m., the time of the fatal shooting, is bare of any evidence or testimony from which any inference or presumption may be drawn as to what the facts were at that time other than from the testimony of the appellant and the respondent who is seeking damages in the sum of $100,000. There is not one iota of testimony in the whole record either supporting or contradicting the testimony of these parties. The testimony of respondent in this connection is diametrically opposed to the testimony of appellant."

[2] Appellant next contends that the court erred in sustaining respondent's objection to the following question asked of the sheriff of Sutter County: "Did the application to you state why the gun was being obtained?" The evidence showed that appellant had obtained a permit to carry a gun from the sheriff's office several months prior to the shooting, and appellant testified that he obtained the permit for his own protection. Appellant's counsel states that he wanted to show that the permit to carry the gun was obtained to protect appellant

against the threats of another man and that his having the gun was innocent so far as taking the life of Salomon Rios was concerned. We believe that the court's ruling was correct upon the ground that any such statement by appellant would be a self-serving declaration, but in any event it is difficult to understand how appellant could have been prejudiced by the ruling or how it could constitute reversible error.

[3] Appellant contends also that the court improperly excluded evidence going to the interest, bias and prejudice of respondent and laying the foundation for threats made by the deceased bearing upon the question of who was the aggressor. In his cross-examination of respondent, appellant's counsel sought to bring out the fact that respondent had a very strong bias and prejudice against appellant. Respondent testified that appellant had killed her husband and that her feeling toward him was "no good." Appellant's counsel sought to have her admit that she was angry with appellant because he had reported the presence of her husband and herself to the immigration authorities and also sought to show that respondent had influenced appellant's wife against him. Objections to questions along this line were first sustained by the court. While the court should have allowed the questions to be answered, it is clear that respondent was biased and prejudiced against appellant. It also appeared in appellant's own testimony that he had reported the presence of respondent and her husband to the immigration authorities, and this fact, together with the fact that appellant had shot her husband and that she was seeking to recover damages from appellant for her husband's death, would of course cause a trial judge to weigh her testimony very carefully. We are satisfied that appellant suffered no prejudicial effect from said ruling.

Appellant next contends that the court erroneously excluded evidence pertaining to the reputation of respondent for truth, honesty and integrity.

Witness Lewis D. Knesek, an investigator for the United States Immigration and Naturalization Service, testified that he was on the Susana Rios case for approximately four months; and since the date of her arrest had been the person in charge of her case and had been generally familiar with it since that time and that his duties, from time to time, brought him to Sutter County and around Marysville in that district, and he had heard discussed in the vicinity of Yuba City and Marysville and even in Sacramento the general reputation of Susana Rios for truth, honesty and integrity. Thereupon he was asked: "Do you know the general reputation of Susana Rios for truth, honesty and integrity, yes or no?" Counsel for respondent objected to the question upon the ground that a person testifying to the reputation of a witness must himself reside in the same community as the witness. The court sustained the objection, stating: "It is not intended that someone who lives forty or fifty or a hundred miles away and who has never lived within the community, only discussing it with a limited number of persons and in a certain circle, can give that testimony." Counsel for appellant then made an offer of proof that the witness would testify that the reputation of respondent was bad.

[4–6] In so ruling the court erred because there is no requirement that a so-called character witness must reside in the same community as the person as to whose reputation he testified. Section 2051 of the Code of Civil Procedure provides that a witness may be impeached "by evidence that his general reputation for truth, honesty, or integrity is bad". If a witness states that he knows the general reputation of a person in the community in which such person resides he should be permitted to answer a question as to whether such reputation is good or bad. Upon cross-examination he may be questioned as to the basis of his opinion and if it appears that he has no knowledge upon which to base his opinion his testimony may be stricken. However, it may, and frequently does, happen that one person who goes into a community for the purpose of ascertaining the general reputation of a person in that community may by diligent inquiry from the representative people gain a fairly accurate estimate of the general reputation of that person in the community. The rule

is well expressed in Wigmore on Evidence, Vol. III, 3rd Edition, section 692, page 18, as follows:

"The admissible reputation is that which is built up in the neighborhood of a man's domicile or in the circle where his livelihood is followed; and it is of slow formation. It is the sum of all that is said or not said for or against him. Consequently, it used to be ruled that a reputation can be adequately learned only by the *witness' residence* in the place, not by a mere visit of inquiry, or by a casual sojourn, or by a conversation with a resident who reports the reputation: * * *.

"But in modern days of organized investigation and research it is easy to see that this original common law rule is too strict. Systematic inquiry by a person coming from outside will often be a better source of knowledge than the casual opportunities of a neighbor or a friend; the only reason for distrust exists when the inquirer is a paid partisan agent who seeks evidence of one purport only."

If there had been a jury trial in the instant case and the evidence as to liability were not so strong, the error just discussed might be serious enough to require a reversal of the judgment. However, where, as in the instant case, respondent who was seeking to recover damages from appellant admitted her bias and prejudice against appellant, we do not believe appellant was prejudiced by the fact that the witness Knesek was not permitted to testify that her reputation for truth, honesty and integrity was bad. Such evidence would have constituted only a cumulative attack on her credibility, and we are satisfied from a study of the entire record that no miscarriage of justice resulted.

[7] Appellant argues also that he was denied the right of a fair and impartial trial by the prejudice of the trial judge.

The court in discussing an objection to proposed testimony with counsel for appellant stated:

"I know you do, but I think under the objection—she might have been very unfriendly toward Mr. Chand and so might he, and as you know, there has been brought into this another case, and while it is not evidence here, I can not exclude from my mind things I learned last December, was it?"

In discussing another objection, the court stated:

"I will grant the motion. As indicated before, this isn't a Jury trial. I have heard it for what possible harm might be done, but still I don't think there has been anything prejudicial because of the fact that it has been freely admitted in my presence not only in this proceeding but in others that the defendant stands convicted of murder, and I know that there is lots of evidence in that case that probably doesn't come before me in this case. * * *"

However, it must be borne in mind that in the December before the trial of the instant case began in March, appellant had made a motion for a continuance before the same trial judge upon the ground that the appeal of appellant from a conviction of murder in the second degree in the criminal case was pending in this court, and that on the first day of the trial counsel for appellant had made a motion for a further continuance upon the ground that the decision of this court affirming said judgment of conviction was not yet final. The quoted remarks of the court must therefore be construed in the light of that situation, and the fact that no assignment of prejudice or misconduct was made at the time by the able and experienced counsel who represented appellant at the trial convinces us that counsel did not consider that appellant was prejudiced thereby.

[8] Appellant's final contention that the award of $15,000 damages was excessive requires little comment. Respondent's deceased husband was 28 years of age and respondent was 27 years of age. He had supported his wife subsequent to their marriage. There was evidence that he earned as much as $1 an hour. He was a farm laborer, and there is evidence in the record he had followed agricultural activities since he was a boy. Appellant argues that said husband

was an alien, about to be deported to Mexico, and that his earning capacity in Mexico would be very small. In view of the fact that the husband's expectancy of life was 39.49 years, it is clear that the court must have taken into consideration these factors mentioned by appellant or the award of damages would no doubt have been much larger.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



131 Cal.App.2d 1

Wade LIVINGSTON, Plaintiff and Respondent,

v.

Leo RICE, Ernestina C. Rice, Title Insurance and Trust Company, successor to Bakersfield Abstract Company, a corporation, V. Sechini et al., Defendants and Appellants.

Civ. 4916.

District Court of Appeal, Fourth District, California.

Feb. 18, 1955.

Action against grantors of deed of trust, grantors' judgment creditor, and others, to foreclose the deed of trust on realty. The Superior Court, Kern County, W. L. Bradshaw, J., entered decree of foreclosure, and defendants appealed. The District Court of Appeal, Mussell, J., held that lien of trust deed given to secure loan was created by execution and delivery of trust deed and took precedence over judgment lien obtained after execution of trust deed but prior to recording of such trust deed.

Judgment affirmed.

1. Mortgages ⇐151(5)

Lien of trust deed given to secure loan was created by execution and delivery of trust deed and took precedence over judgment lien obtained after execution of trust deed but prior to recording of such trust deed. West's Ann.Civ.Code, §§ 1107, 1214.

2. Mortgages ⇐151(5)

By recording abstract of judgment, judgment creditor could only reach such interest as judgment debtors had in the realty concerning which they had previously executed deed of trust, and such interest was subject to trust deed lien. West's Ann. Civ.Code, §§ 1107, 1214.

3. Mortgages ⇐481

Where, in action to foreclose deed of trust on realty, judgment creditor of grantors had not filed cross-complaint but had, in her answer, set forth her interest in the property as judgment creditor and it did not appear that interests of defendants, if any, in any surplus that might result following foreclosure sale had been put in issue by the pleadings, failure to make any finding with respect to nature and extent of judgment lien and direction that surplus funds be paid into court to abide its order was not error. West's Ann.Civ.Code, §§ 727, 1107, 1214.

Severson, McCallum & Davis; Nathan R. Berke, San Francisco, for appellant.

T. R. Claflin, Bakersfield, for respondent.

MUSSELL, Justice.

This is an action to foreclose a second deed of trust on residential property in the city of Bakersfield. There is no dispute as to the material facts.

On February 14, 1947, defendant Rice and his wife executed a promissory note payable to plaintiff in the sum of $4,000 for money loaned to Rice. The note was secured by a deed of trust of the same date and both instruments were then delivered to the plaintiff. The note was not paid when due and plaintiff took it with the deed of trust to an attorney to commence foreclosure proceedings. The deed had not been recorded or acknowledged and plaintiff secured the acknowledgment of Rice and his wife on January 19, 1951, and on the same day recorded the deed of trust. On December 4, 1951, this action to foreclose was filed and defendant V. Sechini filed an answer in which she claimed an interest in the property described

in the deed of trust by reason of a judgment which she had secured against Rice and his wife on April 4, 1950, which was for the sum of $6,345.89, plus interest and costs. She further alleged and it is not disputed that on April 14, 1950, she recorded an abstract of this judgment in the office of the county recorder of Kern county. There is no dispute as to the amount still unpaid and owing to plaintiff on his note and to defendant Sechini on her judgment.

The trial court found that the note to plaintiff and the deed of trust were executed February 14, 1947, and was acknowledged and certified so as to entitle it to be recorded on January 19, 1951, and was recorded on that date; that the sum of $3,964.06, with interest, costs and attorney's fees was due plaintiff thereon. The court further found that the defendant V. Sechini claims to have some interest or claim upon the premises described in the complaint as judgment creditor, which interest or claim is subsequent to the lien of the deed of trust of plaintiff referred to in said complaint. A decree of foreclosure and order of sale was rendered. A commissioner was ordered appointed and she was directed to pay any surplus money, after applying the proceeds of sale to plaintiff's indebtedness, into court "to abide the further order of the court".

[1] The principal contention of appellant is that the abstract of judgment is a lien upon the property involved and having been recorded prior in time to the deed of trust, is superior to the claim of plaintiff. This contention is without merit. In Bank of Ukiah v. Petaluma S. Bank, 100 Cal. 590, 591, 35 P. 170, it is held that the lien of a mortgage given to secure a loan is created by the execution and delivery of the mortgage and takes precedence over an attachment or judgment lien obtained after its execution. This case has been cited with approval in Wolfe v. Langford, 14 Cal.App. 359, 362, 112 P. 203; Rowley v. Davis, 34 Cal.App. 184, 192, 167 P. 162; Commercial Nat. Bank v. Roberts, 49 Cal.App. 764, 769, 194 P. 751; Reidy v. Collins, 134 Cal.App. 713, 720, 26 P.2d 712; Christopher v. City of Los Angeles, 13 Cal.App.2d 118, 129, 56 P.2d 539. See also 18 Cal.Jur., Sec. 433, p. 130. In Boye v. Boerner, 38 Cal.App.2d 567, 101 P.2d 757, 759, plaintiff was given judgment in a quiet title action and the question at issue was whether the rights acquired by respondent through the medium of a sheriff's deed, issued after sale under execution, in an attachment proceeding, brought against the owner of the lot involved, took precedence over appellant's unrecorded trust deed given by said owner several months prior to the levy of the writ of attachment. The court there held that the lien of an unrecorded mortgage given to secure a loan is created by the mere execution and delivery of the mortgage, and takes precedence over a subsequent attachment lien; that in such case the attaching creditor is not deemed to be a bona fide purchaser for value within the meaning of section 1214 of the Civil Code, and that he takes only what interest the debtor has at the time of the attachment, and is entitled to nothing more; that the well settled rule is that there must be an interest to which a creditor's lien can attach; that such lien does not attach to a mere naked title, but only to the debtor's interest in the property at the time of the levy, and that if at that time all title and interest has passed from him to a third person, the creditor gets nothing; that an attachment lien is not "an instrument that is first duly recorded" within the meaning of section 1107 of the Civil Code; hence that under the provisions of that code section an unrecorded deed takes precedence over a subsequent attachment lien; and that "with respect to the legal effect of a deed of trust it has been definitely determined that where as here it is executed for the purpose of securing a debt, it conveys title so far as may be necessary to the execution of the trust. Wasco Creamery & Const. Co. v. Coffee, 117 Cal.App. 298, 3 P.2d 588." [38 Cal.App.2d 567, 101 P.2d 759.]

[2] In the instant case appellant by recording the abstract of judgment could only reach such interest as Rice and his wife had in the property and that interest was subject to the lien of the trust deed. Graves v. Arizona Central Bank, 205 Cal. 715, 719, 272 P. 1063.

[3] Appellant's next contention is that the court erred in failing to make any finding with respect to the exact nature and

extent of the lien of the defendant Sechini. A finding in this respect was unnecessary in the determination of plaintiff's rights in the foreclosure proceedings under the issues presented by the pleadings.

Section 727 of the Code of Civil Procedure provides as follows:

> "*Surplus money to be deposited in court.* If there be surplus money remaining, after payment of the amount due on the mortgage, lien, or incumbrance, with costs, the Court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in Court."

In Rowley v. Davis, 169 Cal. 678, 681, 147 P. 958, it was held that it is within the sound discretion of the trial court in a foreclosure suit to give the plaintiff judgment for the relief asked and postpone the determination of conflicting claims between the defendants in which the plaintiff is not interested and which do not affect the relief which he asks. Citing Stockton Savings & Loan Soc. v. Harrold, 127 Cal. 612, 620, 60 P. 165, and cases from other jurisdictions.

In Withington v. Shay, 47 Cal.App.2d 68, 73, 117 P.2d 415, 417, 119 P.2d 1, in an action to foreclose a mechanic's lien, where the trial court in its judgment made no provision for the disposition of the surplus proceeds of sale, this court held:

> "After issue joined in the foreclosure proceeding, the court should have determined the matters between the parties to the action and provided for a disposition of the surplus proceeds of sale, if any there be, in accordance with the rights of the respective parties. The decree containing no provision for disposition of the surplus, should have been modified to make provision therefor.
>
> "It is a general rule of law that a court may order the surplus remaining after satisfying a plaintiff's debt and costs, to be paid into court to be distributed to the respective parties in interest as their interests may subsequently be made to appear and as the court may subsequently determine. Code Civ. Proc. § 727; Hibernia Savings, etc., Society v. Fella, 54 Cal. 598; Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620; 18 Cal.Jur. p. 638, § 843."

In the instant case the trial court determined the issue between the parties to the foreclosure action and directed the surplus proceeds of the sale, if any, to be paid into court "to abide the further order of the court." The defendant Schini filed no cross-complaint in the present action and in her answer set forth her interest in the property as a judgment creditor. Rice and certain other defendants did not answer the complaint and their defaults were duly entered but it does not appear that the interests of such defendants, if any, in the surplus funds were put in issue by the pleadings and the trial court, under the circumstances presented by the record, was not in error in directing that the surplus funds be paid into court to abide its order.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



131 Cal.App.2d 123

Lewis C. PFEIFER, Plaintiff and Cross-Defendant, Appellant,

v.

Marion B. PFEIFER, Defendant and Cross-Complainant, Respondent.

Civ. 16157.

District Court of Appeal, First District, Division 2, California.

Feb. 28, 1955.

Proceeding by mother of minor child to modify divorce decree provision relating to custody. The Superior Court, Alameda County, Thomas J. Ledwich, J., entered order modifying decree so as to give custody to mother, and father appealed. The District Court of Appeal, Nourse, P. J., held that evidence of changed conditions since entry of divorce decree and of circumstanc-

es relating to child's welfare established that order was not abuse of discretion.

Order affirmed.

1. Infants ⇐19

In awarding or modifying custody of minor child, that which appears to be for best interest of child, considering and weighing all factors which may influence it, is controlling. West's Ann.Civ.Code, § 138.

2. Infants ⇐19

Generally, until some change of circumstances arises which makes a modification of former order of custody advisable from point of view of child's welfare, court will refuse to make a modification, but there may be cases in which, despite absence of apparent change of circumstances, child's welfare might require modification.

3. Infants ⇐19

An application for modification of custody is addressed to sound legal discretion of trial court, and that discretion will not be disturbed unless abuse clearly appears.

4. Parent and Child ⇐2(3.3)

That divorced mother recovered from post-partum psychosis and remarried and was willing to give up her profession in favor of providing home for child was of itself sufficient change of circumstances to justify change of custody from father to mother. West's Ann.Civ.Code, § 138(2).

5. Divorce ⇐303(3)

Evidence of changed conditions since entry of divorce decree and of circumstances relating to child's welfare established that order changing custody of minor child from divorced father to mother was not abuse of discretion. West's Ann.Civ.Code, § 138.

B. W. Hirschberg, Jr., San Francisco, for appellant.

Weinmann, Rode, Burnhill & Moffitt, Oakland, Landau, Newell & Chester, Los Angeles, for respondent.

NOURSE, Presiding Justice.

This is an appeal by the father of the six year old child Kent Pfeifer from an order modifying the final divorce decree so as to give the care, custody and control of the minor to its mother.

From the extensive evidence in the case we note the following:

Respondent, mother, was 34 years old at the time of the custody trial (August, 1953). She graduated with Phi Beta Kappa honors from the University of California in 1945, majoring in journalism, and married appellant in 1946. After the birth of Kent on July 17, 1947, she developed a post-partum psychosis. There was expert psychiatric evidence that with modern treatment all patients who develop this form of psychosis get well again and do not relapse unless they have another pregnancy. Respondent was treated first in a sanitarium and thereafter in a state hospital from which she was released on leave of absence on December 13, 1947 and discharged recovered on March 17, 1948. It was stipulated at the trial that she had had no known relapse. Shortly after respondent's return the parties separated and respondent went to live with her mother in Berkeley. In May, 1950, she obtained an interlocutory decree of divorce on her cross-complaint. The interlocutory decree provided that the parties would have the joint care, custody and control of the child and that the father would have the physical custody until further order of the court or further agreement between the parties. Until the interlocutory decree respondent continued to live with her mother, who worked for her living, in her mother's small flat. Except for the first few weeks of respondent's illness the child Kent was in the care of appellant's mother (the paternal grandmother). All provisions of the interlocutory decree, including those concerning custody, were continued in force and effect in the final judgment entered May 31, 1951.

In June, 1952 respondent married her present husband. They have built a new home in a quiet suburban neighborhood where there are many younger families with children of elementary school age; elementary schools are close to the home. In the home a special room is made up for the boy. Respondent's husband testified that he was 42 years old, had no children

from his former marriage and did not intend to have children in this marriage because of the danger for respondent involved in pregnancy.

Appellant was 39 years old at the time of the custody trial and was chief announcer at a radio station. Until he remarried in December, 1952, appellant lived with his parents and the little boy. His mother took care of Kent. At the time of the custody trial she was 68 years old, her husband 77 or 78. When appellant remarried he moved from his parent's flat in Lombard Street to an apartment in a different neighborhood. His present wife is engaged in a cosmetic business of her own which she intends to continue. She had no child at the time of the trial but was pregnant. Kent was being taught that appellant's present wife was his mother. Most weekends Kent went to the apartment of his father but never slept there. He remained with his grandparents.

Appellant contends that the modification of the final decree so as to give the custody to the mother was an abuse of discretion because after the decree no change in circumstances had occurred which required modification in the interest of the child and because of the concern of the father and paternal grandparents as to the alleged mental instability of the mother. The contentions are without merit.

[1–3] In awarding or modifying the custody of a minor child that which appears to be for the best interest of the child, considering and weighing all factors which may influence it, is controlling. § 138, Civil Code; Ludlow v. Ludlow, 89 Cal.App.2d 610, 201 P.2d 579. Generally until some change of circumstances arises which makes a modification of the former order of custody advisable from the point of view of the welfare of the child, the court will refuse to make a modification, but there may be cases in which despite absence of apparent change of circumstances the welfare of the child might require modification. An application for modification is addressed to the sound legal discretion of the trial court and its discretion will not be disturbed unless an absence of that discretion clearly appears. Munson v. Munson, 27 Cal.2d 659, 666, 166 P.2d 268.

[4, 5] In this case there have been after the decree such changes in circumstances as to justify the reweighing of the factors influencing the interest of the child. The child was at the time of the decree, and still at the time of the custody trial, at a tender age at which other things being equal it should have been given to the mother. § 138(2), Civil Code. However at the time of the final decree the mother had rather recently recovered from a post-partum psychosis, was trying to rebuild her life on the basis of a professional career and had no home to offer for the child. The father lived with his parents so that the paternal grandmother could take care of the child in the same home where the father lived. Since then the mother has remained in good mental health for two more years without a relapse; she has remarried, can offer the child a good home and is willing to give up her profession to take care of him and her household. This change in the circumstances of the mother could in itself justify the change of custody ordered. Exley v. Exley, 101 Cal.App.2d 831, 835, 225 P.2d 662. Moreover the father has also remarried and has moved out of the home of his parents to another neighborhood. The grandparents, with whom the child remained, have reached an age, which, notwithstanding their love and devotion, must make them less fit to educate a child of the age of Kent and compared to them the mother has, if she is not unfit to have the custody, certainly a prior claim to the child. White v. White, 109 Cal.App.2d 522, 240 P.2d 1015. If, however, the father would take the child in his new family such would at any rate cause a manifest change in the child's circumstances and the trial court had the right freely to weigh whether a change from the grandparents to the father or to the mother would be more in the interest of the child. Under the facts shown by the evidence stated no abuse of discretion appears in preferring the mother. It may be noted that the court mentioned as one of the grounds for its decision that after having talked to the child and heard the testimony of the parties, and considering that the child thought that appellant's present wife was his mother, there was danger that the child

would grow up without knowing its real mother. (See 16 Cal.Jur.2d 560.)

The basic point in this case seems to be the concern of the father and grandparents as to mental instability of the mother. However, the only expert evidence before the court was that in case of a post-partum psychosis there was no danger of a recurrence in the absence of pregnancy. Appellant did not produce any contrary expert evidence and stipulated that there had been no known relapse. As against the evidence as to an emotional outburst at a conference between the parties there was much evidence of stability and effectiveness of the mother under circumstances causing pressure. The trial court under these circumstances was entitled to hold that the fear of the father and the grandparents was not justified.

Order affirmed.

DOOLING and KAUFMAN, JJ., concur.



131 Cal.App.2d 142

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Henry Clay CASEY, Defendant and Appellant.

Cr. 5289.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1955.

Defendant was convicted of bookmaking. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to sustain conviction.

Judgment and order affirmed.

Gaming ⇐98(3)

Evidence was sufficient to sustain conviction for bookmaking. Pen.Code, § 337a.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment and from the order denying defendant's motion for a new trial.

Appellant was charged by information with the violation of Section 337a of the Penal Code. Four counts were alleged. Defendant was found guilty on Counts II and IV; Counts I and III were dismissed.

It is contended on appeal that the evidence is insufficient to sustain the conviction.

As recited in appellant's brief, "Officer Martin Yturralde, Jr., testified that he was a vice officer and he saw defendant in a smoke shop located at 11513 South Wilmington Avenue, Los Angeles on March 2, 1954. He entered the shop about 1:00 p. m. and purchased a National Daily Reporter. He asked him if there was any particular horse that would be a good bet running on that day at Santa Anita and defendant stated 'The best bet would be Sierra II.' He asked defendant if he would take a bet on that horse, and he said he would not, but he would take a bet on another horse if he wished to place a bet. He then stated that he wished to make a bet on Gay Darling in the fourth race at Santa Anita, two dollars to place; and two dollars to place on Mount Haro in the sixth race at Santa Anita. He then paid defendant four dollars. Santa Anita is a race track operated in Arcadia, California. He hung up the receiver and approximately one minute later the phone rang and defendant answered it. At that time he heard defendant say 'Hot Cow Sage'. At that time he told defendant he would like to bet two dollars to place on Pistollo in the fifth; and two dollars to place on Indian Red in the Sixth at Santa Anita. At that time, defendant repeated these names and his initials M. Y. He then gave defendant four dollars. Defendant asked him how much he owed him from yesterday and he stated $4.10."

A similar incident occured the next day. Two other officers took part. The number on the bills given the defendant was noted and later the money was found in defendant's cash register.

Appellants' contention that the evidence is insufficient lacks support in the record.

The judgment and order are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



131 Cal.App.2d 165

Richard A. LOVETT, Plaintiff and Appellant,

v.

Jack DINTZER and Jack Dintzer, doing business under the name and style of the Senate Hotel, Defendant and Respondent.

Civ. 20513.

District Court of Appeal, Second District, Division 2, California.

March 1, 1955.

Action for injuries sustained by plaintiff when he fell over railing on porch of building owned by defendant and tenanted by plaintiff. The Superior Court, Los Angeles County, Herbert V. Walker, J., granted defendant a new trial after a jury verdict for plaintiff, and plaintiff appealed. The District Court of Appeal, McComb, J., held that the trial judge's order could be supported upon the ground that the damages awarded by jury were excessive.

Affirmed.

1. Appeal and Error ⇐854(6)

An order granting a motion for new trial will be affirmed if it can be sustained upon any grounds stated in notice of intention to move for new trial.

2. Appeal and Error ⇐854(6)

When motion for new trial is granted on errors of law, even if order specifies ground upon which it is granted, appellate court is not limited to consideration of ground stated in order but will consider any ground stated in notice of intention to move for new trial.

3. New Trial ⇐163(1)

Where new trial is granted on ground of excessive damages, it need not be so specified in order granting motion.

4. Damages ⇐208(1)
New Trial ⇐74

In personal injury action, amount of damages is committed to sound discretion of jury in first instance, and, next, to the discretion of trial judge who, in ruling upon motion for new trial, may consider evidence anew, determine anew the facts and set aside verdict if it is not just.

5. Damages ⇐132(8)

Award of $14,000 for injuries to left arm, which had been injured previously, was so excessive as to justify granting new trial where 10% loss of function in the left elbow could be due to any one of injuries thereto or a combination of them.

Paul E. Gervais, Burbank, and Toxey H. Smith, Los Angeles, for appellant.

Moss, Lyon & Dunn, Gerold C. Dunn, Henry F. Walker, Los Angeles, for respondent.

McCOMB, Justice.

From an order granting a motion for a new trial in an action to recover damages for personal injuries resulting from the alleged negligence of defendant, plaintiff appeals.

Facts: Defendant was the owner of a building known as the Senate Hotel, in which one of the apartments was leased to plaintiff. On February 7, 1953, having occasion to leave the hotel, plaintiff went out the rear exit and as he opened the screen door onto the porch he heard a noise and looked up and saw bricks falling. He lost his balance and tried to move out of the way but fell over a railing to the ground fifteen feet below and received personal injuries. The jury returned a

verdict in favor of plaintiff in the sum of $14,000.

Defendant filed a notice of intention to move for a new trial upon the ground, among others, that the jury had awarded excessive damages under the influence of passion and prejudice. The minute order of the trial court granting the motion for new trial read: "Motion for a New Trial is granted upon the following grounds, to wit: Errors of law in instructing the jury and in refusing to give instructions requested by defendant."

The sole question necessary for us to determine is whether the trial court erred in granting the motion for a new trial.

[1–3] This question must be answered in the negative and is governed by these rules:

(1) An order granting a motion for a new trial will be affirmed if it can be sustained upon any ground stated in the notice of intention to move for a new trial. (Parks v. Dexter, 100 Cal.App.2d 521, 524 [2], 224 P.2d 121.)

(2) When a motion for a new trial is granted on errors of law, even if the order specifies the ground upon which it is granted, an appellate court is not limited to a consideration of the ground stated in the order but will consider any ground stated in the notice of intention to move for a new trial. (Scott v. Renz, 67 Cal.App.2d 428, 432 [6], 154 P.2d 738; Gray v. Robinson, 33 Cal.App.2d 177, 180 [1], 91 P.2d 194; Kauffman v. Maier, 94 Cal. 269, 276, 29 P. 481, 18 L.R.A. 124.)

(3) Where a new trial is granted on the ground of excessive damages it need not be so specified in the order granting the motion. (Gardner v. Marshall; American Brake Shoe & Foundry Co., 24 Cal.2d 686, 690, et seq., 151 P.2d 122.)

Applying the foregoing rules to the present case it appears that the trial court's order is supported upon the ground that the jury's verdict was excessive in awarding plaintiff $14,000 damages.

Plaintiff testified by a deposition taken in Massachusetts that he had no recollection of being struck by any bricks; that he fell mainly on his back and left elbow; that he received some bruises and that they were not serious; that there was no injury to his back and that the injury was confined primarily to his left elbow. He further testified that his left arm had previously been injured in 1948, when he received a fracture of both bones of his left forearm and that thereafter he was inducted into military service and received a bullet wound in the left forearm. He testified that he was stunned by the fall; that he picked himself up and did not realize his arm was broken until he was up off the ground; that he walked into the hotel, told what had happened and an ambulance was called which took him to St. Joseph's Hospital; that he was anesthetized and when he came to, he had a cast on his arm]; that he was in the hospital for six days and that within a week or a week and a half after the accident he went to Massachusetts; that his hospital bill was $155 and the doctors' bills were $480; that in the latter part of June, 1953, he took a part time job with a roofing company, laying tar papers on roofs, and in September of the same year he went to work as a silver brazer and since then has been transferred to the Sommerville plant where he is cutting channels for Raytheon, operating a cutting machine, cutting aluminum, a machine that is hand operated. He further testified that in February, 1953, at the time of the injury, he was an employee of Lockheed, making approximately $60 or $65 a week. In addition he testified he does not now have full use of his left arm, although before the fall he did. He explained that in stating he does not have full use, he meant the strength is not there in the hand as it was before the accident and the elbow does not straighten all the way.

An X-ray of his arm disclosed that a plate had been placed in it at a previous time as a result of a prior fracture. A doctor testified that he had examined plaintiff and that in his opinion he had a 10% loss of function in his left elbow and that this loss of function could be due to any one of the first three injuries or a combination of them, referring to the fracture of both bones of the forearm and the gunshot

wound later received and the injury to his left elbow received in 1953.

[4] In an action of this type the amount of damages is committed to the sound discretion of the jury in the first instance, and next to the discretion of the trial judge who, in ruling upon the motion for a new trial may consider the evidence anew, determine anew the facts and set aside the verdict if it is not just. (Hale v. San Bernardino etc. Co., 156 Cal. 713, 715, 106 P. 83; Lahti v. McMenamin, 204 Cal. 415, 419, 268 P. 644.)

[5] From the foregoing testimony it is clear that the trial judge's order can be supported upon the ground that the damages were excessive.

In view of our conclusions it is unnecessary to discuss other questions argued by counsel. (Harp v. Pease, 52 Cal.App. 744, 746, 199 P. 863; Leach v. Klein, 42 Cal. App. 435, 439, 183 P. 703.)

Affirmed.

MOORE, P. J., and FOX, J., concur.



131 Cal.App.2d 191

Walter OSBORN, Jr., Plaintiff and Respondent,

v.

Virginia Patrick OSBORN, Defendant and Appellant.

Civ. 4944.

District Court of Appeal, Fourth District, California.

March 1, 1955.

Divorce action wherein plaintiff-husband obtained a default and an interlocutory decree. Wife moved to set aside default and decree. The Superior Court, Kern County, Warren Stockton, J., denied the motion, and wife appealed. The District Court of Appeal, Mussell, J., held that record disclosed that denial of motion had not been abuse of discretion.

Order affirmed.

1. Appeal and Error ⇐957(1)
Judgment ⇐139

Where evidence, including affidavits, in a proceeding on motion for relief from default is conflicting, trial court has sound discretion to grant or deny motion, and in absence of a clear showing of abuse, order will not be interfered with on appeal. West's Ann.Code Civ.Proc. § 473.

2. Divorce ⇐161

In proceeding on motion for relief from default and divorce decree, record supported trial court's implied finding that movant's filing motion nearly four and one-half months after filing of interlocutory decree was not within a reasonable time. West's Ann.Code Civ.Proc. § 473.

3. Appeal and Error ⇐935(2)

On appeal from denial of motion for relief from default, facts would be viewed from standpoint of those adduced by prevailing party. West's Ann.Code Civ.Proc. § 473.

4. Divorce ⇐161

Record on appeal from denial of motion for relief from default and divorce decree disclosed that denial of motion had not been abuse of discretion. West's Ann. Code Civ.Proc. § 473.

Jerry Giesler and Rexford D. Eagan, Beverly Hills, for appellant.

Vizzard, Baker & Sullivan and James Vizzard, Bakersfield, for respondent.

MUSSELL, Justice.

The motion to set aside the default herein was made pursuant to the provisions of Section 473 of the Code of Civil Procedure and upon the grounds that the judgment was taken against defendant by reason of mistake, inadvertence, surprise and excusable neglect. The principal question for our determination is whether the trial court abused its discretion in denying the motion.

On June 16, 1953, plaintiff filed this action for divorce in Kern county. He was

unable to obtain service of summons in California and after an order of publication had been secured, personal service of the summons and complaint was made on the defendant in Clark county, Nevada, on July 30, 1953. On September 2, 1953, the cause came on regularly for hearing in the superior court in said Kern county, California, and the default was entered by order of court. Evidence was produced by the plaintiff and the court granted him an interlocutory decree of divorce on the ground of extreme cruelty. The decree was filed on September 3, 1953.

On January 14, 1954, defendant filed a notice of motion to set aside the default judgment and based her motion on the files in the action and on her affidavit, which was filed with her demurrer to the complaint. She states in her affidavit that starting with June 26, 1953, her attorneys conducted extensive negotiations with plaintiff's attorneys for a settlement of her property rights and that such negotiations were still being conducted at the time of the entry of the default; that she and her attorneys were led to believe that no default would be entered pending such negotiations for settlement; that on or about August 26, 1953, she submitted an offer of settlement to plaintiff and on August 29, 1953, plaintiff submitted a counter offer; that while she and her attorneys were considering said counter offer, plaintiff caused defendant's default to be entered on September 1, 1953, and caused the matter to be placed on the calendar for hearing on September 2, 1953; that she refrained from entering any appearance in said action, relying upon the representation that no default would be entered until the property settlement agreement between the parties had been completely executed; that she first learned of the entry of her default on September 8, 1953; that she was without funds to engage counsel and was unable to secure such services until January 4, 1954.

Affidavits in opposition to defendant's motion were filed by plaintiff and his attorney, James Vizzard. Defendant avers in his affidavit that the parties separated on June 10, 1953; that immediately thereafter a firm of attorneys engaged by defendant contacted plaintiff for the purpose of attempting to negotiate a property settlement agreement; that plaintiff was informed by his attorney that defendant demanded $25,000 in cash, plus other personal property of the value of several thousands of dollars; that plaintiff offered to open his books and records to defendant's attorneys so that they could investigate his financial records; that before this offer was accepted defendant changed attorneys and another attorney contacted Mr. Vizzard and recommended a settlement in the neighborhood of $10,000; that there was an attempt by Mr. Vizzard to enter into further negotiations with this attorney but Mr. Vizzard was informed that this attorney no longer represented the defendant; that affiant then filed the divorce action and attempted to serve a copy of the summons and complaint on defendant in Bakersfield but found that she had gone to Las Vegas, Nevada; that he secured the services of a detective and had defendant personally served with a copy of summons and complaint in Las Vegas; that affiant then carried on negotiations with a firm of attorneys in Las Vegas who were then representing the defendant; that affiant prepared a property settlement agreement during the month of August, 1953; that on August 29, 1953, affiant wrote to defendant's attorneys, Mr. Goldwater and Mr. Jones, advising them that Mr. Vizzard was away on vacation and that the property settlement agreement was being forwarded for the signature of the defendant; that at that time defendant's time to appear had either expired or was about to expire and plaintiff notified Mr. Jones that in any event he intended to go ahead with his California action and had left instructions with his attorney's office that a default be taken and entered at once; that in accordance with said instructions defendant's default was entered; that Mr. Vizzard returned to his office on September 1, 1953, and informed plaintiff that he, Vizzard, had a telephone conversation with Mr. Jones that day and desired plaintiff to contact Mr. Jones personally and notify him that a default was being entered; that plaintiff then called Mr. Jones by tele-

phone and notified him that a default was being entered; that Mr. Jones stated that he could not reach or find his client but presumed from former conversations that the property settlement agreement would be acceptable to her; that she would contact him and he would further inform her that if she were not willing to actually execute said agreement, he would tell her there was a procedure to attempt to set aside an interlocutory decree if such procedure was promptly followed; that there is no community property of the parties except affiant's one-half interest in certain office fixtures, furniture and library, not to exceed the sum of $1,500; that affiant's community earnings have never exceeded $8,500 per year, which said sum has been expended each year for living expenses; that on October 1, 1953, defendant called plaintiff by telephone and stated that she wished to negotiate a settlement and was not satisfied with the agreement prepared by plaintiff and sent to her attorneys in Las Vegas; that plaintiff saw defendant again on October 14, 1953, and turned over to her certain of her personal property.

Mr. Vizzard stated in his affidavit that on June 16, 1953, he had a telephone conversation with Morris B. Chain who then represented defendant and Chain stated that he would recommend a settlement in the neighborhood of $10,000; that on June 18th affiant was informed by Chain that he no longer represented defendant; that on or about June 26th, affiant received a letter from a firm of attorneys in Las Vegas in which Mr. Goldwater stated that they were representing the defendant; that he was informed that plaintiff had filed suit for divorce in California; that "Mrs. Osborn agrees that a divorce should be had" but was concerned with her property rights; that "If it becomes necessary Mrs. Osborn will enter her appearance in the California action"; that Mrs. Osborn was willing to make a settlement of her property interests for $20,000 cash, attorneys' fees and her present expenses; that on July 2, 1953, Mr. Vizzard replied to this letter, stating plaintiff's financial situation and that his client made an offer of $5,000 and the automobile registered in defendant's name to settle the matter and that this offer would remain open for a reasonable period of time; that he would be glad to recommend that plaintiff's books and records be made available for examination; that on July 31, 1953, affiant informed Mr. Goldwater that plaintiff's previous offer of settlement would not stand any longer; that on or about June 26, 1953, affiant received a letter from Mr. Goldwater stating that Mrs. Osborn had rejected plaintiff's offer of settlement; that she planned to defend the action brought by Mr. Osborn in California and that as far as he knew she was "proceeding in California"; that on August 25, 1953, affiant had a telephone conversation with Mr. Goldwater in which affiant stated that plaintiff was not disposed to grant any continuance in the matter for further negotiations and that the instructions to affiant were to take a default judgment whenever the time to appear expired, but affiant would see that Mr. Goldwater was notified at the time preparations were being made to take such default; that on September 1, 1953, affiant was contacted on long distance telephone by Mr. Jones, as associate of Mr. Goldwater; that Mr. Jones was then informed that a default was being prepared but that affiant would call or instruct plaintiff to call him personally before he went to court to present said default; that he requested plaintiff to call Mr. Jones and notify him that the hearing would be put on the calendar as soon as possible; that on September 2, 1953, affiant was informed that the matter had been placed on the calendar for hearing on that day; that he then proceeded to court to have the matter heard; that on September 2, 1953, he mailed a copy of the interlocutory decree to Mr. Jones; that the defendant has not at any time been misled and that her failure to file an appearance in the action or to take prompt action in setting aside the default has been entirely due to her neglect.

Appellant argues that her affidavit, together with the counter affidavits of respondent and his attorney and the files and records in this action present a proper case for relief under section 473 of the Code of Civil Procedure and that the denial of appellant's motion to vacate the inter-

locutory decree and for leave to file written appearances constitutes an abuse of judicial discretion on the part of the trial court. We are not in accord with these contentions.

[1] It is a settled principle of law that motions for relief from default under the remedial provisions of section 473 of the Code of Civil Procedure are addressed to the sound discretion of the trial court and in the absence of a clear showing of abuse will not be interfered with by an appellate tribunal. McNeil v. Blumenthal, 11 Cal.2d 566, 567, 81 P.2d 566; Beard v. Beard, 16 Cal.2d 645, 647, 107 P.2d 385; Tearney v. Riddle, 64 Cal.App.2d 783, 787, 149 P.2d 387. In Couser v. Couser, 125 Cal.App.2d 475, 477, 270 P.2d 496, it is said that where the evidence (including the affidavits) is conflicting the court has a sound discretion to grant or to deny a motion under section 473 of the Code of Civil Procedure. In the absence of a clear showing of abuse of discretion, the order will not be interfered with on appeal. In Kester Motors, Inc., v. Haddad, 109 Cal.App.2d 369, 371–372, 240 P.2d 1011, 1012, this court held that:

> "While it is the policy of the law that every case should be litigated upon its merits, and that because of this the reviewing court will scan more closely orders denying relief and are more prone to reverse orders of denial, it is the fundamental rule that an application to set aside a default or grant relief therefrom, rests so largely in the trial court's discretion that it will not be disturbed on appeal unless it shall be made clearly to appear that there was an abuse of discretion, and this general rule has not been relaxed by the rule that a discretion is better exercised when it tends to bring about a decision of the case on its merits. Ingrim v. Epperson, 137 Cal. 370, 372, 70 P. 165; Anglo California Trust Co. v. Kelly, 95 Cal.App. 390, 391, 272 P. 1080; Hughes v. Wright, 64 Cal.App.2d 897, 903, 149 P.2d 392."

In Baratti v. Baratti, 109 Cal.App.2d 917, 921, 242 P.2d 22, 25, it is held that to obtain relief a defendant must have acted within a reasonable time; that a party will not be relieved from his default unless he shows he acted in good faith and that his mistake, inadvertence, surprise or excusable neglect was the actual cause of his failure to appear; that in a matter in which an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contentions of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom; that "No showing was made to excuse defendant's failure to file her motion for relief until May 21, 1951, after consulting with her present attorney on February 21, 1951. In Benjamin v. Dalmo Mfg. Co., 31 Cal.2d 523, at page 529, 190 P.2d 593, 596, the court said: 'Defendant has not cited nor has independent research disclosed, any case in which a court has set aside a default where, in making application therefor, there has been an unexplained delay or anything approaching three months after full knowledge of the entry of the default.' Courts do not relieve litigants from the effects of mere carelessness."

[2] In the instant case the notice of motion to set aside defendant's default was filed on January 14, 1954, nearly four and one-half months after the filing of the interlocutory decree on September 2, 1953, and the record supports the trial court's implied finding that defendant failed to file her motion within a reasonable time. It appears from the affidavits of plaintiff's attorney that on August 25, 1953, Mr. Vizzard informed Mr. Goldwater that plaintiff was not disposed to grant any continuance in the matter for further negotiations and that his instructions were to take a default judgment whenever the time had expired. Defendant and her attorneys were thus notified that plaintiff intended to enter defendant's default when the time to appear expired and there is substantial evidence to support the trial court's determination that there was no representation, as claimed by defendant, that a default would not be entered until a property settlement agreement had been completely executed. The record does not show that defendant or any of her attorneys requested an extension of

time to answer or file an appearance before the default was entered.

[3, 4] Appellant argues that in the interests of justice she should be granted her day in court. However, the record shows that she agreed that a divorce should be had and so informed her attorneys. It is evident that she was not seeking to preserve the marriage but was attempting to secure an advantageous property settlement agreement. In this connection the affidavits show that she received offers of settlement which were not unreasonable in view of the facts set forth in plaintiff's affidavit, and she declined to accept these offers. The facts must be here viewed from the standpoint of those adduced by the prevailing party, Couser v. Couser, supra, 125 Cal.App.2d 477, 270 P.2d 496, and we cannot here hold as a matter of law that an abuse of the trial court's discretion was shown.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



131 Cal.App.2d 281

Josephine HOGAN, Plaintiff and Appellant,

v.

Daniel HOGAN, Defendant and Respondent.

Civ. 16155.

District Court of Appeal, First District, Division 2, California.

March 4, 1955.

Wife's action to set aside judgment in previous action wherein title to certain real estate was quieted in husband. The Superior Court, City and County of San Francisco, John B. Molinari, J., sustained demurrer, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that complaint was insufficient for failure to allege extrinsic fraud.

Judgment affirmed.

1. Judgment ⇐443(1), 444

A judgment allegedly based upon perjured testimony or rendered because material evidence was concealed or suppressed is not subject to being set aside as based upon extrinsic fraud.

2. Evidence ⇐43(3)

Ordinarily a court takes judicial notice of files in same case, but it does not usually do so of its files in another case in same court, although, as a rule of convenience, it may do so to prevent injustice.

3. Judgment ⇐443(1)

Mere incompetence or lack of preparation of an attorney is not a charge of extrinsic fraud such as will permit the setting aside of a judgment.

4. Judgment ⇐460(4)

Wife's complaint to set aside judgment in quiet title action wherein title to real estate was determined to be in husband was insufficient for failure to allege extrinsic fraud.

5. Judgment ⇐501

Judgment was not subject to collateral attack for errors of law.

E. C. Mahoney, Burlingame, for appellant.

Courtney L. Moore, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal from a judgment in favor of defendant and respondent in an action to set aside and enjoin the enforcement of a judgment previously entered by the Superior Court in and for the City and County of San Francisco in a quiet title action between the same parties.

On September 21, 1949, Daniel Hogan, the defendant and respondent in the present action, filed a complaint to quiet title and delare a trust in certain real property in San Francisco naming his wife, Josephine Hogan, appellant herein, as defendant. The complaint in the quiet title action alleged that he had purchased the property with his sole and separate funds, but caused title to be conveyed to himself and wife

in joint tenancy, his wife having prior to the conveyance agreed with him that property during her husband's lifetime should be regarded as his sole and separate property, that she had no interest therein, that her husband should collect the rentals as his sole and separate property, and that she would not sell or mortgage said property during his lifetime.

It was further alleged that in violation of this agreement, Josephine Hogan on August 9, 1949, filed an action of divorce against plaintiff and gave her attorney a promissory note secured by deed of trust on said property. The answer alleged that the property was held by her in joint tenancy with her husband, denied the making of the alleged agreement that it was to be held as his sole and separate property, and admitted the making of the promissory note and deed of trust to her attorney. The answer denied that defendant had brought a divorce action, alleging that it was instead a separate maintenance suit. She alleged that she employed an attorney to protect her interest against her husband, had forced her to support herself and seek medical care from free clinics, and that her attorney's services had been and were being rendered and that she was receiving due value in consideration of the execution of the note and deed of trust.

On June 1, 1950, the trial judge filed a memorandum opinion in which he held that the real property was the sole and separate property of respondent, but subject to the liability of the note and deed of trust because plaintiff had made it possible for the loss to fall on an innocent person. On July 10, 1950, the findings of fact were filed which stated that plaintiff had paid the wife's attorney fees incurred in the separate maintenance action. The decree quieting title in plaintiff husband was entered on August 25, 1950. No motion for new trial was made, nor was an appeal taken.

On July 17, 1953, Josephine Hogan, filed her complaint in the present action to set aside the judgment in the quiet title suit, alleging in the first cause of action that the prior judgment was obtained by the false testimony of Daniel Hogan at the trial of that action, in the following particulars: (1) that he did not intend to give his wife any present interest in the real property when he acquired it by joint tenancy deed; (2) that his wife requested that he put her name on the deed as security in event anything happened to him; (3) that he believed that she would acquire a right to the property only if she survived him; (4) that gift tax returns filed after the acquisition of the property were made at the instance of his accountant and without any request or knowledge on his part; (5) that prior to the execution of the deed he informed his wife of the understanding that said property would remain his separate property during his lifetime, and that she agreed thereto; (6) that she agreed that he should collect the rents from said property during his lifetime as his sole and separate property and that she would not sell or mortgage it.

It was alleged that after judgment was entered appellant's attorney failed and refused to advise her further, thus no motion for new trial was made and no appeal was taken; that she has been further hindered in obtaining information to prove that her husband testified falsely because he kept all records under lock and key and threatened to have appellant declared incompetent if she attempted to gain access to them or if she consulted an attorney.

Respondent demurred generally and specially. The matter was argued on August 17, 1953, and on Friday, October 9, 1953, the court made a minute order sustaining the demurrer without leave to amend. On October 14, 1953, judgment was entered. On October 29, 1953, appellant moved the court for permission to amend the complaint which was denied. On December 4, 1953, appellant moved to set aside the judgment sustaining the demurrer and to be permitted to file an amended complaint, submitting therewith a copy of the proposed amended complaint. This motion was denied after hearing on December 10, 1953.

Appellant at the outset concedes that she must allege and prove extrinsic fraud in order to successfully attack the judgment rendered against her in the quiet title suit.

McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110; Harada v. Fitzpatrick, 33 Cal.App.2d 453, 459, 91 P.2d 941; 15 Cal.Jur. 18, § 124; 49 C.J.S., Judgments, § 374, p. 745. She contends that the concealment from the court by respondent that he had made out a state gift tax return in which he described the nature of the gift as a joint interest in this property, is an instance of extrinsic fraud.

[1] It would seem that the concealment of evidence by a party, which if disclosed would tend to overthrow his case, is not ground for a suit to set aside a judgment. In re Estate of Griffith, 84 Cal. 107, 23 P. 528, 24 P. 381; Allen v. Currey, 41 Cal. 318; 15 Cal.Jur. 19, § 124. And in People v. Egan, 73 Cal.App.2d 894, 167 P.2d 766, it is said that it is settled in this estate that a judgment will not be set aside because it is based upon perjured testimony or because material evidence is concealed or suppressed, that such fraud both as to the court and the party against whom judgment is rendered is not fraud extrinsic to the record for which relief may be had. And, see, Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336.

Appellant alleged both in the original complaint and in the proposed amended complaint that respondent had hindered her in obtaining information that would enable her to prove that he committed perjury at the trial by keeping his records under lock and key and threatening to have her declared incompetent if she gained access to them or consulted an attorney as to her rights in the real property. It is significant that it is not alleged that that conduct preceded or persisted during the trial.

[2] Respondent maintains that it is the duty of the court to take judicial notice of the proceedings in the former action in this same court between these parties in the quiet title suit. Livermore v. Beal, 18 Cal.App.2d 535, 64 P.2d 987. While ordinarily a court takes judicial notice of the files in the same case, it does not usually do so of its files in another case in the same court (10 Cal.Jur. 728, § 52), although this is a rule of convenience, and it may do so to prevent injustice. Willson v. Security-First Nat. Bank, 21 Cal.2d 705, 134 P.2d 800; Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333.

The recent opinion of the Supreme Court in Weil v. Barthel, 1955, 279 P.2d 544, [rehearing granted] is not contrary to these views because here the former action was pleaded by appellant and thus became a part of the record in this action, which, of course, brought the former action to the notice of the court.

[3] It is clear that the mere incompetence or lack of preparation of an attorney is not a charge of extrinsic fraud such as will permit the setting aside of a judgment. There is nothing in the pleading to indicate that appellant did not freely select the attorney who represented her at the trial. If such a charge could invalidate a judgment, then few judgments would be safe from attack.

[4, 5] It would therefore appear that in the instant case no cause of action in extrinsic fraud is stated by either the original complaint or the proposed amended complaint, and that the trial court did not abuse its discretion in sustaining the demurrer without leave to amend as to the first cause of action. The remaining two causes of action in the original complaint merely attack the judgment for errors of law and are therefore insufficient against the demurrer in this type of action. Appellant has not attempted to support either of these two counts on appeal and the proposed amended complaint has omitted them. We may presume that appellant has recognized that the demurrer was properly sustained as to these counts.

Judgment affirmed.

DOOLING, Justice.

I concur. I am not prepared to agree that where the parties occupy a confidential relation to one another the concealment or suppression of material evidence may not constitute extrinsic fraud. See Jorgensen v. Jorgensen, 32 Cal.2d 13, 193 P.2d 728. However as pointed out in the Jorgensen case where the husband takes a hostile position a duty is cast on the wife and her attorney to make a reasonable

effort to investigate the facts. In the Jorgensen case the court said in 32 Cal.2d at page 19, 193 P.2d at page 732: "It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case."

While it is alleged that respondent concealed the fact of his having made a state gift tax return, the fact of his having made a federal gift tax return was developed on the previous trial. If he made the one it should have put appellant and her attorney on inquiry whether he had made the other. There is no allegation in the complaint or in the proposed amended complaint that any effort was made by appellant or her counsel in the previous action to ascertain whether a state gift tax return had been filed. Under the circumstances disclosed by this record I agree that the demurrer was properly sustained.

KAUFMAN, J., deeming himself disqualified does not participate herein.



131 Cal.App.2d 65

Rose PIERCE, Plaintiff, Cross-defendant and Respondent,

v.

John FREITAS, Defendant, Cross-complainant and Appellant.

Civ. 16180.

District Court of Appeal, First District, Division 2, California.

Feb. 23, 1955.

Action to quiet title to a city lot. Defendant filed a cross-complaint for reformation of his deed conveying the lot to plaintiff's grantor by changing the description as to the length of the lot's frontage on a street on the ground of mutual mistake. From a judgment of the Superior Court, Santa Clara County, John D. Foley, J., for plaintiff and cross-defendant, defendant and cross-complainant appealed. The District Court of Appeal, Nourse, P. J., held that the trial court's decision, on parties' conflicting testimony as to their intentions and prior oral negotiations, that plaintiff was fee owner of the lot as described in such deed and that the allegations of the cross-complaint were untrue, was binding on the appellate court.

Judgment affirmed.

1. Limitation of Actions ⇐19(3), 37(2)

The five-year statute of limitations applies to cross-action for reformation of deed on ground of fraud or mistake as incident to action to quiet title or in ejectment, but three-year statute applies to action for reformation on such ground in absence of any attempt to recover property conveyed or establish title thereto. West's Ann.Code Civ.Proc. §§ 318, 338, subd. 4.

2. Deeds ⇐78, 196(1)

A deliberately executed written instrument, such as deed, is presumed to express parties' intention, and question whether such presumption has been overcome is for trial court to determine in action to quiet title to land conveyed.

3. Boundaries ⇐3(3)

Ascertained monuments stated in description of boundary line in deed are paramount to conflicting measurements stated therein when construction is doubtful and there are no other sufficient circumstances to determine it. West's Ann.Code Civ.Proc. § 2077, subd. 2.

4. Boundaries ⇐3(2)

In construction of boundaries stated in deed, parties' intention is controlling consideration.

5. Appeal and Error ⇐1011(1)

In action to quiet title to lot, trial court's decision, on parties' conflicting testimony as to their intentions and prior negotiations, that plaintiff was fee owner of lot, as described in defendant's deed to plaintiff's grantor and deed to plaintiff, and that allegations of defendant's cross-

complaint for reformation of his deed on ground of mutual mistake as to length of lot's frontage on street were untrue, is binding on District Court of Appeal on defendant's appeal from judgment for plaintiff.

Frank G. Nunes, Jr., Hayward, for appellant.

Machado & Machado, San Jose, for respondent.

NOURSE, Presiding Justice.

Respondent Rose Vierra Pierce in 1952 instituted a quiet title action with respect to a rectangular parcel of real property with a front of 60 feet on the southwest side of Main Street in Santa Clara. The parcel had been acquired from appellant Freitas. The deposit receipt in respondent's name dated August 21, 1946, described the parcel as 2052 Main Street only. The deed dated January 4, 1947, was taken in the name of respondent's son Manuel Vierra. It conveyed also another lot not here involved. It described the front of the rectangular lot in question as follows: "Beginning at a harrow tooth on the southwesterly line of Main Street, distant thereon North 23° 00′ West 596.00 feet from the point of intersection of the said southwesterly line of Main Street with the northwesterly line of Reed Street, * * *; running thence North 23° 00′ West along the said southwesterly line of Main Street 60.00 feet to a stake set at the common corner for Lots 6 and 7 * * *." By a grant deed of July 13, 1948, Manuel Vierra and his wife conveyed the parcel to respondent, the deed containing exactly the same description as the deed from appellant to Manuel Vierra.

It was appellant's contention that the above description in the deed signed by him was the result of mutual mistake as he had agreed to sell a rectangular lot with a frontage of 55 feet only, the description of which should have read: "Beginning at a harrow tooth on the southwesterly line of Main Street, distant thereon North 23° 00′ West *601 feet* from the point of intersection of the said southwesterly line of Main Street with the northwesterly line of Reed Street * * *; running thence North 23° 00′ West along the said southwesterly line of Main Street *55.00 feet* to a stake set at the common corner for Lots 6 and 7 * * *." In a cross-complaint appellant sought reformation of the deed accordingly.

In support of his contention appellant relied on the escrow instructions signed by him and Manuel Vierra on January 4, 1947, in which the description of the frontage read: "Beginning at a harrow tooth on the southwesterly line of Main Street, distant thereon North 23° 00′ West *596.00 feet* from the point of intersection of the said southwesterly line of Main Street with the northwesterly line of Reed Street, * *; running thence North 23° 00′ West along the said southwesterly line of Main Street 55.00 feet to a stake set at the common corner for Lots 6 and 7 * * *." It is conceded by appellant that said description is inconsistent because the actual distance of the monuments, the harrow tooth and the stake as therein described, would be 60 feet. He contends, however, that the escrow holder bank without consulting the parties erroneously resolved the discrepancy in favor of the monuments and that appellant because he could not read, was not aware either of the discrepancy in the escrow instructions or the alleged mistake in the deed.

The evidence further showed that respondent lived in the house on the parcel in question and that if the boundary appellant contended for were accepted the house would be too near the property line to leave the side line set back required by local law and that parts of the building would even protrude over the property line. Appellant conceded this but testified that respondent had agreed to move the house at her expense. He did not wish to sell 60 feet because that would include part of the garage driveway of his own adjacent home and he did not wish to replace his existing driveway, which curved to the house sold, by a straight one which would require the taking out of one or two trees on his property. Respondent as a witness testified that the moving of the house to conform to a local ordinance had never

been mentioned as she had bought 60 feet and there had never been any conversation about buying 55 feet only. She had in 1938 tried to put up a fence on the boundary in accordance with the 60 feet width but appellant had thrown it down and she had abstained from rebuilding because of death threats by appellant. She had always paid the taxes in accordance with her deed and appellant conceded that he never tried to pay taxes on the five foot strip in dispute or to have the assessment corrected.

The court held that respondent was owner in fee of the real property as described in the deeds and refused the reformation sought in the cross-complaint, finding in substance that the allegations on which the action for reformation was based were untrue and that said action was barred by the provisions of section 338, subd. 4, Code of Civil Procedure (the three year statute for an action for relief on the ground of fraud or mistake).

[1] Appellant first urges that his cross-action was not barred by the statute because in essence it was an action for a recovery of real property (to wit, the disputed five foot strip) to which the five year statute of section 318, Code of Civil Procedure, is applicable, relying on cases such as Murphy v. Crowley, 140 Cal. 141, 73 P. 820 and Union Ice Co. v. Doyle, 6 Cal.App. 284, 92 P. 112. The California authorities distinguish between cases in which action for reformation on the ground of fraud or mistake is incidental to an action to quiet title or in ejectment, in which cases, as in the ones cited, the five year statute prevails and cases where there is no attempt to recover property or establish title over and above such action for reformation, in which cases the three year statute of section 338, subd. 4, Code of Civil Procedure, prevails. 16 Cal.Jur. 437, § 46; Annotation, 36 A.L.R.2d 687, 699. As appellant was in actual possession and did not pray that his title be quieted but took a merely defensive position except for the reformation prayed for, he might come within the latter category exemplified by Eureka v. Gates, 137 Cal. 89, 69 P. 850, and Hart v. Walton, 9 Cal.App. 502, 99 P. 719. However, we need not decide this point or whether even if the action for reformation were barred, appellant could without such reformation rely on the alleged mutual mistake as a defense to respondent's quiet title action, because the trial court also rejected appellant's contention as to mutual mistake in substance, and said decision must be upheld.

[2–5] On its face the deed signed by appellant conveys the property as claimed by respondent without any ambiguity or discrepancy. "The presumption is that a written instrument deliberately executed expresses the intention of the parties. * * * It is for the trial court to determine if this presumption has been overcome." Kayser v. Gorman, 3 Cal.2d 478, 486, 44 P.2d 1041, 1044. Moreover the escrow instructions on which appellant relies tend to support respondent's position. In the conflict between the stated monuments which favor respondent and the stated measurement on which appellant relies, the monuments if ascertained are paramount, § 2077, subd. 2, Code of Civil Procedure. The escrow holder bank in drawing up the deed evidently followed this rule. It is true that the rule only applies "when the construction is doubtful and there are no other sufficient circumstances to determine it", § 2077, Code of Civil Procedure, and that in the construction of boundaries the intention of the parties is the controlling consideration. Machado v. Title Guarantee & Trust Co., 15 Cal.2d 180, 186, 99 P.2d 245. But as to their intention and prior oral negotiation the testimony of the parties is in hopeless conflict, appellant testifying that it was agreed to that respondent would take 55 feet and move the house, respondent that she bought 60 feet and did not speak about moving the house. That under said circumstances the decision of the trial court is binding on this court does not require citation of authority.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

131 Cal.App.2d 172

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Clyde HEATH, Defendant and Appellant.

Cr. 5249.

District Court of Appeal, Second District, Division 3, California.

March 1, 1955.

Prosecution for possession of preparation of heroin submitted on transcript of preliminary examination with right of state and defendant to offer additional evidence. From adverse judgment of the Superior Court, Los Angeles County, Ralph K. Pierson, J., and from order denying motion for new trial, the defendant appealed. The District Court of Appeal, Shinn, P. J., held that it would be presumed that trial court performed its duty to read transcript in absence of affirmative showing by record that court had neglected to read transcript.

Judgment and order affirmed.

1. Criminal Law ⇐260(11)

In prosecution for possession of preparation of heroin submitted on transcript of preliminary examination with right of state and defendant to offer additional evidence, it would be presumed that court performed its duty to read transcript in absence of affirmative showing by record that court had neglected to do so. Health and Safety Code, § 11500; West's Ann.Code Civ.Proc. § 1963, subd. 15.

2. Criminal Law ⇐486

In prosecution for possession of preparation of heroin obtained by officer from defendant when he noticed defendant was trying to swallow something and he ordered him to spit it out whereupon defendant spat out white paper bundle wrapped in cellophane which officer placed in envelope, which was placed in large envelope, sealed with sealing wax, identified by initials of officer and received in that condition by chemist of bureau of narcotic enforcement, substance analyzed by chemist was sufficiently identified as that taken from defendant. Health and Safety Code, § 11500.

3. Criminal Law ⇐662(6)

Where prosecution for possession of preparation of heroin was submitted, by stipulation, on transcript of preliminary examination, defendant was not deprived of right to be confronted by witnesses against him. Health and Safety Code, § 11500.

Crispus A. Wright, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Clyde Heath appeals from a judgment of conviction of the offense of having in his possession a preparation of heroin in violation of Section 11500 of the Health and Safety Code and also from an order denying his motion for a new trial.

When the case came on for trial, a jury was waived, it was stipulated that the cause was submitted on the transcript of the preliminary examination with the right of the People and of the defendant to offer additional evidence. There was evidence of the following facts received in the preliminary examination. E. B. Hollingsworth, a State Narcotics Inspector, testified that he saw defendant at about 11:25 p.m., January 25, 1954, on the sidewalk on the south side of Sixth Street in Los Angeles between Towne and Crocker Streets. As he approached he saw that the defendant was trying to swallow something. He told him to spit it out and he spat a white paper bindle wrapped in cellophane. This was taken to chemist Arnold of the California State Bureau of Narcotic Enforcement. Upon the trial Mr. Hollingsworth testified that he arrested the defendant and at that time defendant stated that the package contained heroin and that he had just picked it up from where he had "stached" it earlier in the day. Mr. Arnold testified that he had made a chemical analysis of the contents of the package received from Mr. Hollingsworth, and that in his opinion the same contained heroin.

[1] The first point made on the appeal is that the record does not affirmatively show that the trial judge read the transcript

of the evidence at the preliminary. A supplemental transcript which was settled by the court contains a statement by the court that the court had read and considered the transcript of the preliminary. This was unnecessary. There was nothing in the original reporter's transcript or the clerk's transcript which indicated that the court had not read and considered the preliminary transcript. Although it is customary for the court to announce in such cases that the transcript has been read, it would not be presumed in the absence of such a statement that the transcript had not been read. It was the duty of the court to read the transcript and it will be presumed that that duty was duly performed. The point urged could have validity only if it was shown affirmatively by the record that the court had neglected to read the transcript. It is as unreasonable to argue that the court did not read the transcript as it would be to make the bland assertion that the court did not pay attention to the testimony of the witnesses. It is as clear a case as could be found for application of the presumption that official duty has been duly performed. Code Civ.Proc. § 1963, subd. 15.

[2] The contention that the substance analyzed by witness Arnold was not sufficiently identified as that taken from defendant is not sustained by the record. It was placed in an envelope which was placed in a larger envelope, sealed with sealing wax, identified by the initials of the officers and was received by Arnold in that condition. Moreover, there was evidence that defendant admitted the substance was heroin.

[3] The further point that defendant was deprived of the right to be confronted by the witnesses against him because he did not personally join in the stipulation for submission in evidence of the transcript of the preliminary examination was answered contrary to defendant's contention in People v. Hart, 121 Cal.App.2d 301, 262 P.2d 865. There is no merit in the appeal.

The judgment and order denying motion for new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

131 Cal.App.2d 39

Richard GOLD, a minor, by Bernice Gold, his mother and guardian ad litem, and Milton Gold, Plaintiffs and Respondents,

v.

John HLIVYAK and Caryl I. Hlivyak, individually, and doing business as Johnson's Boys Club, Defendants and Appellants.

Civ. 20440.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1955.

Action by 12 year old boy against operator of boys' club for loss of three fingers which occurred when boy hung a toy called a "slinky," which was a coil of fine steel wire, out of rear window of station wagon in which operator was taking boys to playground and wire caught on parked or passing automobile. From order of the Superior Court, Los Angeles County, Henry M. Willis, J., granting boy's motion for new trial, the operator appealed. The District Court of Appeal, Drapeau, J., held that evidence was insufficient to establish that boy knew or was warned that playing with "slinky" was a dangerous pastime and likely to result in serious bodily injury, and therefore defense of assumption of risk was not available to operator.

Order affirmed.

1. Negligence ⇐65, 105

Contributory negligence arises from lack of due care, while assumption of risk will negative defendant's liability regardless of fact that plaintiff may have acted with due care.

2. Negligence ⇐105

Defense of assumption of risk is available where there has been voluntary acceptance of risk and where such acceptance, whether express or implied, has been made with knowledge and appreciation of risk.

3. Negligence ⇐105

Plaintiff may be found to have assumed risk if facts are such that he must have had knowledge of hazard, but where it merely appears that he should or could have

discovered danger by exercise of ordinary care, defense is contributory negligence and not assumption of risk.

4. New Trial ⇐39

Trial court has wide discretion in passing upon motions for new trial and fact that certain instruction has been held proper under certain circumstances does not necessarily mean that it would not be error to use same or similar language in case involving different circumstances.

5. Automobiles ⇐224(1), 244(56)

In action by 12 year old boy against operator of a boys' club for loss of three fingers which occurred when boy hung a toy known as "slinky," which was coil of fine steel wire, out rear window of station wagon in which proprietor was taking boys to playground, and wire caught on parked or passing automobile, evidence was insufficient to establish that boy knew, or had been warned, that playing with toy was dangerous pastime, and therefore defense of assumption of risk was not available to operator.

Sampson & Dryden and Patrick D. Horgan, Los Angeles, for appellants.

Samuel A. Rosenthal and Leonard G. Ratner, Los Angeles, for respondents.

DRAPEAU, Justice.

Richard Gold, hereinafter referred to as plaintiff, is a twelve year old boy. John Hlivyak, hereinafter referred to as defendant, operated a boys' club for compensation.

On Saturday mornings, defendant usually picked up a group of boys in his Plymouth station wagon and supervised them in a program of athletics and recreation.

On May 3, 1952, he was transporting a group of sixteen boys in and around Beverly Hills on their way to a playground in Culver City. The station wagon had a rear window opening upward.

Plaintiff was one of the first to be picked up. When he got into the station wagon he was carrying a new toy called a "slinky". This was a coil of fine steel wire, two to three inches in diameter and four inches in length when in repose. When in operation it expanded lengthwise a distance of from 10 to 15 feet.

The club had a rule that nothing should be dropped or thrown from the windows of the station wagon. However, plaintiff began playing the toy out of the rear window, allowing it to bounce along on the pavement behind the car.

Defendant warned plaintiff to be careful with the slinky and not to let it out the back window. But plaintiff continued to do so and defendant took it away from him and put it in the glove compartment of the station wagon.

After several minutes, plaintiff asked for the return of his toy and promised defendant he would not let it drop out of the window anymore. Defendant returned the slinky to him, and plaintiff immediately dropped it out the window. As he did so, he observed other automobiles near the station wagon, and also that the slinky stretched out about 14 feet—far enough to reach a parked car. Shortly thereafter the toy caught, either on a parked car or a passing Cadillac, the coil of wire tightened and amputated three of plaintiff's fingers.

The instant action is one for damages for these personal injuries sustained by plaintiff on account of defendants' alleged negligence and lack of supervision of the minor.

Defendants denied the negligence and affirmatively pleaded contributory negligence and assumption of risk.

At defendants' request, the trial court instructed the jury on both of these defenses, including an instruction that voluntary assumption of risk does not require a showing of proximate cause.

The jury returned its verdict in favor of defendants. And then the trial court granted plaintiffs' motion for a new trial on the ground of error in giving the instructions based on the defense of assumption of risk.

Defendants appeal from the order granting such new trial.

[1–3] "The defenses of assumption of risk and contributory negligence are based on different theories. Contributory negligence arises from a lack of due care. The defense of assumption of risk, on the other hand, will negative liability regardless of the fact that plaintiff may have acted with

due care. (See Prosser on Torts (1941), p. 377.) It is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk. (See Rest., Torts, § 893.) Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of the risk, but where it merely appears that he should or could have discovered the danger by the exercise of ordinary care, the defense is contributory negligence and not assumption of risk. Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 385, 240 P.2d 580; see Prosser on Torts (1941), p. 386. In the present case, the instructions are erroneous since they permitted the jury to find that plaintiff had assumed the risk without finding that she had actual knowledge of the danger. Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 384–385, 240 P.2d 580; Plotts v. Albert, 120 Cal.App.2d 105, 260 P.2d 621." Prescott v. Ralph's Grocery Co., 42 Cal.2d 158, 161, 265 P.2d 904, 906.

In his order granting the new trial, the judge gave as his reasons therefor the following:

"However, as contributory negligence had been pleaded and the jury fully instructed thereon, the giving of these instructions on the subject of 'assumption of risk', with the accompanying declaration of law that proof thereof deprived plaintiff of his right of recovery of damage without proof of proximate cause, was misleading and conducive to a misunderstanding on the part of the jury, resulting in a confusion as to whether proof of proximate cause was any longer in the consideration of the jury, should they adopt the basis upon which risk is assumed by the injured party. The verdict for defendant herein creates an implication that plaintiff had actual knowledge of the danger which resulted in his injury, or it could be interpreted as implying a finding of contributory negligence on plaintiff's part which in some degree was a proximate cause of his unusual injury.

"In view of the evidence as a whole, going to make up this case, it becomes apparent that the giving of these instructions on the subject of 'assumption of risk' must have resulted in the jury deciding that plaintiff was barred from recovery, regardless of the issue and its component elements based upon the doctrine of contributory negligence. * * * It follows herein that the instructions in question should not have been given, particularly when it is made manifest that plaintiff could not have had actual knowledge of any danger whatever in playing his 'Slinky' out of the rear window of the station wagon down to, and upon the street pavement.

* * * * * *

"Without that knowledge, required by law to be found to have been established by evidence, the doctrine of assumption of risk is not admissible as a defense herein, and the giving of the instructions thereon was error which requires that the verdict and judgment be set aside and a new trial granted."

It is fundamental that a trial judge has a wide discretion in passing upon motions for new trials and "there is no abuse of discretion if a trial judge is justified in feeling that the jury might have been misled by an instruction." Roberts v. Salmon, 66 Cal.App.2d 22, 26, 151 P.2d 556, 559.

[4] And as said in Barber v. Quatacker, 29 Cal.App.2d 728, 731, 85 P.2d 560, 562:

"The trial judge has a wide discretion in passing upon motions for a new trial and the fact that a certain instruction has been held proper under certain circumstances does not necessarily mean that it would not be error to use the same or similar language in a case involving different circumstances. In Olinger v. Pacific Greyhound Lines, 7 Cal.App.2d 484, 46 P.2d 774, in considering the relation of the provisions of section 4½ of article 6 of the Constitution to the granting of a new trial, this court said (page 775):

" 'Of course, these provisions are as binding on the trial judge as on the members of an appellate court. This being so, we must assume that the trial judge in granting the motion for new trial performed his duty, examined the entire cause including the evidence, and concluded that the errors resulted in a miscarriage of justice. In so doing he was required to consider the credibility

of the witnesses, their manner of testifying on the stand, and the weight and sufficiency of the evidence. While the trial judge should not lightly set aside a judgment, still it is his duty in passing on a motion for new trial to review the cause a second time as a trier of fact and after such review decide the motion. Trial judges are given a wide latitude in exercising a sound discretion in passing on motions for new trial, and an order granting such a motion will not be disturbed on appeal unless there has been an abuse of such discretion.'"

[5] An examination of the record herein discloses a failure to establish that the minor plaintiff knew, or was warned, that playing with the slinky was a dangerous pastime and likely to result in serious bodily injury.

Consequently, assumption of risk was not a defense and it was error to give instructions on that subject.

The order granting a new trial is affirmed.

WHITE, P. J., and DORAN, J., concur.



131 Cal.App.2d 255

J. M. HASTINGS, Petitioner,

v.

The SUPERIOR COURT of the State of California, In and for the COUNTY OF RIVERSIDE, Respondent.

Civ. 5082.

District Court of Appeal, Fourth District, California.

March 2, 1955.

Rehearing Denied March 17, 1955.

Prohibition proceeding to prevent the Superior Court of Riverside County from proceeding with trial of an action after denial of defendant's motion to dismiss it for failure to bring it to trial within five years after filing of the complaint. The District Court of Appeal, by the Court, held that plaintiff's attorney having secured written stipulation by parties that action, which was set for trial on date within statutory five-year period, "be reset for some convenient date, due to conflict of litigation on the part of both attorneys," plaintiff was not within implied exception of plaintiff prevented by causes beyond his control from bringing case to trial from application of mandatory statute requiring dismissal of action not brought to trial within such time, and defendant was not estopped from moving for dismissal on such ground.

Writ granted.

1. Dismissal and Nonsuit ⇐45, 60(3)

The statutory provision for dismissal of action not brought to trial within five years after filing of complaint is mandatory when applicable, but implied exception thereto exists when plaintiff is prevented by causes beyond his control from bringing case to trial. West's Ann.Code Civ. Proc. § 583.

2. Dismissal and Nonsuit ⇐50, 60(6)

A plaintiff, whose attorney secured written stipulation by parties to action, set for trial on date within five years after filing of complaint, that it be "reset for some convenient date, due to conflict of litigation on the part of both attorneys", was not within implied exception of plaintiff prevented by causes beyond his control from bringing case to trial from application of statute requiring dismissal of action not brought to trial within such time, and defendant was not estopped from moving to dismiss action on such ground. West's Ann.Code Civ.Proc. § 583.

3. Dismissal and Nonsuit ⇐60(2)

The fact that action was once set for trial within five years after filing of complaint and then dropped from trial calendar did not toll five-year period within which action must be brought to trial under statute providing for dismissal of action not brought to trial within such time. West's Ann.Code Civ.Proc. § 583.

4. Dismissal and Nonsuit ⇐60(6)

The written stipulation referred to in statute requiring dismissal of action not brought to trial within five years after

filing of complaint, unless parties stipulate in writing that time may be extended, means written stipulation extending time for trial beyond statutory period of five years. West's Ann.Code Civ.Proc. § 583.

5. Dismissal and Nonsuit ⇐60(6)

A written stipulation by parties to action, set for trial on date within five years after filing of complaint, that action "be reset for some convenient day, due to conflict of litigation on the part of both attorneys," did not extend time for trial beyond such five-year period fixed by statute requiring dismissal of action not brought to trial within such time, in absence of showing that it was so intended by parties, whose correspondence leading to stipulation indicated intent to try case within next month or two after date of stipulation. West's Ann.Code Civ.Proc. § 583.

Harmon C. Brown, Riverside, for petitioner.

Jerome L. Richardson, Riverside, for respondent.

PER CURIAM.

The showing made by petitioner is that on August 2, 1949, an action was filed in the Superior Court of Riverside County entitled George H. Gobruegge v. J. M. Hastings. About October 19, 1949, an answer and cross-complaint were filed. Counsel for plaintiff subsequently filed a memorandum moving to set the cause for trial, and it was subsequently set for September 2, 1953, but it was not then tried. On that date it was continued by a written stipulation of the parties agreeing "that the above-entitled action, set for trial September 2nd, 1953, be reset for some convenient date, due to conflict of litigation on the part of both attorneys". Apparently no endeavor was made subsequently to set the case for trial by either party. On September 7, 1954, more than 5 years after the action was filed, defendant and cross-complainant filed a notice of motion to dismiss the action under section 583 of the Code of Civil Procedure, upon the ground that it had not been brought to trial within five years after the filing of the complaint.

On November 12, 1954, the respondent court made its order denying said motion "provided that, within 20 days hereof, the plaintiff file a memo of motion to set cause for trial". On November 19, 1954, plaintiff filed such a memorandum and the court set January 20, 1955, as the time for trial. This writ is sought to prevent any further proceedings upon the grounds stated in said action except to dismiss the same upon the grounds stated.

In opposition to the motion in the trial court plaintiff claimed that ever since the action was filed counsel for the respective parties had numerous negotiations to settle the action out of court and that it would be unjust and inequitable to grant the motion. There is no contention that during the entire period the parties and their counsel were absent from the state or that they concealed themselves therein. In opposition to this writ, respondent now contends that the order of the trial court should be sustained since there was a written stipulation filed extending the time for trial; that five years had not expired from the date of filing the action to the date of trial because the court actually set the case for trial on September 2, 1953, within that period; that plaintiff was prevented from setting the case for trial for causes beyond his control; that the continuance of the date of trial from September 2, 1953, was at the specific request of defendant and he should be estopped from taking unfair advantage of his own acts.

It is petitioner's contention that the section is mandatory and that if the five-year period has elapsed from the date of filing, no discretion is vested in the trial court but to dismiss the action; that the setting of the case for trial and the written stipulation involved constituted no exception within the meaning of that section.

[1–3] The authorities are clear that the five-year provision of section 583 of the Code of Civil Procedure relating to dismissals of actions not brought to trial within five years is mandatory when it is applicable. However, it has been held that an implied exception exists when plaintiff is prevented by causes beyond his control from bringing the case to trial.

The facts related do not bring plaintiff within this exception. Apparently the stipulation extending time of trial to another date was secured at the instance of plaintiff's attorney. The stipulation that followed was by agreement of the respective parties and it was therein stated that the continuance was sought due to conflict of litigation on the part of both attorneys. No estoppel sufficient to avoid the effect of the statute is indicated. Anderson v. City of San Diego, 118 Cal.App.2d 726, 258 P.2d 842; City of Los Angeles v. Superior Court, 185 Cal. 405, 197 P. 79; 19 West's California Digest, ⇐45, p. 20. The fact that the case was once *set* for trial within the five-year period and then dropped from the trial calendar does not toll the five-year period within which the action must be *brought* to trial. Boyd v. Southern Pacific R. Co., 185 Cal. 344, 197 P. 58; Central Pacific R. Co. v. Riley, 31 Cal.App. 394, 160 P. 844; 16 Cal.Jur.2d 192, sec. 35.

[4] The only remaining question involves the construction of the written stipulation. The written stipulation referred to in the five-year statute means a written stipulation extending the time for trial beyond the statutory period of five years. Rosenfelt v. Scholtz, 17 Cal.App.2d 443, 62 P.2d 381; City of Los Angeles v. Superior Court, supra; Central Pacific R. Co. v. Riley, supra.

[5] The written stipulation here under discussion does not indicate from its terms that it was the intention of the parties that the time of trial should be extended beyond the five-year period, and there is no showing in the record that it was so intended by the parties. In fact the intended date of trial, at that time, was to be the next month or two from the date of the written stipulation. The stipulation was that the time of trial "be reset for some convenient date". According to the letters passing between the parties, leading up to the written stipulation, plaintiff's attorney wrote defendant's attorney that on September 2nd he was unable to try the case on that date because he had another case set and he was unable to reach his client. Counsel for defendant replied that he spoke to the judge and requested another date and asked plaintiff's counsel "when in October or November" a convenient date would be for him to go to trial.

The cases relied upon by plaintiff, such as Bank of America Nat. Trust & Savings Ass'n v. Superior Court, 22 Cal.App.2d 450, 71 P.2d 296; and Charles L. Donohoe Co. v. Superior Court, 202 Cal. 15, 258 P. 1094, are factually distinguishable.

Writ granted.



131 Cal.App.2d 151

Oma M. BRIDGES and Alvin C. Bridges, Plaintiffs and Appellants,

v.

The COUNTY OF LOS ANGELES, a political subdivision of the State of California, Doe I, Doe II and Doe III, Defendants and Respondents.

Civ. 20439.

District Court of Appeal, Second District, Division 3, California.

Feb. 28, 1955.

Hearing Denied April 27, 1955.

[Action by husband and wife for injuries sustained by wife when she stumbled over urn located in front of counter in office of sheriff's sub-station. The Superior Court of Los Angeles County, Harold P. Huls, J., granted defendant's motion for nonsuit and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that question whether trusty had placed urn in front of counter while he was waxing floor on preceding day was for jury.

Judgment reversed.

1. Counties ⇐146

If placing of urn in front of counter in office of sheriff's sub-station was due to action of someone acting under authority delegated by board of supervisors, knowledge of condition would be imputed to county and would bring action against county by one falling over urn within statute providing for liability of local agency for injuries to person resulting from dangerous condi-

tion maintained on public property if person authorized to remedy condition had knowledge of condition and had failed within reasonable time to remedy condition. Government Code, § 53051.

2. Counties ⇐146
Evidence ⇐317(9)

In action against county for personal injuries sustained by plaintiff when she had stumbled over urn located in front of counter in office of sheriff's sub-station, special relationship between county and trusty who had waxed floor in office on preceding day had been terminated when work had been completed, and trusty's statement that he had moved urn in front of counter when he had waxed floor was hearsay as to county and was entitled to no weight as evidence of any fact in issue. Government Code, §§ 25358, 25359, 53051.

3. Counties ⇐224

In action against county for personal injuries sustained by plaintiff when she stumbled over urn located in front of counter in sheriff's sub-station, evidence raised question for jury as to whether urn had been in its location for sufficient time for officer in charge of supervision of maintenance of building to discover it in course of reasonable observation of conditions in office so that notice should have been imputed to county. Government Code, § 53051.

4. Appeal and Error ⇐927(3)

On appeal from judgment of nonsuit, all reasonable inferences are to be indulged in favor of plaintiff and such inferences are to be preferred above those which are adverse to plaintiff, even though they may be equally reasonable.

5. Counties ⇐224

In action against county for personal injuries sustained by plaintiff when she stumbled over urn located in front of counter in office of sheriff's sub-station, question whether trusty had placed urn in front of counter while he was waxing floor on preceding day was for jury.

Ferguson & Judge, Fullerton, for appellant.

Harold W. Kennedy, County Counsel, Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondent.

SHINN, Presiding Justice.

Oma M. Bridges suffered injuries when she stumbled over an urn which was maintained in the office of the sheriff's substation at Norwalk, California. She and her husband, Alvin C. Bridges, brought this action against the County of Los Angeles for damages. Defendant's motion for nonsuit was granted and plaintiffs appeal.

The urn in question was of pottery construction, about 20 inches in height, about 11 inches in diameter and filled with sand. At the time of the accident, it was located in front of and close to the south end of a counter in the office and from 6 to 8 inches from the counter. There was evidence that its accustomed place was south of the counter against the south wall and close to a door in that wall, and also evidence that it usually stood just around the corner from its position at the time of the accident. It rested upon a small fiber mat. Mrs. Oma Bridges entered the office at about 11:00 a. m. on Monday morning accompanied by her daughter-in-law, Mrs. Joan Bridges. They walked to the counter, where there was conversation with an officer. Mrs. Oma Bridges stood at the counter during this conversation; the urn was close beside her, and when she started to leave her left foot struck the urn, her feet went from under her, slid somewhat on the floor and she fell heavily, seriously injuring a knee.

The action is based upon Section 53051 of the Government Code.[1]

1. "§ 53051. A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition: (a) Had knowledge or notice of the defective or dangerous condition. (b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

Although the pleadings presented the issue whether the urn in its described location constituted a dangerous condition of public property, it was not urged by the county at the trial and is not urged on the appeal that there was insufficient evidence to have justified a finding that a dangerous condition existed. We therefore express no opinion on the point.

The pivotal questions in the case are whether the urn was placed in front of the counter by someone who possessed authority which would constitute his act the act of the county or, in the alternative, whether it was placed there by someone else and its position had been known by, or had existed for a sufficient time to impute knowledge to a person "authorized to remedy the condition."

[1] If the placing of the urn was due to the action of someone acting under authority delegated by the Board of Supervisors, knowledge of the condition would have been imputed to the county since it would have been the act of the county. Wise v. City of Los Angeles, 9 Cal.App.2d 364, 368, 49 P.2d 1122, 50 P.2d 1079.

[2] We are of the opinion, however, that there was insufficient evidence to have justified a finding that the county created the condition. The evidence was that on Sunday, the day preceding the accident, the office floor had been cleaned and waxed by one Earl Davidson, a trusty, then making his temporary abode in or about the substation. Pursuant to Section 25358 of the Government Code,[2] the Board of Supervisors had provided for the maintenance of the sub-station. As authorized by Section 25359 of the Code, Davidson was performing work upon a public building for the benefit of the county. Captain McLaughlin, a deputy sheriff, at that time a lieutenant, was the delegated representative of the sheriff to supervise the general conduct and maintenance of the station. He caused the assignment of Davidson to clean, wax and polish the floor, and he testified that in this process the urn would have to be moved. He also volunteered the statement in his testimony that the trusty had stated that he had placed the urn in its position in front of the counter. A motion to strike out the testimony as to this statement of the trusty was denied. We think the motion should have been granted. The trusty was not an employee of the county. He was rendering a service to the county while he was actually engaged in his work, but the special relationship which existed during that time ended the instant he ceased work. He could do only what he was directed to do and when he was through, for the time being, he was no more qualified to bind the county by his statements than would have been any other prisoner not engaged in rendering services for the county. See Taylor v. Bernheim, 58 Cal.App. 404, 408, 209 P. 55; West Coast Life Ins. Co. v. Crawford, 58 Cal.App.2d 771, 785, 138 P.2d 384; 31 C.J.S., Evidence, § 347, page 1121; 19 Cal.Jur.2d p. 185. Since it was in evidence that Davidson's work was done on Sunday and no evidence that McLaughlin was at the station on Sunday, we think it must be concluded that the statement of Davidson was made some time later. Insofar as the statement purported to account for the placing of the urn it was pure hearsay as to the county; it was indefinite as to when the urn was placed in front of the counter, and was entitled to no weight as evidence of any fact in issue.

[3] The next question is whether there was indirect evidence sufficient to justify a finding that the urn was in the described position for a sufficient length of time to be discovered by a person who was authorized to remedy the condition. Considering first the latter phase of the problem, we are of the opinion that Lieutenant McLaughlin was a person authorized to remedy the condition, and that if the urn was in its location for sufficient time for him to discover it in the course of reasonable observation of conditions in the office, notice should have been imputed to the county. He had not only the authority but the duty to see that the station was properly maintained; notice to him would have been sufficient; notice

2. "The board shall provide all necessary officers, employees, attendants, and supplies for the proper maintenance of the county buildings."

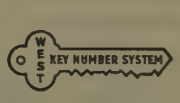
to anyone higher in authority would have been superfluous.

[4, 5] The final question is one of considerable difficulty. It is whether the evidence would have justified a finding that Davidson placed the urn in front of the counter while he was waxing the floor on Sunday. This question required the weighing of the reasonable probabilities. Needless to say, on this appeal from a judgment of nonsuit, all reasonable inferences are to be indulged in favor of the plaintiffs. Such inferences are to be preferred above those which are adverse to the plaintiffs, even though they be equally reasonable. The rule is the same as if plaintiffs had prevailed in the action and the question on appeal was whether there was substantial evidence to support a finding of the court or an implied finding of a verdict that the urn had been placed in front of the counter on Sunday. The question is narrowed to the inquiry whether it was reasonably probable that Davidson moved the urn to its position before the counter on Sunday. In order to clean and wax the floor thoroughly it would be necessary to move the urn. There was no evidence, direct or indirect, of any other reason for moving the urn. Davidson was the only person who had occasion to move it, and since it was moved, it was more logical to believe that he moved it than to believe that it was moved by someone else who had no occasion to move it. It was not a light object which might have been moved accidentally or unintentionally. It was also reasonable to believe that when the urn was moved it was moved to the place in front of the counter where it was next seen. The county says that there was no evidence as to who moved the urn, or when it was moved, and that an answer to these questions would involve nothing but guesswork and speculation. We do not agree. Certain facts were established from which it could have been inferred that the urn was moved by Davidson and no facts which indicated that it had been placed in front of the counter by someone other than Davidson. It was possible that some deputy sheriff or some of the numerous visitors might have moved the urn, but we can conceive of no reason why they should have done so. And this suggests the question—if Davidson did not move it, who did move it? Here we enter the field of pure speculation. The probabilities all seem to favor the plaintiffs' contention, and, this being true, we think the factual question should have been left to the jury. It is our opinion that if the case had gone to the jury and a verdict in favor of the plaintiffs had been returned, it could not properly have been said there was insufficient evidence to justify the implied finding that the dangerous condition had existed for sufficient time to charge a responsible representative of the county with notice of its existence and to give him ample opportunity to remedy the condition.

There are no other questions which call for decision.

The judgment is reversed.

WOOD and VALLÉE, JJ., concur.



131 Cal.App.2d 75

In the Matter of the APPLICATION of Elliott H. TOOR, for Writ of Habeas Corpus.

Cr. No. 3097.

District Court of Appeal, First District, Division 2, California.

Feb. 23, 1955.

Divorced husband brought habeas corpus proceeding to secure his discharge from custody in county jail under an adjudication that he was in contempt of court for his wilful failure to pay alimony and support money. He contended that he lacked ability to pay alimony and support money. The District Court of Appeal, Kaufman, J., held that evidence sustained finding that divorced husband had ability to pay alimony and support money.

Writ of habeas corpus discharged and divorced husband remanded into custody.

1. Criminal Law ⇐198

Contempt of court for failure to comply with court's order to pay when one had the ability to pay is a continuing offense, and therefore adjudication that divorced husband was guilty of contempt for wilful failure to pay alimony and support money was not invalid, on ground of double jeopardy, merely because divorced husband had previously been adjudged in contempt for wilful failure to pay alimony and support money.

2. Criminal Law ⇐189

Where original contempt order adjudging divorced husband in contempt of court for his wilful failure to pay alimony and support money, was discharged because of defective affidavit, and not because he had complied with court's order or did not have ability to comply, subsequent adjudication of contempt for wilful failure to pay alimony and support money was not invalid, on ground of double jeopardy.

3. Divorce ⇐269(11), 311

Evidence sustained finding that divorced husband had the ability to pay alimony and support money and that therefore his failure to do so was contempt of court. West's Ann.Code Civ.Proc. arts. 1143–1154, 1148.

Thomas J. Pope, San Francisco, for petitioner.

Raymond H. Williamson, San Francisco, for Sheriff Dan Gallagher.

Walter McGovern, San Francisco, for Ethel Toor, Real Party in Interest.

KAUFMAN, Justice.

Petitioner Elliott H. Toor seeks discharge from custody pursuant to a Writ of Habeas Corpus issued out of this court on the ground that he is being held in custody without legal cause and is entitled to be discharged from custody pursuant to the provisions of §§ 1143–1154 of the Code of Civil Procedure.

On November 29, 1954, petitioner Elliott H. Toor was adjudged in contempt of court for his wilful failure to pay alimony and support money for the maintenance of his minor child in the amount of $2,700 and ordered imprisoned in the county jail until payment of said money. He seeks his discharge on Habeas Corpus on the ground that on December 17, 1954, he moved the Superior Court for a discharge from said imprisonment on the ground that he did not have any estate to the amount of fifty dollars, to which fact he testified and which testimony he claims was substantially undisputed, but that nevertheless that court refused to administer the oath of section 1148, Code of Civil Procedure and denied the motion to discharge; and on the further ground of double jeopardy because he had before on November 8, 1954 been adjudged in contempt and imprisoned for the same failure but had on November 18, 1954, been discharged by the Superior Court on the court's own motion on the ground that the affidavit on which the order to show cause in recontempt was issued was defective in jurisdictional respects.

[1, 2] The ground of double jeopardy has no merit. Contempt of court for failure to comply with the court's order to pay when one has the ability to pay is a continuing offense. Furthermore, the original contempt order was discharged because of a defective affidavit not because petitioner had complied with the court's order or did not have the ability to comply. See People v. Hamberg, 84 Cal. 468, 24 P. 298.

The order of contempt of November 29, 1954 was based on the facts existing on that date and the previous discharge by the court because of an insufficient affidavit based on facts occurring previously is not double jeopardy. Golden Gate Consolidated Hydraulic Mining Co. v. Superior Court, 65 Cal. 187, 3 P. 628; Solano Aquatic Club v. Superior Court, 165 Cal. 278, 131 P. 874.

The transcript of the hearing on November 29 shows over and above petitioner's testimony as to his lack of estate that when petitioner was arrested for an alleged violation of section 270a Penal Code, $1,000 cash was put up as bail money which bail was still in force and which amount petitioner testified was deposited by his brother. However, Ethel Toor testified, over petitioner's objection, that in October, 1954, prior to said arrest she saw petitioner

hand to a certain Harry Chernoff a roll of bills, saying something after which Mr. Chernoff said: "Why can't I do it?" and petitioner answered: "No, you go to my brother Bud; give it to him so he can claim it, so she can't get her mitts on it." In denying the discharge the court stated for the record his opinion that petitioner had not spoken the truth.

Petitioner's testimony that the bail money belonged to his brother was contradicted by Ethel Toor and was ample reason for disbelieving petitioner's testimony. Furthermore, Ethel Toor's testimony was sufficient to support a finding that the bail money belonged to petitioner.

It is also our view that the showing before the trial court on November 29, 1954, that petitioner had $1,000 in October is sufficient for the trial court to find that petitioner still had the $1,000 on December 17, 1954. This is true because the bail money found by the trial court to belong to petitioner was still up on deposit at the time of the hearing of December 17, 1954. A reading of the transcript amply supports the trial court's implied finding that petitioner had an estate of over $50.

[3] The trial court having found on sufficient evidence that petitioner had the ability to pay on December 17, 1954, his motion for discharge from custody under §§ 1143–1154, Code of Civil Procedure was properly denied. In re Pillsbury, 69 Cal. App. 784, 232 P. 725.

In re Johnson, 92 Cal.App.2d 467, 207 P.2d 123, 126, cited by petitioner in support of his contention, is not here in point for the reason, as stated there by the court, that "According to his uncontradicted and unimpeached testimony he is presently unable to pay the alimony award." Here petitioner's testimony was both impeached and contradicted.

Ordered Writ of Habeas Corpus be discharged and petitioner be remanded into custody of the Sheriff of the City and County of San Francisco.

NOURSE, P. J., and DOOLING, J., concur.

131 Cal.App.2d 9

Winifred A. LEONARDINI and Bradford E. Parrish, Plaintiffs and Appellants,

v.

WELLS FARGO BANK & UNION TRUST CO., as Trustee under the Last Will and Testament of Robert F. Lopez, Deceased; Franklyn L. Sweeney, Lillian A. Robinson, William T. Anderson, Geraldine K. Parrish, and the unborn issue of Winifred A. Leonardini, and Bradford E. Parrish, Defendants and Respondents.

Civ. 16002.

District Court of Appeal, First District, Division 1, California.

Feb. 21, 1955.

Hearing Denied April 20, 1955.

Action by life tenant and named remainderman of testamentary trust against trustee, guardian of unborn issue of remainderman, and others, to obtain invasion of trust corpus for benefit of named remainderman. The Superior Court, City and County of San Francisco, William F. Traverso, J., refused to permit the invasion, and remainderman appealed. The District Court of Appeal, Peters, P. J., held that, where, in creation of testamentary trust which contained spendthrift provision, testator's main purpose was to protect life tenant, even as against herself, even if life tenant and remainderman were only persons having interest in trust, refusal to permit, even with consent of life tenant and remainderman, invasion of trust corpus so that remainderman could obtain monthly income prior to life tenant's death was proper.

Judgment affirmed.

1. Trusts ⇐58

Court, sitting in equity, may modify a testamentary trust, if the court believes, because of provisions of will and surrounding circumstances, that settlor would have taken such action had he foreseen the emergency which has arisen.

2. Trusts ⇐58

In exercising court's power of permitting what court believes that settlor would have permitted had he anticipated emergency which has arisen, court may permit deviation from express terms of trust and even permit violation of such terms.

3. Trusts ⇐58

Court's power to modify trust is a limited one and is to be exercised sparingly and only in the clearest of cases.

4. Trusts ⇐58

Where rights of residuary beneficiaries may be adversely affected by court's modification of trust, modification is not permissible unless all beneficiaries adversely affected consent.

5. Wills ⇐684(2)

Where testamentary trust provided that total income should go to life tenant for her life and contained spendthrift provision so that such income could not be depleted by her acts, testator's main purpose was to protect life tenant, even against herself, and his interest in remainderman was secondary.

6. Wills ⇐684(2)

Where, in creation of testamentary trust which contained spendthrift provision, testator's main purpose was to protect life tenant, even as against herself, even if life tenant and remainderman were only persons having interest in trust, refusal to permit, even with consent of life tenant and remainderman, invasion of trust corpus so that remainderman could obtain monthly income prior to life tenant's death was proper.

7. Wills ⇐684(2), 713

Where remainder of testamentary trust was to go to named remainderman "or his heirs", if interest of named remainderman was either contingent or defeasible, heirs would take by purchase, and not by descent, and heirs' consent would be indispensable to an invasion of corpus.

8. Remainders ⇐10

A remainder may be vested and still be defeasible, that is, subject to being divested upon failure of a condition. West's Ann.Civ.Code § 694.

9. Wills ⇐634(8), 636

Gift to named remainderman "or to his heirs" at least creates a defeasible vested interest, if not a contingent interest. West's Ann.Civ.Code, § 694.

10. Wills ⇐684(2)

Where income from testamentary trust was to be paid to life tenant for life, with remainder to named remainderman "or his heirs", regardless of whether named remainderman's interest was vested but defeasible or was contingent, the heirs, including unborn issue of named remainderman, had interest in trust corpus, and, therefore, corpus could not be invaded without their consent.

11. Wills ⇐684(2)

Where unborn issue and other heirs of named remainderman had interest in trust corpus, there was no one, including guardian appointed to represent unborn issue, who could give consent to invasion of trust corpus and make such consent binding upon the unborn issue. West's Ann.Code Civ.Proc. § 373.5.

12. Guardian and Ward ⇐28

Guardian, who had been appointed to represent interest of unborn issue of named remainderman in trust corpus, was duty bound to protect interests of her wards and did not have power to consent to invasion of trust corpus in absence of showing that such invasion would be beneficial to the wards. West's Ann.Code Civ.Proc. § 373.5.

13. Guardian and Ward ⇐28

Representation made by a guardian must be real and not merely formal. West's Ann.Code Civ.Proc. § 373.5.

14. Judgment ⇐731

Prior judgment could not be used, in subsequent proceeding, to foreclose issues which were raised in subsequent proceeding but which were not necessarily decided in action resulting in the prior judgment.

15. Trusts ⇐58

Even if, in prior proceeding in which invasion of testamentary trust corpus was ordered for benefit of remainderman, court necessarily decided that remainder had indefeasibly vested in such remainderman, so that testamentary trusteee would be estopped from challenging such conclusion, refusal to allow further invasion of trust corpus for benefit of such remainderman would not be error in absence of showing

that case was proper one in which to exercise extraordinary power of modifying terms of the express testamentary trust.

W. D. Prideaux, Berkeley, Joseph L. Bortin, San Francisco, for appellant.

Allen G. Wright, San Francisco, Albert F. Skelly, San Francisco, of counsel, for respondent.

PETERS, Presiding Justice.

Mrs. Winifred Leonardini is the life tenant, and her son, Bradford Parrish, is a remainderman, of a trust set up by the will of Robert F. Lopez. By this proceeding these two beneficiaries sought to invade the corpus of the trust by asking for Mrs. Leonardini a monthly income in excess of the income of the trust, and by seeking for the remainderman a monthly income prior to the death of the life tenant. At the commencement of the trial the proceeding as to Mrs. Leonardini was voluntarily dismissed. A guardian was appointed to represent the interests, if any, of any unborn children of Bradford's that might have an interest in the remainder. This guardian joined in the answer of the trustee in opposing the invasion of the corpus of the trust,[1] but at the trial[2] joined with Mrs. Leonardini in consenting to the invasion. The trial court refused to permit the invasion. Bradford appeals.

The facts giving rise to the controversy are as follows: One Robert Lopez, a retired naval officer, who after his retirement, and up to the time of his death, lived in the household of Mrs. Leonardini, his goddaughter, died testate in 1936. By his will a portion of the estate was devised in trust. The income from the trust was to be paid to Mrs. Leonardini for life, with remainder at her death to "Bradford E. Parrish, or his heirs." Bradford is the son of Mrs. Leonardi, and was, at the time of trial, 37 years of age.

The trust provision in question bequeathed one-quarter of Lopez's contingent interest in the so-called Evans Trust,[3] and the rest, residue and remainder of his estate to respondent trustee. The trust provisions require that the net income shall be paid to Mrs. Leonardini for life, this portion of the trust being made a spendthrift trust, and then provides:

> "This trust shall cease and determine upon the death of said Winifred A. Leonardini and all the property then forming the property of this trust fund shall then go to Bradford E. Parrish or his heirs."

Under this section, the remainderman, Bradford, was entitled to nothing from the trust until the termination of the life estate of his mother. Nevertheless, Bradford contends that he is entitled to invade the corpus of the trust estate prior to his mother's death because of the following facts:

In 1934, prior to the death of Robert Lopez, Bradford sustained a serious head injury. Mr. Lopez paid the hospital and

1. There were other parties who joined in the answer, such as the former wife of Bradford's and certain relatives of Mrs. Leonardini, but they took no active part in the proceeding.

2. There is some dispute between the parties as to whether the guardian actually expressed such consent, or merely stated she was in "sympathy" with helping Bradford. When asked whether she was in "sympathy" with granting Bradford $400 a month from the corpus, she replied "I certainly am." When asked whether as guardian she was willing to have the order made, she replied "Oh, certainly." There would seem to be no doubt that this amounted to a consent by the guardian to the invasion of the corpus, if she was legally entitled to so consent.

3. The Evans trust had been created some years before by the brother-in-law of Lopez. By it Robert Lopez and his brother might become entitled to certain property upon the death of the life tenant of the trust. The two Lopez brothers agreed that when this remainder vested they would equally divide it. It was this remainder that was referred to above. When Robert Lopez died in 1936 the life estate in the Evans trust had not yet terminated. It was not until 1944 that the executor of the estate of Robert Lopez received the remainder of the Evans trust. In that year about $240,000 was distributed to the Wells Fargo Bank for the establishment of the trust here involved. Other than the interest in the Evans trust, the residue of Robert Lopez's estate was very small.

doctors' bills totaling over $3,000. After the death of Lopez in 1936, and after the establishment of the trust in 1944, Bradford suffered a second head injury which required extensive treatment. In 1948, on the application of Bradford, the corpus of the trust was successfully invaded by Bradford who secured a court order that $10,000 of the corpus should be used to pay his hospital and doctors' bills. Apparently Bradford did not completely recover from his injury, and his doctors recommended as practical therapy that he should attempt some form of organized study. Bradford decided to study law, and enrolled in a law school. The court found that his health and nervous condition improved as a result of this organized study. It is the theory of his petition that he cannot continue these studies without some financial assistance, and that from the corpus of the trust he should be advanced $400 a month until he becomes self-supporting. Undoubtedly, the evidence shows, and the trial court in effect found, that the law studies of Bradford were beneficial to him. His mother, the life tenant, as well as the guardian for the unborn children of Bradford, consent to the invasion of the corpus.

The trial court found the facts substantially as above set forth and then found that the remainder to Bradford "or his heirs," bequeathed to him a vested remainder subject to being defeated if he did not survive his mother. In that event, the heirs would take, said the court, not by descent, but by purchase. Thus, the interest of Bradford was found to be vested but defeasible. The court then went on to find that the main purpose of Lopez was to provide a life estate for Mrs. Leonardini, and that the terms of the will "do not reflect the showing of great affection for said Bradford E. Parrish by the Deceased, nor do the terms of the Will of the Deceased, above referred to, show that the guarding of the corpus of the trust fund was made so that Bradford E. Parrish would have over a quarter of a million dollars or any other sum at the death of his mother." The court found that the protective provisions surrounding the trust were for the benefit and protection of the life tenant.

In its conclusions the court determined that the interest of Bradford was a vested defeasible interest, subject to the condition that he survive his mother; that in the will there is no provision authorizing the trustee to distribute any of the corpus during the life of the life tenant, and that if Bradford fail to survive his mother the remainder would go to his heirs as purchasers. The court also concluded that it was without authority to invade the corpus of the trust without the consent of all the remaindermen adversely affected, and that, as to the remaindermen who were the unborn issue of Bradford, there "is no one who could give any consent to such a misuse and dissipation of the corpus of said trust fund, which could or would be binding upon such unborn issue."

[1–4] At the inception of the discussion it should be stated that there is no doubt that there is nothing in the will, or the decree of distribution, authorizing the trustee to use any portion of the corpus for the benefit of Bradford during the lifetime of the life tenant, his mother. Appellant and respondents also agree that a court, sitting in equity, may modify a trust, if the court believes, based upon the provisions of the will, and upon the surrounding circumstances, that the settlor would have taken such action had he foreseen the emergency that has arisen. It is well settled that, in the exercise of this power of permitting what the court believes that the settlor would have permitted had he anticipated the emergency that has arisen, the court may permit a deviation from the express terms of the trust, and may even permit a violation of an express term of the trust. 4 Pomeroy's Equity Jurisprudence (5th Ed.), § 1062b; Donnelly v. National Bank of Washington, 27 Wash.2d 622, 179 P.2d 333. But this power to modify a trust is a limited one. It is to be exercised sparingly and only in the clearest of cases. Moreover, all of the parties to this appeal are agreed, and it is the law, that where the rights of residuary beneficiaries may be adversely affected by the modification,

such modification is not permissible unless all of the beneficiaries adversely affected consent. See Estate of Van Deusen, 30 Cal.2d 285, 182 P.2d 565; Wogman v. Wells Fargo Bank, 123 Cal.App.2d 657, 267 P.2d 423; Restatement of Trusts, § 168; 2 Scott on Trusts, p. 852.

In the instant case Mrs. Leonardini, the life tenant and the one most directly affected by the invasion of the corpus, consented to such action. Bradford, the remainderman, by bringing this proceeding, not only consents but insists upon the modification. If these are the only two persons who have an interest in the trust, then all the consents necessary to confer upon the court the power to consider the merits of the application have been given.

[5, 6] On the merits of the application, and assuming that Mrs. Leonardini and her son are the only beneficiaries of the trust who could be affected by the modification, the court would have been justified in concluding that, under the facts, this was not a proper case in which to exercise the power, even though both beneficiaries consented. The court found all the facts that would have justified a denial on the merits. It is true that the trial court also found that beneficial rehabilitation of Bradford has followed from his organized study schedule. Indeed, the trial court even noted the probability that the failure to receive additional funds may cause a curtailment of this beneficial therapy program and perhaps a relapse in the mental health of the appellant. But a showing of need is not equivalent to a showing that this need should be met by invading the corpus of this trust. The trial court found that the legal and moral duty of supporting appellant rests primarily upon his mother. She receives an income of $600 a month from the trust and also rent free occupancy of a house maintained by the trustee. While the lower court was solicitous of appellant's well-being, it concluded that the primary duty of support rested upon the mother. Moreover, in order to invade the corpus, the court, as already pointed out, would have to ascertain the presumed intent of the testator—that is, ascertain what the testator would have done had he contemplated the claimed emergency that has arisen. The trial court determined that the main purpose of the testator was to protect Mrs. Leonardini, even against herself, and that the testator's interest in the appellant was secondary. An examination of the terms of the trust discloses that this is so. The testator set up this trust for the life of Mrs. Leonardini and provided that the total income should be paid to her for that period. To protect her against herself, and to assure that this income should not be depleted by her acts, he made this a spendthrift trust. It certainly violates the spirit of the spendthrift provisions to permit Mrs. Leonardini, by consenting to an invasion of the corpus, to thus permit her to consent to its diminution—the very thing the testator tried to prevent by the spendthrift provision.

Thus, the trial court found all the necessary facts that would have justified it, on the merits, in denying the requested modification. The judgment can be sustained on this ground alone, even if Mrs. Leonardini and appellant were the only persons with an interest in the trust, and even though the trial court may have been in error in holding that others, in addition to appellant, have an interest in the remainder. These findings, under the circumstances, even if erroneous, could be disregarded as surplusage. Alonso v. Hills, 95 Cal.App.2d 778, 214 P.2d 50.

The trial court, however, did not rest its judgment solely on the above findings, but also concluded that the interest of Bradford in the remainder was vested, but defeasible. The court interpreted the language that upon the death of Mrs. Leonardini the trust should terminate and the corpus should then go to appellant "or his heirs," to mean that the will created remainders in the alternative, that is, such words gave the heirs an interest if appellant predeceased the life tenant. It held, therefore, that appellant's interest was vested but defeasible, that is, subject to being divested if appellant predeceased the life tenant. If appellant should predecease the life tenant, the court held that the remainder interest would go to the heirs by purchase and not by descent. Based on this holding, the trial court concluded that it was "without authority" to

invade the corpus without the consent of the live and unborn heirs of appellant, and that as to such unborn heirs "there is no one who could give any consent to such a misuse and dissipation of the corpus of said trust fund, which could or would be binding upon such unborn issue." Thus, in effect, the court held that consent attempted to be given by the guardian was ineffectual.

These findings present two issues: First, was the court correct in holding that under the trust the heirs of appellant take by purchase and not by descent, and second, if so, was the consent to the invasion of the corpus given by the guardian for the unborn heirs legally sufficient?

[7] As already indicated, the trial court held that the interest of appellant was vested but subject to being divested by his death before that of the life tenant. If the interest of appellant is either contingent or defeasible, the heirs take by purchase and not by descent, and their consent is indispensable to an invasion of the corpus. The parties seem agreed that the interest of appellant was vested, and base that conclusion on Estate of Norris, 78 Cal.App.2d 152, 177 P.2d 299, 306. Undoubtedly, this court held in that case that a decree of distribution which provided that a gift, after a life estate, to the children "or their legal heirs by right of representation," created a vested remainder in the children. The quoted phrase is, of course, equivalent to "or his heirs" found in the present case. But the court did not hold that in every case the quoted phrase made the remainder a vested one, but held that under all the provisions of the decree of distribution, discussed at length in the opinion, an intent appeared to make the remainder vested. The cases on this subject are in hopeless conflict, and seldom, if ever, turn solely upon the words "or his heirs" or their equivalent. The great majority of them turn upon all of the provisions of the trust, the courts trying to ascertain the intent of the testator. See annotation 128 A.L.R. 306. That annotation certainly refers to many cases holding that such a remainder, as distinguished from one to X "and his heirs" may be contingent and is not always vested.

The Restatement of Property, section 252, provides:

> "In a limitation purporting to create a remainder or an executory interest, in 'B or his children,' or in 'B or his issue,' or in 'B or his descendants,' or by other language of similar import, the alternative form tends to establish as to the interest of B that
>
> "(a) a requirement of survival to the end of all preceding interests exists; and
>
> "(b) such survival is a condition precedent of such interest."

In the instant case there is little in the decree of distribution or in the will from which to determine the testator's intent in this regard. It would seem that in the absence of any explanatory language that the language to X "or to his heirs," creates a contingent and not vested remainder.

[8, 9] But even if the remainder were vested it was then subject to a condition, that is, subject to being divested by death before that of the life tenant. There can be no doubt that a remainder may be vested and still be defeasible, that is, subject to being divested upon failure of a condition. Section 694 of the Civil Code recognizes this. Again this becomes a question of interpretation. In the absence of any other language in the will or decree of distribution explanatory of the phrase, under the constructional preference stated in section 252 of the Restatement of Property above quoted, such phrase should be construed, if not creating a contingent interest, at least as creating a defeasible vested interest. See cases collected 128 A.L.R. 306, at p. 336 et seq. It is worthy of note that the will and decree of distribution here involved contain some language in support of the interpretation that this remainder was intended to be defeasible. The will, in addition to the trust here involved, created another trust. This other trust created a life estate for one Claribel H. Kirby, and after her death a life estate to Mrs. Leonardini, "or if she be not then living to her son Bradford E. Parrish or his heirs." The decree of final distribution, which of course controls the language of the will, interprets

this clause to mean "The remainder estate or interest, after the termination of the life estate of Claribel Hughes Kirby in that certain trust fund * * * is hereby distributed to Winifred A. Leonardini, on the condition and provided that she survive said Claribel Hughes Kirby, and otherwise to Bradford E. Parrish, the son of said Winifred A. Leonardini, on the condition and provided that he, too, survive the said Claribel Hughes Kirby as well as his mother, Winifred A. Leonardini, and otherwise to the heirs of said Bradford E. Parrish." This interpretation of the phrase to "Bradford E. Parrish or his heirs" appears in the decree of distribution before the provisions in reference to the instant trust. It is reasonable to assume, inasmuch as "Bradford E. Parrish or his heirs" are given remainders in two trusts, and the court having already expressly interpreted such language to mean as to the first trust that Bradford must survive his mother to take, that the court, in its decree of distribution, when it simply provided as to the second and instant trust that the remainder was to go to appellant "or his heirs" intended that language to mean precisely what it, in other portions of the decree, had already held the same language to mean. The words of the will as to both trusts were identical. They obviously should be interpreted to mean the same thing.

[10, 11] Thus, whether the interest of appellant is vested but defeasible, as held by the trial court, or contingent, the heirs of appellant, including unborn issue of appellant, have an interest in the corpus of the trust. The trial court was correct, therefore, in holding that the corpus of the trust could not be invaded without their consent. The guardian for such unborn issue attempted to consent to the invasion. That being so, was the trial court correct in holding that it was "without authority" to invade the corpus because there was "no one who could give any consent to such a misuse and dissipation of the corpus * * * which could or would be binding upon such unborn issue"? We think that it was.

[12, 13] The guardian was here appointed under the terms of section 373.5 of the Code of Civil Procedure. She joined with the trustee in an answer opposing the petition. But, as already pointed out, as a witness, she consented to the invasion. As a guardian she was duty bound to protect the interests of her wards, the unborn issue of appellant, who could not speak for themselves. The representation by the guardian must be real and not merely formal. Wogman v. Wells Fargo Bank, 123 Cal.App.2d 657, 267 P.2d 423. The guardian had no power to consent to an act hostile and adverse to the interests of her wards, in the absence of some showing that such invasion of the wards' rights might be beneficial to them. There are cases where a guardian of unborn issue may lawfully consent to an invasion of the corpus of the trust in which they have a remainder interest. Thus, in Mabry v. Scott, 51 Cal. App.2d 245, 124 P.2d 659, the court permitted the guardian to consent to a compromise settlement that affected the corpus, because, under the facts, this saved the corpus from being depleted by expensive litigation. Other situations undoubtedly exist where it would be to the best interests of the unborn remaindermen that their guardian be permitted to consent to an invasion of the corpus. But, in the absence of any evidence that the unborn remaindermen would be so benefited, the guardian is without power to consent to direct invasion of the unborn remaindermen's rights. That is the necessary implication of the Wogman case, supra.

In the instant case, the trial court on the showing made was correct in concluding that it was "without authority" to permit the invasion of the corpus—that is, without authority to accept the purported consent of the guardian in the absence of showing of benefit to the wards.

Appellant, apparently recognizing that the guardian was under a positive duty to represent the best interests of her wards, and had no power to consent to an invasion of their rights in the absence of evidence of some benefit to them, argues that the guardian in consenting may have felt that she was helping the unborn issue to come into existence by making Parrish self-supporting instead of living in "poverty." Is there any reasonable ground for believing that the "rich" are more likely to have

children than the "poor"? We think not. There was not one word of evidence that the invasion would, in any way, benefit the wards. The evidence is to the contrary. Under those circumstances the lower court was justified in finding, in effect, that the consent was not consistent with the duty owed the unborn issue, and that under the facts there was no real consent. Therefore it was "without authority" to permit the invasion.

[14, 15] Rather belatedly, after failing to even mention *res judicata* in his opening brief, appellant in his closing brief argues that the issue here involved has already been litigated. Appellant had pleaded, and there was no denial, that in 1948 the Superior Court had permitted Parrish to invade the corpus to the extent of $10,000 to pay hospital bills and doctors. There is nothing in the record to show the circumstances of that award. There is nothing to show that the court then determined that appellant's interest was vested and indefeasible. There is nothing to show whether or not a guardian was appointed and whether he did or did not consent to the invasion. There is nothing to show whether that invasion was or was not in the best interests of the unborn issue. What issues the prior adjudication settled are not set forth. The prior judgment cannot be used to foreclose issues which were not necessarily decided in that action. Moreover, even if, in the prior proceeding, the court necessarily decided that appellant's remainder was indefeasibly vested, so that respondent would be estopped from challenging that conclusion, such conclusion would not require a reversal. That is so because, as already pointed out, even if Mrs. Leonardini and her son are the only persons beneficially interested in the trust, the trial court was justified in finding, on the merits, that this was not a proper case to exercise the extraordinary power of modifying the terms of an express trust.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Oscar Leon WILKES and Lewis Edward Jones, Defendants and Appellants.

Cr. 3042.

District Court of Appeal, First District, Division 2, California.

Feb. 25, 1955.

Hearing Granted March 22, 1955.*

Defendants were convicted of burglary. The Superior Court, Marin County, Thomas F. Keating, J., rendered judgment, and defendants appealed. The District Court of Appeal, Kaufman, J., held that circumstantial evidence, including possession of burglary tools shortly after commission of crime and scientific evidence in regard to paint and tool markings, sustained conviction for burglary.

Judgment affirmed.

Dooling, J., dissented.

1. Burglary ⇐43

Possession of burglary tools shortly after commission of crime is not alone sufficient to prove guilt.

2. Burglary ⇐43

Circumstantial evidence, including possession of burglary tools shortly after commission of crime and scientific evidence in regard to paint and tool markings, sustained conviction for burglary.

3. Jury ⇐92

Relationship which will require granting of challenge for cause must be relationship to defendant or to party injured or who would normally be complaining witness, and past attorney-client relationship between deputy district attorney and a prospective juror did not require sustaining challenge. Pen.Code, § 1074.

4. Criminal Law ⇐1166½(8)

Where juror was removed by peremptory challenge, and defendant did not use all peremptory challenges, trial court's failure to sustain challenge for cause was not prejudicial error.

* Opinion vacated 284 P.2d 481.

5. Jury ⇐110(1)

Defendants who failed to challenge juror for cause waived any objection they might have had.

6. Witnesses ⇐337(5)

Defendant may not be impeached by showing a prior misdemeanor conviction.

7. Criminal Law ⇐1171(1)

Where defendant had admitted to "quite a few" felony convictions, and later in trial volunteered information concerning a misdemeanor conviction, district attorney's inquiry concerning prior conviction was not prejudicial in allegedly seeking to bring out misdemeanor conviction.

8. Criminal Law ⇐706

Where defendant, in explaining why he failed to answer a question at preliminary hearing, voluntarily explained the reason to be connected with a prior conviction, inquiry whether he had refused to answer the question was not an improper attempt to force him to reveal prior conviction. Pen.Code, § 166.

9. Witnesses ⇐379(9)

A defendant may be impeached by showing that he refused to answer same question at preliminary examination that he answered freely at trial.

10. Witnesses ⇐379(9)

Statements made before grand jury which are inconsistent with those made at trial are admissible for purposes of impeachment.

11. Witnesses ⇐379(9)

Where defendant had refused to answer question at preliminary hearing, but answered it at trial, his refusal to answer question at preliminary hearing could be shown for impeachment purposes.

12. Criminal Law ⇐785(12)

In burglary prosecution, instruction on weight to be given other persons' admissions and contradictory statements admitted for impeachment sufficiently warned jury of caution with which to receive prior inconsistent statements.

13. Criminal Law ⇐783(2)

In burglary prosecution, instruction of weight to be given defendant's admission of earlier burglaries was fair to defendant.

14. Criminal Law ⇐730(11)

In burglary prosecution, wherein it appeared that defendant's wife could have testified concerning an essential element of case, prosecutor's remarks concerning wife's failure to testify were not prejudicial, under full and correct instructions as to weight to be given prosecutor's argument. West's Ann.Code Civ.Proc. § 1963; Pen. Code, § 1323.

Carl B. Shapiro, Fairfax, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., W. O. Weissich, Dist. Atty. of Marin County, Roger Garety, Chief Criminal Deputy, San Rafael, for respondents.

KAUFMAN, Justice.

Appellants, Wilkes and Jones, appeal from a judgment of conviction of burglary, committed in Marin County on January 31, 1954. They were arraigned on March 1, 1954 and entered pleas of not guilty on March 8. After trial by jury, verdicts were returned finding each defendant guilty of burglary in the second degree. Motion for new trial was denied.

It is contended on this appeal that the evidence is insufficient to support the judgments of conviction, in that appellants' conviction rests exclusively upon circumstantial evidence that is weaker than that in any reported case in which a conviction has been upheld.

The burglary with which appellants were charged, occurred at the Village Inn at Novato in Marin County sometime between 3:30 a.m. and 7:00 a.m. on January 31, 1954. A bartender at the Village Inn placed the money in the safe, locked the safe and the door leading to the room in which the safe was located, and left the premises between 3:30 a.m. and 3:45 a.m. on the morning of January 31. When another bartender arrived at 7:00 a.m. on the same day, he noticed that the Dutch door in the rear of the building had been forced open, and the door leading to the room containing the safe had been broken open. The safe had been badly damaged. Its dial was de-

tached and lay on the floor. The owner of the bar estimated that approximately $1,674 in money was taken from the safe and one and one-half cases of whiskey from the bar.

A thorough search revealed no complete recent fingerprints, indicating that the burglars must have worn gloves. Certain chips of paint were discovered on the floor a few feet from the safe by a deputy sheriff who was called to investigate the crime.

Appellants were seen in the early morning hours of February 2, 1954, by a deputy sheriff who found them asleep in an automobile in a residential district of Fresno. With the assistance of two other officers he placed appellants under arrest. The officers searched the car, and found in the trunk a pair of vise grip pliers with drift punch attached. Both appellants denied ownership of this tool, which is a burglary tool commonly used for safe breaking. A tire iron was found in the front of the car, and Jones admitted that he owned it although at the trial he denied that it was in his car on the night of the arrest. Paint smears appeared on the tire iron which had been transferred to it under pressure. The paint smear consisted of three layers, the top layer, a certain shade of cream, the middle layer, a different shade of cream, while the bottom layer was a reddish brown paint. A few small chips of paint with the same color arrangement also appeared on the tire iron. The paint on the tire iron was identical in shades and arrangement to the paint chips which were found on the floor near the safe.

In the back seat of the car were certain newspapers, a San Francisco Examiner dated January 27, 1954, a San Francisco Chronicle of January 30, 1954, and a San Francisco Examiner of February 1, 1954. Both appellants said that the Examiner of February 1 was bought in Bakersfield, but denied any knowledge of the other papers.

The officers found two boxes of washers in the car, one in a suitcase in the trunk, and another on the floor. (People's Exh. 15 & 16.) Wilkes when questioned about one box of washers, the People's Exhibit No. 15, admitted that they had been used in building a trailer in Arkansas, and that he had thrown the washers which had been left over into his suitcase. At the trial he denied that he had ever seen the washers or that he had made the above statement concerning them to the police. The manager of the hardware store in Novato identified this box of washers by means of certain markings which he had made on the box in taking inventory. He was therefore able to state that this box had been in the Novato store until shortly after the first of the year 1954. Wilkes denied ever having been in Novato.

Two pairs of gloves were found in the car during the search.

Mr. David Burd, criminologist in the laboratory of the California State Bureau of Criminal Identification and Investigation, an expert on markings left by tools, testified that it was his opinion that the drift punch tool found in appellants' car was the tool which had made the marks on the spindle which was removed from the bar safe during the burglary. He based this opinion on the fact that there was an 80% correspondence between lines left by the tool mark on the spindle and those made in tests with this tool, whereas marks made by two different tools ordinarily do not have more than 25% correspondence.

Appellant Jones and Wilkes testified that on January 25, 1954, they left Arkansas for California. They arrived in Truckee on January 29. Jones, at the time of his arrest, said that he and Wilkes had been in Arizona on January 30 and had come into California on Route 66. Again, Jones denied that he had been in California during the month of January. Wilkes stated that they had entered California via Route 66. Jones denied at the trial that appellants had ever stated that they had entered California via Route 66, or that they were not in California in January.

Appellants testified at the trial that they drove from Truckee to Sacramento, then went through Stockton and on to Bakersfield and Los Angeles. Wilkes did not remember, and Jones denied, that they drove through Oakland or its suburbs, although prior to the trial Wilkes told the police that they had driven from Truckee to Oakland and had stopped there, before going on to

Los Angeles, and had also testified to this effect at the preliminary examination.

The purpose of appellants' trip to California was, according to their testimony, to find employment in construction work. They said they checked with union halls in cities through which they passed, but did not check on work in the Oakland-San Francisco area, but intended to stop at San Francisco on their way back from Los Angeles. They arrived in Los Angeles, they said, on the morning of January 30, a Saturday, and called the union but were unable to contact the business agent. They then rode around looking for construction jobs, but admitted that on Saturday there was usually no one on these jobs.

In the afternoon of January 30, appellants said that they went to a bar where later they met two women with whom they spent the evening at the bar, and the remainder of the night at their apartment. They knew only the women's first names, could not identify the location of the bar or the women's apartment. They said that at 6:00 a.m. on January 31, they left the apartment, and after a long distance call to Wilkes' wife in Texas, went to visit Wilkes' mother in Los Angeles at about 8 a.m., and remained at her apartment for about an hour and a half.

Appellant Wilkes' mother testified in support of her son's alibi as to the visit at her apartment. However, the owner of the apartment building testified that she did not move into the apartment at the address where the visit was supposed to have taken place until February 23, 1954. Wilkes' mother was also impeached by a showing that she had been convicted of a felony.

Later in the morning of January 31, at about 11:30, appellants checked into a motel in Bakersfield. Wilkes registered for them, using the name J. S. Wright.

Appellants concede that circumstantial evidence is sufficient to support a conviction for burglary, but contend that a study of the cases reveals that in no case where such a conviction has been upheld on appeal has there been as little evidence to connect defendants with the crime as in the present case. Since appellants admit that there is circumstantial evidence herein to connect defendants with the crime, although they discount its importance, they are really arguing the question of the weight of the evidence and the credibility of witnesses which are questions to be decided by the jury.

It is argued that appellants were arrested within two days after the burglary was discovered, and no large sums of money and no whiskey were found in their possession. It is not incredible that the loot could have been concealed or disposed of within 48 hours. Appellants stress the fact that they were arrested a great distance from the scene of the crime—the distance from Novato to Fresno—and the fact that they arrived in California only 24 to 30 hours before the crime was committed. It cannot be said that it is inherently incredible that they could have covered the distances involved in their 1953 model automobile. Again, it is said that the only link in the chain of circumstances which connects them with the town where the crime was committed is the box of washers which was identified by the hardware store owners as having come from the stock in his store sometime after the first of the year. They say it is uncontradicted that appellants were in California Friday evening, Saturday, Sunday and Monday, and that Sunday afternoon and evening were spent in Bakersfield. The jury could have believed that Sunday afternoon and evening were spent in Bakersfield, as testified to by the motel owner, and also disbelieved appellants' testimony concerning their whereabouts and activities on the preceding days.

The scientific evidence concerning the paint smears and chips found on the tire iron, which Jones first admitted was his, although he denied ownership at the trial, is very convincing. The colors and arrangement of the layers of paint on the tire iron were the same as those found on the floor near the safe. The markings made by the drift punch—a common burglary tool—corresponded to such a high degree with test markings made by the same tool, that the jury could reasonably infer that the markings on the spindle were not made by any other tool than that introduced as an exhibit in evidence by the People.

The alibi testimony evidently did not impress the jury, and this is not surprising, in view of the fact that appellant Wilkes' mother's testimony was contradicted by the landlord's testimony that she did not rent the apartment in Los Angeles where appellant's visit was supposed to have taken place till weeks after the date of the alleged visit. Furthermore her testimony was impeached by showing of a prior conviction of a felony, and that of her son, by more than one felony conviction.

In People v. Taylor, 4 Cal.2d 495, 50 P.2d 796, a burglary case, wherein the only evidence connecting defendant with the scene of the crime was an imprint of a rubber heel found on an invoice near the burglarized safe which appeared to have been made by a shoe belonging to defendant and found in his apartment, the conviction was upheld against the contention that the evidence was insufficient, even though the court stated that it was far from conclusive.

[1, 2] While it is true that possession of burglary tools shortly after the commission of a crime is not sufficient alone to prove defendant's guilt, when that factor is combined with other circumstances, such as were proved here, there is sufficient evidence. See People v. Godlewski, 22 Cal.2d 677, 685, 140 P.2d 381. In such cases the corroborating evidence need be but slight. People v. Parkinson, 138 Cal.App. 599, 609, 33 P.2d 18. Here the scientific evidence in regard to the paint and tool markings are extremely convincing. And the jury may well have believed the testimony as to the prior statements made by appellants rather than their later inconsistent statements made at the trial. The jury no doubt also believed the testimony which completely shattered appellants' alibi.

[3, 4] It is contended that appellants were deprived of a fair trial because prejudicial error was committed in the selection of the jury. A prospective juror Mrs. Worlund was challenged for cause because a deputy district attorney had once been her attorney. He had some months prior to the trial drawn a will for her. The challenge was denied, but appellants used one of their peremptory challenges to remove her from the jury. The judge pointed out that the number of prospective jurors remaining at that time was only seventeen. He ruled that the relationship in this case was not one that comes within Section 1074 of the Penal Code, since the relationship must be to the defendant or to the party injured or who would normally be the complaining witness. It is settled that this interpretation is correct. People v. Conte, 17 Cal.App. 771, 788, 122 P. 450, 457; People v. King, 30 Cal.App.2d 185, 85 P.2d 928. It is clear, therefore, that there is no ground for the claim of prejudice in this instance. Furthermore, the claim is completely unfounded, in view of the fact that appellants exercised a peremptory challenge to remove Mrs. Worlund from the jury.

[5] Appellants claim that Mr. Pierce who served on the jury was not challenged for cause in view of the ruling of the court in regard to Mrs. Worlund, even though in his case an attorney-client relationship existed with the district attorney, although not with the deputy trying the case. Since appellants did not challenge the juror for cause, they undoubtedly waived any objection they might have had. People v. Young, 21 Cal.App.2d 423, 428, 69 P.2d 203. Furthermore, they used only nine of the twenty peremptory challenges allowed to them. In People v. Goldberg, 110 Cal.App.2d 17, 23, 242 P.2d 116, it is said that if an appellant complains that a challenge for cause was improperly denied, he must show as a condition precedent that he has exhausted his peremptory challenges.

[6] It is urged that prejudicial error was committed by the district attorney's attempt to impeach appellant Wilkes by showing a prior misdemeanor conviction. It is settled that such impeachment is improper. People v. Hamilton, 33 Cal.2d 45, 198 P.2d 873. However, in the case herein appellant Wilkes was asked if he had ever been convicted of a felony. He replied: "Yes, quite a few, sir." The district attorney asked him to tell what felony he was convicted of. He answered that he had been convicted of burglary in 1947 for stealing

20 shotguns and that he was sentenced to the Texas State Penitentiary. The trial judge told him that he only needed to state "when and where and what was the charge." He was asked: "What was the second felony?" and responded: "Forgery of a bill of sale." Then the district attorney asked: "What was the third felony?" Wilkes answered: "I don't know if I was convicted of a felony that time or not." He was asked: "What crime was that, forgery." His counsel objected, and the objection was overruled. The district attorney then inquired: "Were there any others you were convicted of?" and he replied: "Felonies? No, sir."

It is obvious that appellant himself placed in doubt whether or not he had been convicted of a third felony. He himself gave the impression at the outset that he had been convicted of at least three felonies when he said that he had been convicted of "quite a few." In People v. O'Brand, 92 Cal.App.2d 752, 756, 207 P.2d 1083, it was contended that the district attorney must show that the conviction with which he attempted to impeach the defendant was a felony conviction by showing that defendant had in fact served a prison sentence. It was held in that case that the conviction of a crime designated a felony could be shown to impeach the accused without proving that he has been sentenced to the state prison.

[7] Appellant suggests that it was known to the deputy and this trial judge that he had been tried in that very county and that the conviction was for a misdemeanor. There is nothing in the record to show that the conviction to which appellant was referring at this time was one that had taken place in that same court. Appellant had admitted to "quite a few" felony convictions, and the district attorney had no way of knowing what might be forthcoming. Later in the trial this appellant, when asked if he had ever been in Marin County, said: "Yes, you convicted me of a felony here in Marin County, or a misdemeanor, I don't know." Since appellant volunteered this information, it is difficult to see how he can claim that any prejudice resulted from the question asked earlier by the district attorney.

[8-11] Appellant Wilkes was asked over objection if he had not refused at his preliminary hearing to answer a specific question as to his whereabouts on a certain date. He complains that he was forced to explain his prior conviction for a violation of Penal Code, section 166. He was asked nothing at all about his conviction for this violation, but volunteered the information in explaining why he had refused to answer the question at the preliminary hearing. It would appear perfectly proper to impeach a defendant by showing that he refused to answer the same question at the preliminary examination that he answered freely at the trial. A witness may certainly be impeached by showing inconsistent statements made at the preliminary examination. People v. Adams, 137 Cal. 580, 70 P. 662; People v. Chrisman, 135 Cal. 282, 67 P. 136. This is in effect the same situation as that in the present case. Statements made before the grand jury which are inconsistent with those made at the time of trial are admissible for purposes of impeachment. People v. Kynette, 15 Cal.2d 731, 104 P.2d 794, and it has been held that refusal to testify before the grand jury may be shown for that same limited purpose at the trial. People v. Montgomery, 47 Cal.App.2d 1, 117 P.2d 437. Clearly, there was no error in allowing the prosecution to show appellant's refusal to answer the same question at the preliminary hearing.

[12] It is argued that prejudicial error was committed by the court in failing to give an instruction warning the jury that evidence of prior inconsistent statements should be received with caution. Appellants have evidently overlooked some of the instructions given by the court. An instruction was given that evidence of the oral admission of a party "other than his own testimony in this trial, ought to be viewed by you with caution." Another instruction advised the jury that contradictory statements or evidence of possibly contradictory statements might be considered only for the purpose of possible impeachment of the witness.

[13] Appellants complain generally of an instruction saying that "inherent in these statements is an assumption of the truth of the charges." In the instruction the trial judge cautioned the jury because he felt that the district attorney may have given them the impression that they could consider an alleged earlier admission of appellant Wilkes concerning prior burglaries, as evidence that he might have committed this one. The court gave a detailed and lucid instruction pointing out that this might be considered only for impeachment, and was not competent evidence to prove that appellant committed the crime with which he was now charged. This instruction was very fair to appellant, as were the instructions as a whole.

Finally, misconduct of the district attorney is charged, in that the district attorney discussed over objection the contempt citation and conviction as well as the failure of Mrs. Wilkes, wife of one appellant, to testify. The district attorney could properly comment on the evidence in the record concerning appellants' refusal on the preliminary examination to answer the question as to his whereabouts at a certain time. See People v. Planagan, 65 Cal.App. 2d 371, 407, 150 P.2d 927; People v. Reznick, 75 Cal.App.2d 832, 841, 171 P.2d 952.

[14] The court overruled appellant's objection that the reference to Mrs. Wilkes' failure to testify was prejudicial misconduct, stating that the question was not the right of the wife not to testify, but whether or not the best evidence had been brought out by the party to whom it was available. Counsel for appellants had discussed at some length evidence of the long distance phone call alleged to have been made by appellant Wilkes to his wife. Appellants cite generally People v. Klor, 32 Cal.2d 658, 197 P.2d 705; People v. Harmon, 89 Cal. App.2d 55, 200 P.2d 32; Thompson v. Hickman, 89 Cal.App.2d 356, 200 P.2d 893, and People v. McMahon, 116 Cal.App.2d 883, 254 P.2d 903, saying that a study of these cases will show that the rule is becoming crystallized in our law that such behavior as that noted above is misconduct. It is true that those cases indicate that such comment is considered misconduct, but not necessarily prejudicial error. Where, as here, the testimony of the wife concerns an essential element of the case, the failure to place her on the stand appears to be relevant. Here her testimony would be the best evidence available on a particular point therefore it would be proper for the state to comment on whether there was better evidence than offered, and thus a rebuttable presumption that it would be adverse to that actually offered. Code Civ. Proc. sec. 1963.

In People v. Klor, supra, a case where defendant was charged with assault with intent to commit murder, the prosecuting attorney repeatedly referred to the fact of the failure of defendant's wife to testify. He was admonished by the court and an instruction was given that neither side was obliged to call as witnesses all persons shown to be present or who might appear to have some knowledge. In view of the instruction and the fact that the evidence clearly established the guilt of defendant, the court held the misconduct did not warrant a reversal. In People v. Briggs, 20 Cal.2d 42, 123 P.2d 433, such misconduct was not considered reversible error where the court gave an instruction concerning the matter, although such instruction was not entirely accurate.

In the case of Thompson v. Hickman, 89 Cal.App.2d 356, 200 P.2d 893, the leading cases concerned with this subject were analyzed, although that case itself dealt with the incompetency of a plaintiff as a witness in a suit against the estate of a deceased person. It is there noted that in People v. Heacock, 10 Cal.App. 450, 102 P. 543, the court advised the district attorney on a retrial of the case to refrain from such comment, and in People v. Terramorse, 30 Cal.App. 267, 157 P. 1134, 1137, the court considered such comment prejudicial, but remarked that if the case had proceeded with "decorum and courtesy" this one instance of misconduct might not have been sufficient to warrant a reversal.

The Heacock and Terramorse cases were decided prior to the 1935 amendment to section 1323 of the Penal Code, which allows counsel to comment on the failure of defendant to testify. When these cases

were decided section 1323 provided that defendant's neglect or refusal to be a witness could not be used against him at the trial. The Heacock case in deciding that such comment should not be made, reasoned that since section 1323 prohibited comment on defendant's refusal to testify, such comment should not be permitted on his wife's refusal to testify, since under section 1322 she was incompetent as a witness without the husband's consent. See 8 Cal.Jur. 270, § 331. Since section 1323 now specifically permits comment on the defendant's refusal to testify, the reason supporting the Heacock and Terramorse cases would seem to have been removed.

However, the case of People v. Klor, supra, would indicate that such comment is still considered erroneous, but may be cured by instruction. In the present case the instructions as a whole were comprehensive and very fair to appellants, and an instruction was given cautioning the jury "to distinguish carefully between the facts testified to by the witnesses and the statements made by counsel, or contained in their arguments, as to what facts have been proven, and if there is a variance between the two, you must, in arriving at your verdict, consider only the facts testified to by the witnesses; and you are to remember that statements of counsel themselves are not evidence in the case."

The jury having been fully and correctly instructed as to the weight to be given to counsel's argument, it does not appear that any prejudice could have resulted from the remarks of the prosecuting attorney concerning the failure of Mrs. Wilkes to testify. See People v. Amaya, 40 Cal.2d 70, 251 P.2d 324; People v. Sampsell, 34 Cal.2d 757, 764, 214 P.2d 813.

Judgment affirmed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I dissent. This case is one which depends entirely upon circumstantial evidence. No witness by direct testimony placed the appellants in the vicinity of the crime and and no part of the stolen property was found in their possession. Appellants both testified that Wilkes telephoned to his wife, and that both talked to her, from Los Angeles at a time which would have made it impossible for them to be at the place of the burglary in Novato when it occurred. On oral argument the prosecuting attorney asked why Mrs. Wilkes had not been called as a witness to corroborate this telephone call. Counsel objected to this argument and asked that the court instruct the jury as to the right of a wife not to testify. The court not only failed to do this but instead commented: "The question is not her right not to testify, but whether or not *the best evidence has been brought out by the party to whom it is available.*" (Emphasis mine.) The court then permitted the prosecuting attorney to continue: "Why didn't she take the stand and testify for him? Who would know better than she whether or not Oscar Leon Wilkes called from Los Angeles on the morning of January 31st? You didn't hear from her. * * * Where was Maxine Wilkes during these last four days. She wasn't on the stand."

Following this the court instructed the jury, as a part of the formal instructions at the close of the case: "Another principle I think you should be instructed on is this: That evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which is in the power of one side to produce * * * and if weaker or less satisfactory evidence is offered when it appears stronger and more satisfactory evidence was within the power of a party the evidence offered should be viewed with distrust."

The jury was thus plainly told that it should distrust the evidence of both appellants that they talked to Mrs. Wilkes on the telephone because Mrs. Wilkes was not produced as a witness.

As late as People v. Klor, 32 Cal.2d 658, 663, 197 P.2d 705, 708, our Supreme Court has reiterated that: "It is the law that neither husband nor wife is a competent witness *for* or against the other in a criminal action * * * except with the *consent of both.*" (Emphasis mine.) Since the *wife must consent* to be called, even as a witness *for* her husband, he cannot be charged with the failure to call her. The

misconduct of the prosecuting attorney and the court in this instance is therefore too clear for argument.

The general instruction that the jury is to look to the evidence rather than to arguments of counsel did not cure this misconduct. There was in this case no such instruction as in People v. Klor, supra, that "neither the prosecution nor the defense is required to call as its own witnesses all persons * * *." 32 Cal.2d at page 664, 197 P.2d at page 708. Quite the opposite as the instructions above quoted show, the jury was in effect instructed that it should view the appellants' evidence on this point *with distrust because Mrs. Wilkes was not called as a witness.* This was an instruction on how the jury *should weigh the evidence* and no general instruction that the jury should look to the evidence rather than to counsel's arguments could ameliorate it.

On this case depending solely on circumstantial evidence for a conviction the prejudice of this misconduct to appellants is so clear to me that I believe the judgment should be reversed.



131 Cal.App.2d 227

Sam H. RUDNICK, Plaintiff and Respondent,

v.

Beulah Loretta RUDNICK, also known as Beulah Loretta Davis, Defendant and Appellant.

Civ. 4694.

District Court of Appeal, Fourth District, California.

March 2, 1955.

Rehearing Denied March 22, 1955.

Hearing Denied April 27, 1955.

Man's action for annulment. From an adverse judgment and order of Superior Court, Kern County, Warren Stockton, J., the woman appealed. The District Court of Appeal, Barnard, P. J., held that where the woman's Mexican divorce decree as to prior marriage was invalid, even under laws of Mexico, for want of jurisdictional prerequisites, he could attack validity notwithstanding the rule that a stranger to a foreign divorce decree can impeach it collaterally for fraud only when it injuriously affects him.

Affirmed.

1. Marriage ⇐60(7)

In man's action for annulment, evidence, if properly admitted, sustained trial court's findings that woman had represented that she had obtained divorce in Kern County from previous husband but in truth had secured no divorce and that plaintiff had not participated in or had knowledge of her Mexican divorce proceeding.

2. Divorce ⇐385(3)

In man's action for annulment, he could attack woman's Mexican divorce decree, as to prior marriage, which was invalid even under laws of Mexico, notwithstanding rule that stranger to foreign divorce decree can impeach it collaterally for fraud only when it injuriously affects him.

3. Divorce ⇐415

In man's action for annulment, evidence sustained finding that jurisdictional facts to support Mexican divorce decree, even under laws of Mexico, were lacking. West's Ann.Code Civ.Proc. §§ 1855, 1904, 1906, 1907.

4. Evidence ⇐332(1)

Code sections prescribing how judicial record may be proved are designed to show how existing court record may be proved and are not applicable or controlling where there is no court record and cannot deprive party of right to show that no such record in fact exists. West's Ann.Code Civ.Proc. §§ 1855, 1904, 1906, 1907.

5. Divorce ⇐413

Marriage ⇐66

In man's action for annulment, question whether Mexican divorce decree existed which had effect of terminating the woman's marriage to previous husband was a question of fact for trial court and its negative conclusion was sustained by evidence properly admitted. West's Ann.Code Civ.Proc. §§ 1855, 1904, 1906, 1907.

6. Divorce ⚖413

In man's action for annulment, evidence sustained finding of trial court that man took no part in woman's attempt to get Mexican divorce, did not rely upon such divorce and did not know about it until after filing action for annulment, and was not estopped to assert invalidity of such divorce.

7. Divorce ⚖386(2)

In man's action for annulment, his introduction into evidence of authenticated copy of her Mexican divorce decree and copy of purported complaint and return of service, for purpose of showing they were not genuine papers issued by court or disclosing court proceedings, was not equivalent of his vouching for them as being true and did not estop him from attacking validity of such decree. West's Ann.Code Civ. Proc. §§ 1855, 1904, 1906, 1907.

8. Bastards ⚖3

Statutes providing that all children born in wedlock are presumed to be legitimate and that all children of married woman born within ten months after dissolution of marriage are presumed to be legitimate children of that marriage, have reference to valid marriages. West's Ann.Civ.Code, §§ 193, 194.

9. Bastards ⚖3

Statutes providing respectively that judgment of nullity of marriage does not affect legitimacy of children conceived or born before judgment and that issue of marriage which is void or annulled or dissolved by divorce is legitimate, relate to children who are, in fact, issue of such void marriage and if they give rise to any presumption, it is a rebuttable one and not conclusive. West's Ann.Civ.Code, §§ 84, 85.

10. Bastards ⚖3, 8

In man's action for annulment, wherein he contended that her child was not his, any presumption relating to that issue was disputable and issue was one of fact to be determined by trial court. West's Ann.Civ. Code, §§ 84, 85, 193, 194.

11. Bastards ⚖6

In man's action for annulment, trial court's finding that he was not father of her child was sustained by evidence. West's Ann.Civ.Code, §§ 84, 85, 193, 194.

12. Marriage ⚖62

In man's action for annulment, trial court did not abuse its discretion, under circumstances shown in case, in refusing to make further allowances for support and attorney's fees covering short period in question.

Ehrlich & Blonder, Los Angeles, Mack, Bianco & King, Bakersfield, for appellant.

Borton, Petrini, Conron & Brown, Bakersfield, for respondent.

BARNARD, Presiding Justice.

The defendant has appealed from that part of a judgment which annuls a marriage and decrees that there was no issue of said marriage, and from an order denying an application for certain attorneys' fees and support money.

The parties to the action were married in Las Vegas, Nevada, on August 11, 1951. The plaintiff brought this action on October 5, 1951, alleging, among other things, that at the time of this marriage the defendant had another husband living; that this prior marriage had never been dissolved by divorce or otherwise; that the defendant falsely represented to the plaintiff that she was single; that plaintiff believed this representation to be true and relied upon it; and that plaintiff, since ascertaining the facts, has not lived or cohabited with the defendant. In a supplement to the complaint it was alleged that a child was born to the defendant on February 26, 1952; that the defendant named him Samuel H. Rudnick, Jr.; and that plaintiff is not the father of said child. The answer alleged among other things that the defendant was pregnant at the time of the marriage on August 11, 1951; that this child was the issue of that marriage; that the defendant had obtained a divorce in Mexico on March 3, 1951; and that the plaintiff requested her to obtain said divorce and assisted her in obtaining the same.

The court found, among other things, that the marriage of these parties was null and void from its inception; that there was no

issue of said marriage and the plaintiff is not the father of the child born to the defendant on February 26, 1952; that the defendant was married to one Gerald L. Davis in Bakersfield on July 28, 1944; and that such marriage has not been dissolved by divorce or otherwise, and is still in full force and effect. It was found that most of the material allegations of the defendant's answer were untrue, it being further found that the defendant filed an action for divorce against Davis in Kern County on October 4, 1949, and later dismissed said action prior to the time any decree was entered; that that action was not filed at the request of the plaintiff; that plaintiff had not entreated the defendant to obtain a divorce from Davis and had not informed Davis of his desire to marry the defendant; that defendant did not take up her residence in Mexico, and her marriage to Davis was not dissolved on March 3, 1951; that the plaintiff did not know that the defendant had gone to Mexico for the purpose of obtaining a divorce and did not encourage or assist her in procuring such a divorce; that the defendant did not show a divorce decree to the plaintiff within a few days after she received it; and that the plaintiff did not advise her that his attorney had informed him that such decree was valid.

It was further found that the plaintiff and defendant went through a marriage ceremony in Las Vegas on August 11, 1951; that they lived together until September 11, 1951, and have since lived separate and apart; that the defendant went to Tijuana, Mexico, remaining there not exceeding two days, and engaging an attorney to obtain a divorce from Davis; that she signed a power of attorney authorizing one Mena to bring and prosecute a divorce proceeding against Davis in the state of Guerrero, Mexico; that this power of attorney was not acknowledged before any notary public as required by the laws of Mexico; that the defendant was not at any time during 1951 in the state of Guerrero or in any other part of Mexico except Tijuana; that immediately after signing this power of attorney she returned to Bakersfield where she has resided for many years and still resides; that on or about March 19, 1951, she received a writing purporting to be a decree of divorce from Davis issued by the court of first instance in the city of Tixtla, Guerrero, Mexico; that said decree was wholly fictitious and void and not based upon any proceeding filed in the described court or any other court having jurisdiction of such a proceeding; that said decree was purely a "mail order" decree not based upon a court proceeding of any nature and was one having no validity or effect in Mexico or in California; that the defendant's husband, Davis, was domiciled in California at all times from 1944 until after September, 1951; that he was actually present and living in this state from the beginning of 1951 until after the end of April, 1951; that he was in the United States Air Force and was stationed near Sacramento from January, 1951 to the end of April, 1951; that he and the defendant were periodically together during the first four months of 1951; that they were together on or about the end of April, 1951, and again from September 19, 1951 to September 21, 1951 in Omaha, Nebraska; that Davis maintained a home for himself and the defendant in Bakersfield from the date of their marriage until July 28, 1951; that Davis was never a resident of Mexico and was not in Mexico during the first four months of 1951; that he had never appointed any agent for service of process in Mexico, was never served with any process of any court or papers of any kind in connection with any divorce proceeding in Guerrero or elsewhere in Mexico; that he did not authorize anyone to represent him and did not appear either in person or by agent in any proceedings in any state in Mexico; and that Davis did not have notice, actual or constructive, of any Mexican divorce proceeding or any other divorce proceeding during 1951.

It was further found that the defendant represented to the plaintiff that she had obtained a divorce from Davis in Kern County near the end of the year 1949, and that since that time she was a single woman; that the plaintiff believed said representations, which were false; that the plaintiff did not participate in the purported Mexican divorce proceeding directly or indirectly, did not assist the plain-

tiff in any way in that regard, and had no notice or knowledge that defendant claimed such a divorce from Davis until after the separation of the plaintiff and the defendant; that the defendant represented to the plaintiff that she had not associated with her husband, Davis, or with any other man other than the plaintiff between February 1, 1951 and August 11, 1951, and such representations were false; that a child was born to the defendant on February 26, 1952, which the defendant named Samuel H. Rudnick, Jr.; that such child was not the result of any relationship of the defendant and the plaintiff; and that the plaintiff is not the father of said child and such child is not the issue of the void marriage of the plaintiff and defendant.

The court then made long findings as to what was necessary under the laws of Mexico at that time in order to confer jurisdiction upon such a court of first instance in Guerrero, Mexico, to grant a divorce in that state, and finding various particulars in which these laws had not been complied with in connection with this purported Mexican divorce decree and further finding that the court of first instance in Guerrero, named in the decree, had no jurisdiction over either Davis or the defendant to render any decree of divorce between them. As conclusions of law, it was found that the marriage between the plaintiff and defendant was null and void and should be annulled on the ground that the defendant had another husband living; that defendant's prior marriage was in force and undissolved at the time of her purported marriage to the plaintiff; that there was no issue of her marriage to plaintiff, and the plaintiff is not the father of Samuel H. Rudnick, Jr.; and that there is no community property of the parties. Judgment was entered accordingly and this appeal followed.

[1] There is ample evidence to support the essential findings as to the invalidity of the marriage in Las Vegas on August 11, 1951, if that evidence was properly admitted and could be considered by the court. There was evidence clearly indicating that no valid decree of divorce from Davis had ever been secured by the defendant, that the plaintiff had not participated in the attempt to secure a Mexican divorce and knew nothing about such a proceeding, and that the defendant represented to the plaintiff that she had secured a final divorce in Kern County in the latter part of 1949. The defendant was evasive and gave many false answers in her testimony. She testified that she had married one Fuller in Mexico in December, 1941, and divorced him in Mexico on January 2, 1942. She later admitted that she had never been married to Fuller nor divorced from him. A letter she wrote to Fuller while this action was pending was received in evidence, in which she asked Fuller to perjure himself in this case in order to assist her in prevailing in this action, telling him what she wanted him to say and urging him to memorize it carefully. Although she contended that she had told the plaintiff about the Mexican divorce and he had assisted her in such a proceeding she signed an affidavit of application for a marriage license at Las Vegas on August 11, 1951, in which it was stated that she had been previously married and had received a final decree of divorce on October 27, 1949 at Bakersfield, California, on the ground of cruelty. The plaintiff had knowledge of that statement since he also signed the same application, which contained matters relating to him.

The defendant was married to Davis in 1944 at Bakersfield. He was an officer in the Air Force but he continued to maintain his residence in Bakersfield, where the defendant resided. He was stationed at Sacramento the first four months of 1951 and on or after April 30, while on his way to an overseas assignment, he went to Bakersfield where he stopped for a day or two, picking up some things at their home, but leaving his automobile with the defendant. He did not know of any alleged Mexican divorce decree at that time. She wrote letters to him and called him long distance in London in July, 1951. On a visit to America in September, 1951, he arranged to meet her at Omaha and they registered at a hotel as husband and wife, and stayed there three days. She continued

to receive support money from Davis and as late as September, 1951, he directed a letter to her as "Mrs. G. L. Davis."

As early as 1948, the defendant started going with one Fink, the manager of a store in Bakersfield where she worked. In January, 1951, Fink moved from Bakersfield to Eureka. The defendant followed him there and from then on through May, 1951, she was with him in his apartment there a considerable part of the time. Over Washington's Birthday in 1951, she and Fink went to Mexico supposedly to get married. Following that event she was introduced by Fink as his wife in Eureka and lived with him in his apartment. She later returned to Bakersfield and said she did not like Eureka and was going to dissolve her marriage to Fink.

Shortly after Labor Day 1951, the plaintiff returned to Bakersfield. A check was made of the Kern County divorce action and plaintiff discovered for the first time that that action had been dismissed in January 1950 without any decree having been entered. The plaintiff immediately separated from the defendant. After this action was started plaintiff learned for the first time that the defendant claimed to have obtained a divorce decree from Davis in a Mexican court.

[2–5] With respect to the annulment portion of the judgment the defendant contends that the plaintiff could not attack the Mexican divorce decree because he was not a party to or interested in that proceeding. It is argued that the case of Mumma v. Mumma, 86 Cal.App.2d 133, 194 P.2d 24, and certain cases from other jurisdictions, have established the rule that a second husband has no standing to collaterally attack his wife's decree of divorce because of his lack of interest at the time it was entered; that the court's finding that this Mexican divorce decree was invalid and that jurisdiction had not been obtained could only be based upon the ground that the defendant had misrepresented the residence of Davis to the Mexican court; that the finding of lack of jurisdiction was based upon a claim of fraud, and this case comes squarely within the rule in the Mumma case; that the only one who can complain of this fraud is Davis, who has not seen fit to do so; that this plaintiff, being a stranger to that decree, has no standing to collaterally attack it for such fraud; that the court's finding that the Mexican decree of divorce was fictitious and void was not supported by admissible evidence; and that the finding that the supposed decree was not based on any proceedings filed in the Mexican court was improper since evidence of the nonexistence of court records should not have been admitted. In support of the last contention it is argued that under sections 1855, 1904, 1906 and 1907 of the Code of Civil Procedure such a judicial record can only be proved by a copy of the original or of the record properly attested by the clerk of the court and by the testimony of a witness that the copy has been compared with the original, is an exact transcript thereof, that the original was in the custody of the clerk, that the copy is duly attested by a seal proved to be the seal of the court where the record remains; and that the plaintiff was permitted to prove the contents of a judicial record of a foreign country contrary to these code provisions.

While it was stated in the Mumma case that a stranger to a foreign divorce decree can impeach it collaterally for fraud only when it injuriously affects him, and further stated that when he subsequently marries one of the divorced parties he has no such interest as will enable him to attack the decree (for fraud), that language must be considered in light of the facts of that case. That was an action for damages for fraud brought by a wife against her husband, she having previously brought an action for divorce in this state in which she had obtained an interlocutory decree establishing the validity of her marriage to the defendant, which had become final. It was further pointed out in that case that the jurisdictional grounds upon which a foreign divorce decree is subject to collateral attack in this state are set forth in Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351, where it was held that a foreign divorce decree is subject to collateral attack upon three jurisdictional grounds: (1) that it was procured upon a fraudulent domicile or residence, (2) that the laws of the state granting the decree

were not complied with, and (3) that the spouse who procured the divorce was the wrongdoer whereas the other spouse was a citizen of this state, was neither personally served nor appeared, and was the innocent party; and that if any one of these jurisdictional defects is established the foreign decree will not be recognized as valid in this state. It was further held in Mumma v. Mumma that it is always open to the person against whom a judgment of another state is attempted to be used to show by extrinsic evidence, and even by evidence opposed to recitals contained in such a record, that the court purporting to give the judgment was without jurisdiction either of the cause or of the parties. A similar holding is found in Crouch v. Crouch, 28 Cal.2d 243, 169 P.2d 897, although it has been held that a foreign decree cannot be attacked by a party who procured it, or a party who has remarried in reliance thereon or by one who has aided another to procure the decree in order that the latter will be free to remarry. Rediker v. Rediker, 35 Cal.2d 796, 221 P.2d 1, 20 A.L.R.2d 1152. It was held in Kegley v. Kegley, 16 Cal. App.2d 216, 60 P.2d 482, that a "mail order" divorce, where both parties lived in California and neither was in Mexico at the time a petition was filed in the Mexican court and at the time the decree was granted, could be attacked for lack of jurisdiction.

The court here found such a lack of jurisdiction in the Mexican court and under these cases, and many others which might be cited, we think the plaintiff could properly attack the validity of this Mexican divorce decree. The defendant and her husband were residents of California and, having been in Tijuana only two days, she claimed to have secured a divorce decree just 13 days later in another city and district about a thousand miles from there. There was ample evidence that the jurisdictional facts to support that decree were lacking. Two experts on Mexican law testified to the effect that this purported decree was void upon its face, and there was a large amount of testimony as to what was required by Mexican law at that time, and that the required facts were not only non-existent but their lack was disclosed by the papers purportedly filed in and issued by the Mexican court. It was further shown by the testimony of competent witnesses that a search of the records of the court in question had disclosed that there was no record in that court that any such divorce proceedings had ever been brought or acted upon in that court. The plaintiff was an interested party with respect to the effect of the purported Mexican divorce decree, and regardless of other considerations the court properly admitted evidence for the purpose of showing that no such proceeding had been had in this Mexican court and that no such decree had been issued by that court. While the code sections relied on by the defendant are designed to show how an existing court record may be proved they are not applicable or controlling where there is no court record, and cannot be held to deprive a party of the right to show that no such record, in fact, exists. The question as to whether a valid Mexican divorce decree existed which had the effect of terminating the marriage of defendant Davis was a question of fact for the trial court, and the court's findings in that connection are supported by evidence which was properly admitted.

[6] The defendant next contends that the plaintiff was estopped to attack the Mexican decree of divorce. It is argued that the public policy of this state requires the preservation of the second marriage if possible, rather than its annulment, citing Rediker v. Rediker, 35 Cal.2d 796, 221 P.2d 1, 20 A.L.R.2d 1152; that the rule of estoppel applied against any party to a divorce decree who either procured it, remarried in reliance thereon or who aided one of the parties to procure it, was extended by Dietrich v. Dietrich, 41 Cal.2d 497, 261 P.2d 269, so as to apply to one who is neither a party to that proceeding nor aided therein, but who married one of the parties with knowledge of the circumstances under which the decree was obtained; that the plaintiff knew that the defendant had been a married woman and never made any inquiry of her regarding any divorce of that marriage; that al-

though he claimed that he had married the defendant because she convinced him he was the father of the child, he deliberated for approximately two months before marrying her and it was apparent from his actions that he intended to mislead her at all times; that the court's findings that the defendant represented to the plaintiff that she had obtained a divorce from Davis in Kern County near the end of 1949 and that the plaintiff believed the same, are supported by no evidence other than the defendant's statement to that effect in her marriage license in Las Vegas; and that there is no evidence that the plaintiff saw that application. Both parties signed that application and the only reasonable inference is that the plaintiff saw it and was acting on that statement. There is evidence, which the court believed, that the plaintiff took no part in the attempt to get a Mexican divorce, that he did not rely upon it, and that he knew nothing about it until after this action was filed. While there is a conflict in the evidence, there is ample evidence to support the findings in favor of the plaintiff and against the defendant on the facts involved in this contention. It cannot be held, as a matter of law, that such an estoppel here appears.

[7] Some contention is made in the closing brief that the plaintiff could not attack the Mexican decree because an authenticated copy of that decree and a copy of the purported complaint and return of service was offered in evidence by the plaintiff, and that the decree was thus vouched for by him as being true. This contention is without merit. In connection with the examination of the defendant and of an expert witness on Mexican law there was a great deal of argument about a copy of the decree which defendant's counsel had offered, and plaintiff's counsel furnished a so-called authenticated copy which had been obtained during the investigation of the matter. It was apparently obtained from the parties who had furnished the papers to the defendant, and the plaintiff did not claim to have received it from the court itself. These papers were offered and admitted for the very purpose of, and in the process of, showing that they were not genuine papers issued by a court or disclosing court proceedings, and nothing in the record in any way indicates that the plaintiff vouched for them as being true. No estoppel or error in the admission of evidence appears in this connection.

[8–10] With respect to the issue as to whether the plaintiff was the father of this child the defendant contends that the child is conclusively presumed to be the issue of her marriage to the plaintiff; and that even though a conclusive presumption is inapplicable the evidence is insufficient to overcome a rebuttable presumption to that effect. It is argued that a conclusive presumption exists because of sections 84, 85, 193 and 194 of the Civil Code. These sections provide, respectively, that a judgment of nullity of marriage does not affect the legitimacy of children conceived or born before the judgment, that the issue of a marriage which is void or annulled or dissolved by divorce is legitimate, that all children born in wedlock are presumed to be legitimate, and that all children of a married woman born within ten months after dissolution of the marriage are presumed to be legitimate children of that marriage. In support of this contention the defendant relies on Dazey v. Dazey, 50 Cal.App.2d 15, 122 P.2d 308; Rivieccio v. Bothan, 27 Cal.2d 621, 165 P.2d 677; In re Estate of Walker, 180 Cal. 478, 181 P. 792; In re Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313; Williams v. Moon, 98 Cal.App.2d 214, 219 P.2d 902; In re Estate of Lee, 200 Cal. 310, 253 P. 145 and Hill v. Johnson, 102 Cal.App.2d 94, 226 P.2d 655.

Sections 193 and 194 of the Civil Code apparently refer to valid marriages and it was held in Re Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313, that the prima facie presumption of legitimacy provided for in section 194 may be overcome by other evidence. The only code sections directly dealing with the issue of a marriage which is annulled are sections 84 and 85 of the Civil Code. These sections do not specifically provide for any presumption but apparently relate to children who are, in fact, the issue of such a

void marriage. If any presumption exists in such a case it would naturally be a rebuttable, rather than a conclusive, presumption.

Most, if not all, of the cases relied on by the defendant were cases where there was a valid marriage or where no issue of fact was presented as to whether or not the child was the issue of the parties. There is nothing in those cases which would establish as a controlling rule, under the facts of this case, that there was a conclusive presumption that plaintiff was the father of this child. Any presumption which would be applicable here would be a disputable one, and the issue as to whether the plaintiff was the father of this child was one of fact to be determined by the trial court.

[11, 12] The child was born on February 26, 1952. There is evidence that the plaintiff did not see the defendant from sometime in April, 1951 to June 1, 1951; that he had sexual intercourse with the defendant on June 1, 1951 and on the succeeding two days; that the defendant missed her first menstrual period on June 1, 1951, and missed her menstrual period thereafter until the child was born; and that within a week after June 1, she informed the plaintiff that she was pregnant as a result of their intercourse on or about June 1. The plaintiff had not been with the defendant for nearly two months prior to June 1, 1951, and there was medical testimony that the defendant had become pregnant prior to June 1, 1951, that the intercourse between these parties at that time and thereafter had nothing to do with her pregnancy, and that their intercourse on the first three days of June could not have caused the pregnancy leading to the birth of this child. During the trial the plaintiff moved for an order directing the parties to this action, as well as the child, to submit to a blood test by some qualified person to be designated by the court. This motion was opposed by the defendant and was denied by the court. Evidence was received from which it could be reasonably inferred that the defendant had sexual relations with her husband, Davis, during the time when the child was probably conceived, and there was strong evidence indicating that she had such relations with Fink during the period in question. As was said in Re Estate of McNamara, 181 Cal. 82, 183 P. 552, 557, "Where she has had intercourse with more than one man at about the same time, and a child has resulted, neither she nor any one else can say with reasonable certainty which is the father. Any weighing of probabilities under such circumstance is but guessing." The question of whether or not the plaintiff was the father of this child was one of fact for the trial court and in view of the evidence presented its decision thereon cannot be said to be without support in the evidence.

Finally, the defendant contends that the court erred in denying her support money while a motion for a new trial was pending, and attorneys' fees for the presentation of that motion. This relates only to the period from January 1, 1953 to April 1, 1953. It is argued that the court had power to provide for such support and attorneys' fees, Dunphy v. Dunphy, 161 Cal. 87, 118 P. 445 and Harron v. Harron, 128 Cal. 303, 60 P. 932; that while the granting or denying of such support and maintenance is a discretionary matter the court may not act arbitrarily; and that in view of the previous and subsequent orders granting support money and attorneys' fees no good reason appears why defendant should have been denied such support and attorneys' fees for this three months' period.

On February 21, 1952, the court ordered the plaintiff to pay the defendant $250 per month for support until the trial of the action. Such payments were made up to December 31, 1952, when the judgment of annulment was entered. The court also ordered the plaintiff to pay the defendant $1,500 for counsel fees and $250 for court costs, which were paid. On August 26, 1952, the plaintiff was ordered to and did pay a further sum of $1,000 for costs. The judgment entered on December 31, 1952, awarded the defendant's counsel $5,000 as additional attorneys' fees and $938.05 as additional costs, which amounts were paid. While the motion here in ques-

tion was denied, on a subsequent motion the court awarded the defendant $3,000 for attorneys' fees on the appeal, with $1,450 for costs, and further ordered the plaintiff to pay the defendant $250 per month for her support commencing April 1, 1953 and continuing to the determination of the appeal. In view of the court's findings in this case, the allowances previously and subsequently made, and the legal questions involved in making the later allowances, it cannot reasonably be held that the court abused its discretion in refusing to make the further allowances covering the short period in question.

The judgment and the order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.



131 Cal.App.2d 110

F. W. HICKS and Dernice Ann Hicks, Plaintiffs and Appellants,

v.

WHELAN DRUG CO., Inc., et al., Defendants and Respondents.

Civ. 20389.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1955.

Rehearing Denied March 17, 1955.

Hearing Denied April 20, 1955.

Action by lessor of building to recover damages and other relief for alleged breach of lease by lessee who operated drugstore. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment in favor of plaintiffs, and plaintiffs appealed on ground that relief granted was inadequate. The District Court of Appeal, McComb, J., held that evidence sustained findings that closing of soda fountain in drugstore and walling off portion of premises used for soda fountain had not resulted in any loss of percentage rental above minimum rent figures set in lease.

Affirmed.

1. Appeal and Error ⇐931(1)

On appeal, District Court of Appeal views evidence in light most favorable to respondent.

2. Evidence ⇐450(4)

Where language of lease providing for operation of drugstore in demised premises was clear and explicit, construing lease without considering extraneous evidence was proper. West's Ann.Civ.Code, §§ 1638–1641.

3. Trial ⇐375

View by court of drugstore involved in suit by lessor of building was independent evidence which could be considered by trier of fact in arriving at conclusions and was substantial evidence in support of findings consonant therewith.

4. Landlord and Tenant ⇐49(2)

In action by lessor of building based on breach of lease agreement, evidence sustained findings that closing of soda fountain in drugstore and walling off portion of premises used for soda fountain had not resulted in any loss of percentage rentals above minimum rent figures set in lease.

5. Landlord and Tenant ⇐134(1)

Lease basing rentals on sales and which conferred upon drugstore lessees option or privilege of operating soda fountain, did not impose an obligation upon lessees to operate soda fountain.

6. Landlord and Tenant ⇐49(2)

In action by lessor of building to recover damages for alleged breach of lease by drugstore lessees who had closed soda fountain and walled off part of store containing soda fountain so as to conceal it, evidence sustained finding that lessees had not permitted store to remain vacant and unoccupied without adequate stock and personnel.

7. Landlord and Tenant ⇐134(1)

Provision of drugstore lease for rent based on gross receipts and for minimum monthly rental was not an implied covenant that lessee would during term of lease so conduct his business as to make it mutually profitable to both parties where circumstances showed business was new venture.

8. Appeal and Error ⇐984(5)

Amount of award of attorney fees would not be disturbed on appeal where trial judge had before him knowledge of services rendered by counsel upon which to base award, and he used own experience in determining the reasonable value thereof, and there was no showing of abuse of discretion.

C. P. Von Herzen and Samuel L. Laidig, Los Angeles, Julius A. Leetham, Los Angeles, of counsel, for appellants.

Desser, Rau & Hoffman, Beverly Hills, William Christensen, Beverly Hills, of counsel, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs in an action for an injunction, declaratory relief and damages against a lessee for breach of a lease, plaintiffs appeal, urging that the relief granted by the trial court was inadequate and not all that they sought.

[1] *Facts*:[1] Prior to March 5, 1941, H. B. Garfield was the owner of and engaged in the business of operating a chain of drug stores in the county of Los Angeles under the fictitious firm name of Mid-City Drug Stores.

On March 5, 1941, Mr. Garfield and his wife, as lessees and appellants, F. W. Hicks and Bernice Ann Hicks, as lessors, executed a lease covering premises in the City of Glendale, together with the appurtances, improvements, fixtures and equipment to be installed thereon, which contained, among others the following provisions:

"Use of premises: It is understood and agreed that the demised premises shall be used by the Lessee for the purpose of conducting thereupon a general drug store business, including the sale of not only pharmaceutical supplies and prescriptions, patent and other medicines and drugs, but also the sale and dispensing of ice cream, groceries, cigarettes and tobaccos, toilet articles, cosmetics, hair tonics, perfumes, hosiery, household needs, auto supplies and parts, and such other articles as might from time to time be sold or used by beauty parlors or barber shops, and also the sale of sporting goods, photographic equipment and supplies, magazines, stationery, rubber goods, bristle goods, clocks, druggist sundries, radio and television equipment and supplies, beers, wines, liquors and all legal alcoholic beverages, prepared food and *the privilege* of operating a restaurant, fountain and beauty parlor, and all other items and products which are, or may in the future be generally handled, sold or dispensed in super drug stores within the County of Los Angeles. Lessor agrees that he will not lease or let or permit to be occupied any or all of the remaining stores in the building of which the demised premises are a part, for a general drug store or fountain or restaurant or liquor business.

"Lessee further covenants and agrees that he will not allow said premises to be used for any purpose that will increase the rate of insurance thereon, or keep thereon any gasoline, distillate, or any kind of petroleum product for use in heating, lighting or other purpose, except the handling of such items of like kind as are usually handled in super drug stores. Lessee will not permit said premises to be used for any unlawful purpose that will injure the reputation of the same or of the building of which they are a part, or disturb the tenants of such building or the neighborhood, and that he will not permit the same to remain vacant or unoccupied at any time after the initial entry and occupation thereof, except insofar as such vacancy shall be necessitated or occasioned by the making of any improvement, alterations, replacements or repairs duly consented to by the Lessor. It is contemplated, however, that the Lessor will grant his consent to proper and necessary remodeling and redecoration of the demised premises." (Italics added.)

Contemporary with the execution of the lease the parties executed a supplemental agreement modifying the rental fixed in the lease. Plaintiffs completed the building

1. The evidence is viewed in the light most favorable to defendant (respondent) pursuant to the rule set forth in Re Estate of Isenberg, 63 Cal.App.2d 214, 216 [2], 146 P.2d 424.

which they were required to erect on said premises by the terms of the lease and the lessees went into possession and commenced the operation of a retail drugstore on or about July 10, 1941.

Thereafter, on or about January 23, 1942, H. B. Garfield and his wife assigned all of their right, title and interest in and to the leased premises and the lease to the Mid-City Drug Stores, a California corporation which entered into possession of the premises on or about said date and continued the operation of a retail drugstore thereon.

On or about September 23, 1946, the corporation assigned the above mentioned lease, together with the drugstore located on the premises, and its stock to defendants. About September 1, 1949, the soda fountain which had been operated in the drugstore was closed and the portion of the store which had been used for such purposes was enclosed by a paneled partition.

On December 12, 1951, plaintiffs filed the present action setting up the lease, the subsequent assignment and acceptance by defendants, and asking for declaratory relief, an injunction and damages for breach of the lease. In substance plaintiffs alleged as follows:

"1. That the lease, which was for drug store premises, to be operated in the character and style of comparable super drug stores within the County of Los Angeles, included a fully equipped drug store, luncheon counter, and soda fountain. That, specifically, the luncheon counter and soda fountain fixtures and equipment (although paid for by the lessors) were selected by the lessee and installed under the lessee's direction.

"2. The rental on the premises was on the basis of a specified minimum rental, in addition to which a certain percentage was payable on a gross sales basis after a specified gross sales figure per year was reached.

"3. After the respondents Whelan took possession of the premises, they permitted the stock, merchandising policies, and personnel to deteriorate, and permitted the premises itself to 'fall apart.'

"4. Deprived the plaintiff-appellants of certain anticipated profits under their lease."

The trial court found, (1) that if the soda fountain were reopened and properly operated such operation would increase the gross volume of sales but not to a point where there would be any overage payable under the terms of the lease as amended; (2) that if the portion of the premises presently unoccupied and walled off were used for the display of merchandise or for some other related purpose in the conduct of the drugstore on the premises such use would augment gross sales, but not to the point where any overage payments would become due under the percentage terms of the lease as amended; (3) that there has not been any loss of percentage rentals above the minimum figure provided for in the lease as amended due to the action of defendants; (4) that gross sales in the store have declined materially since September, 1946; that the decline is attributable to many factors, but cannot be attributed solely to the manner in which defendants have operated the premises, and (5) that the closing of the fountain and grill in the drugstore did not constitute a breach of the lease.

Judgment was rendered in favor of plaintiffs, decreeing that defendants had not maintained the property in accordance with the terms of the lease and ordering defendants to paint the exterior signs, place them in good working order and appearance, replace all broken or damaged plate glass, repair venetian blinds, and place the exterior of the building, with the exception of the walls, in first class condition and to so maintain it, and ordered defendants to pay the attorneys for plaintiff $500 as attorneys' fees and awarded plaintiffs costs.

Questions: First: *Was there substantial evidence to sustain the findings of the trial court set forth above?*

[2] *Yes.* The language of the agreement between the parties was clear and explicit. Therefore under the provisions

of the Civil Code, sections 1638–1641 [2] and Masciotra v. Harlow, 105 Cal.App.2d 376, 379, 233 P.2d 586, the terms of the agreement being clear, definite and certain, the language of the instrument governed, and the trial court properly did not take into consideration extraneous evidence in construing the meaning of the contract.

A licensed real estate broker, specializing in business and commercial properties for about 29 years testified that the premises were wholly unsuited for a drugstore operation, and during the four or five years prior and up to the time of the trial, the trend of growth in Glendale and retail merchants was going in a northerly direction on Brand Boulevard, with the consequence that there was no foot traffic at or about the demised premises, and that in his opinion the fact that about one half of the store was walled off would have absolutely no effect upon the sales in the store.

Mr. H. B. Garfield testified as an expert in that he had been working in drugstores since 13 years of age; had been operating his own drugstore since 1928; had a chain of 13 drugstores which he owned, and had been a member of the State Board of Pharmacy for 12 years prior to the time of trial. He testified that the method of operation during the period of time he operated it was that of a super drugstore and that the partitioning off of the space formerly occupied by the soda fountain so as to conceal it to view of persons entering the store was, in his opinion, a good practice; that there was sufficient inventory carried, and they used all the space reasonably necessary for the conduct of a drugstore in accordance with the terms of the lease. Mr. Garfield, who had operated the soda fountain for a period of time, testified that he had closed it on several occasions, had subleased the fountain to several concessionaires who were unable to operate it at a profit, and that the effect of the operation of the soda fountain on the total gross sales of the store was negligible.

[3] In addition the trial judge viewed the premises. This "view" of the store was independent evidence which could be considered by the trier of fact in arriving at his conclusions and is substantial evidence in support of his findings, consonant therewith. (Saks & Co. v. City of Beverly Hills, 107 Cal.App.2d 260, 266 [5–6], 237 P.2d 32, hearing denied by the Supreme Court; Rowland v. City of Pomona, 82 Cal.App.2d 622, 624 [1], 186 P.2d 447.)

[4] The foregoing evidence clearly supports each of the questioned findings. Further discussion of the evidence would serve no useful purpose.

The observation of Mr. Justice Hanson in Achen v. Pepsi-Cola Bottling Co., 105 Cal.App.2d 113, 125 [6], 233 P.2d 74, 82, hearing denied by the Supreme Court, is here apposite:

"We sit as a court to review errors of law and not errors of fact. Accordingly, we are perplexed to understand just why appellants throughout their briefs and argument constantly refer to the fact that the trial judge should on the evidence presented to him have found the facts contrary to the findings he made. If we were to conclude he erred in every finding he made on contradictory evidence we would still be completely helpless to reverse him on that account. The rule is too well established to require the citation of precedents."

Second: *Did the closing of the soda fountain and grill constitute a breach of the lease?*

2. These sections read:
"§ 1638. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.
"§ 1639. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title.
"§ 1640. When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded.
"§ 1641. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

[5] *No.* Paragraph V of the lease expressly gave the lessees "the privilege" of operating a restaurant, fountain and beauty parlor. The word "privilege" is defined in Webster's New International Dictionary, (1939), 2d Ed., Volume 2, page 1969, thus: "1. A right or immunity granted as a peculiar benefit, advantage or favor; * * * 2. A grant of a special right or immunity; a franchise or patent; as, a privilege of printing a book; a privilege granted a manor or town."

It thus appears that the lessees were given the option of operating a restaurant, soda fountain or beauty parlor as an incidental function to the operation of a drugstore. Since it was a privilege, the lessees were not obliged to operate a soda fountain, but at their option could do so or not as they chose. Hence there was no basis for a finding that defendants had breached the lease in this particular.

Third: *Did defendants permit the store to remain vacant and unoccupied without adequate stock and personnel?*

[6] *No.* There is no evidence that defendants permitted the building to remain vacant or unoccupied at any time subsequent to the signing of the lease. On the contrary all the evidence discloses that the premises were occupied in a manner favorable to the operation of super drugstores in the County of Los Angeles. The testimony of Mr. Garfield was to the effect that the display of merchandise was well done; that the merchandise was adequate and the personnel was adequate.

Fourth: *Was there an implied covenant in the lease that defendants would during the term of the lease so conduct the business as to make it mutually profitable to both parties?*

[7] *No.* In Masciotra v. Harlow, 105 Cal.App.2d 376, 379, 233 P.2d 586, plaintiff made the same contention, relying among others on Selber Bros. v. Newstadt's Shoe Stores, 194 La. 654, 194 So. 579; Mayfair Operating Corp. v. Bessemer Properties, 150 Fla. 132, 7 So.2d 342, and Garden Suburbs, etc., Club v. Pruitt, 156 Fla. 825, 24 So.2d 898, 170 A.L.R. 1107, in support of his contention that there was an implied covenant that the lessee, during the term of his lease, would so conduct his business as to make it mutually profitable to both parties. The court there held (105 Cal.App. 2d at page 379 [1 & 2], 233 P.2d at page 589) that such a covenant would not be implied. A covenant that the lessee will, during the term of the lease, so conduct his business on the lessor's premises as to make it mutually profitable to both parties, it was held, would not be implied on a lease based on gross receipts and providing for a minimum monthly rental where the circumstances, as here, showed that the business to be created was a new venture, the probable revenue from which the parties had no way of estimating. Such decision is on all fours with the situation which existed in the instant case and is therefore controlling.

Fifth: *Was the trial court's award of $500 attorneys' fees inadequate?*

[8] *No.* The trial judge had before him the knowledge of the services rendered by counsel in the present action, and it was his province to use his own experience in determining the reasonable value thereof. Having done so, in the absence of a showing of an abuse of discretion, his finding will not be disturbed on appeal. (Clarke v. Angelus Memorial Ass'n, 14 Cal.App.2d 750, 752 [3], 58 P.2d 974, hearing denied by the Supreme Court.)

Affirmed.

We concur:

MOORE, P. J., and FOX, J., concur.

131 Cal.App.2d 136

Nella SNOKELBERG, as Administratrix-with-the-will-annexed of the Estate of Bertha G. Doane, Deceased, Plaintiff and Respondent,

v.

Isaac S. CRECELIUS and Irma M. Crecelius, Defendants and Appellants.

Civ. 20588.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1955.

Administratrix brought action to recover realty and personalty conveyed by deceased by bill of sale shortly before deceased's death at age of 84 years, on ground of fraud and incompetency. The Superior Court of Los Angeles County, Kurtz Kauffman, J., entered judgment adverse to defendants, and they appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained findings that deceased was incompetent to execute deed and bill of sale and that execution thereof was procured by fraud.

Judgment affirmed.

1. Appeal and Error ⇐996

When two inferences are reasonably deducible from facts, reviewing court is forbidden to substitute its deductions for those of trial court.

2. Appeal and Error ⇐931(1)

When judgment is challenged on ground of insufficiency of evidence to support findings, all conflicts must be resolved in favor of respondent and all reasonable inferences must be indulged in favor of findings.

3. Appeal and Error ⇐989

When judgment is challenged on ground of insufficiency of evidence to support findings, power of reviewing court begins and ends with its determination that there is or is not substantial evidence to support findings.

4. Appeal and Error ⇐989

When judgment is challenged on ground of insufficiency of evidence to support findings, reviewing court is governed by principle that evidence which may in transcript appear relatively unsubstantial may have been overwhelming in its persuasiveness when recited in presence of trial court.

5. Appeal and Error ⇐996, 1010(1)

A judgment will not be reversed when there is substantial evidence supporting findings or where different inferences might rationally be drawn therefrom.

6. Appeal and Error ⇐1010(2)

Findings of trial court can be overthrown on appeal when they totally lack support of substantial evidence.

7. Deeds ⇐211(1)

In action by administratrix to recover realty and personalty conveyed by deed and bill of sale of deceased, shortly before her death at the age of 84 years, on grounds of fraud of defendants and incompetency of deceased, evidence sustained finding that deceased lacked mental capacity to execute deed and bill of sale.

8. Deeds ⇐211(3)

In action by administratrix to recover realty and personalty conveyed by deed and bill of sale of deceased, shortly before her death at the age of 84 years, on grounds of fraud of defendants and incompetency of deceased, evidence sustained finding that execution of deed and bill of sale was procured by fraud.

Rinehart, Merriam, Parker & Berg, Pasadena, for appellants.

Garber & Garber, Monrovia, for respondent.

DRAPEAU, Justice.

Mrs. Bertha G. Doane died on February 17, 1953, at the age of 84 years. For several years prior thereto, she lived alone in her home in Monrovia, and did her own shopping and housekeeping.

On January 4, 1953, she became ill. She called her next-door neighbor and asked that the latter send for defendant Irma M. Crecelius. Mrs. Crecelius came to Mrs. Doane's home that evening. She stayed and, with the help of her husband, cared for Mrs. Doane until her death.

On January 19, 1953, Mrs. Doane executed a deed conveying her home to defendants, reserving to herself a life estate.

Thereafter, on February 7th, she executed a bill of sale of her furniture and personal effects, and also a power of attorney in favor of defendant Isaac Crecelius. All three documents were delivered to Mr. Crecelius.

Mrs. Nelia Snokelberg, a neighbor and friend of Mrs. Doane during her lifetime, was appointed administratrix-with-the-will-annexed. Decedent's will devised her home to her niece, who lived in Detroit.

By the instant action, said administratrix sought recovery of the real and personal property conveyed by the deed and bill of sale, on the grounds of fraud of defendants and the incompetency of the grantor. And for an accounting.

The trial court ordered cancellation of the deed and bill of sale; quieted title to both the real and personal property in plaintiff administratrix, and gave a money judgment against defendants for the reasonable rental value thereof.

Defendants appeal from the judgment.

Appellants assert that the evidence does not support certain of the trial court's findings, to-wit:

(1) That decedent was "on January 19, 1953, and for some time prior thereto and continuously thereafter until the time of her death, physically infirm and legally incapacitated by reason of her age, physical and mental infirmities from doing any business or making or entering into any contracts whatever."

(2) That there existed between decedent and appellants during that period "an intimate and confidential relationship" and that appellants procured the execution of the said documents "by taking advantage of decedent's condition and said relationship" with knowledge of her said "incapacity and infirmity" for the purpose of defrauding her.

[1–4] "When a judgment is challenged on the ground of the insufficiency of the evidence to support the findings, four principles govern the conduct of the reviewing court, namely: (1) When two inferences are reasonably deducible from the facts the appellate court is forbidden to substitute its deductions for those of the trial court; (2) all conflicts must be resolved in favor of respondent and all reasonable inferences must be indulged in favor of the findings; (3) the power of the appellate court begins and ends with its determination that there is or is not substantial evidence to support the finding. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Federal Construction Co. v. Brady, 122 Cal.App. 446, 447, 10 P.2d 130. (4) Evidence which may in the transcript appear relatively unsubstantial may have been 'overwhelming in its persuasiveness' when recited in the presence of the court. In re Estate of Bristol, supra." Barham v. Khoury, 78 Cal.App.2d 204, 211, 177 P.2d 579, 583.

[5, 6] "'A judgment will not be reversed when there is substantial evidence supporting the findings * * * or where different inferences might rationally be drawn therefrom * * *. The same rules apply to the determination of the question of mental capacity; and the findings of the trial court can be overthrown only when they totally lack the support of substantial evidence.'" Burgess v. Security-First National Bank, 44 Cal.App.2d 808, 816, 113 P.2d 298, 303. See also Drum v. Bummer, 77 Cal.App.2d 453, 457, 175 P.2d 879.

Mr. George C. Highley, head of a funeral club plan of which Mrs. Doane was a member, testified on behalf of respondent as follows:

He had known decedent since 1942 and saw her from time to time. In December of 1952, respondent Snokelberg came to his office and said that Mrs. Doane was failing very fast. And she said, "Why don't you come by and see her. She wants to see you. * * * She wants to change her will. And she (Mrs. Snokelberg) had the old will. I said, 'Tell her to change it, she can write it any way she wants to.' She said, 'She wants to see you about something that has come up lately.'"

Mr. Highley called on Mrs. Doane on Saturday, January 17, 1953. He talked to her about twenty-five minutes trying to find out what it was she wanted. But he got no response from her, except a shake of the head and a smile. During this time, Mrs. Crecelius came into the room and stood by

the bed. The witness asked her what Mrs. Doane wanted to see him about. Mrs. Crecelius said, " 'She wants to make a deed.' And I said, 'A deed or a will?' She said, 'Oh, no, a deed.' And I said, 'To deed the property?' And she said, 'Yes.' " Mr. Highley then asked Mrs. Doane: "Is that what you want? And I got no response." He turned to Mrs. Crecelius and said, "I don't believe she knows what she wants to do. I'll go now and I'll return tomorrow and see how she feels." He returned the next day, Sunday, January 18, 1953, and again attempted to converse with Mrs. Doane, but without success. She did not talk.

This witness was interrogated as follows:

"Q. Were you asked to take any part in the execution of the deed or any paper? * * * A. I was asked to have her make the deed. And I am a notary public.

"Q. You were asked by whom? A. By Mrs.—I can't call her name.

"Q. By Mr. Garber: Mrs. Crecelius? A. Yes. * * *

"Q. In your opinion when you asked Mrs. Doane, 'Is that what you want?' referring to the matter of the deed, in your opinion did she have any understanding of the question you were then asking her? * * * A. She did not."

The witnesses, Clarence and Nora Crabb, testified that they visited Mrs. Doane during the first week of February, and that she appeared to be unconscious, in a coma, and did not talk.

It was admitted by the appellants that they did not pay any money for the property conveyed by the deed and the bill of sale.

As is usual in a case of this character, the evidence produced by appellants was in direct conflict with the testimony of respondent's witnesses:

Mr. Ainley, a real estate broker and notary public, testified that he called to see Mrs. Doane, at the request of Mr. Crecelius, a few days before January 19, 1953. He asked her if she wanted to deed the property to appellants and she said she did. On the 19th of January, 1953, he asked her if she definitely knew what she was doing, and she said "yes." Also, that Mrs. Doane signed the deed unassisted, he acknowledged it, returned to his office and entered it in his notarial register. He then delivered it to Mr. Crecelius. Thereafter he notarized the bill of sale and the power of attorney which Mrs. Doane signed on February 7th. He had no question in his mind but that she understood what was said and knew what she was doing on both occasions.

Mr. Curry, operator of a health store, testified that Mrs. Doane was a patron and that he saw her once or twice a week after 1949 when she came to his store to shop. After she became ill, he saw her in her home when he was delivering merchandise to her. On January 15, 1953, he made his last visit. This was the day Mrs. Doane told him to discontinue the delivery; that Mr. Crecelius would pick up the items as she needed them. He said he thought she was physically weak but he saw nothing wrong with her mental condition.

Dr. Pugh, a traumatic chiropractor, was called to see Mrs. Doane on February 5, 1953. When he asked her questions, her answers were responsive, and her speech coherent, to-wit:

After he examined her he said "You have arrythemia. And she said, 'I know my heart is failing. My stomach is all upset too.' " He saw her again on February 8th. At that time there was a definite change in her condition: her heart was somewhat weaker. He saw her for the last time on February 13th and conversed with her. Her speech was coherent and she appeared rational. He signed the death certificate.

[7, 8] There was much more conflicting evidence presented on both sides. However, the record discloses ample substantial evidence to support the trial court's findings and judgment. And, under the rule set forth in In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, the power of this court begins and ends with that determination.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

The GAGNON COMPANY, Inc., a Corporation et al., Plaintiffs and Appellants,

v.

NEVADA DESERT INN, Inc., a Corporation, Stanley Burke, et al., Defendants. Stanley Burke, Respondent.

Civ. 20465.

District Court of Appeal, Second District, Division 2, California.

March 1, 1955.

Rehearing Denied March 30, 1955.

Hearing Granted April 27, 1955.*

Action for fraud and mismanagement. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment dismissing the action, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that judgment dismissing with prejudice, as a result of dismissal with prejudice filed by attorney of record for plaintiffs, action instituted in Nevada was res judicata barring subsequent action in California between the same parties based on almost identical allegations.

Affirmed.

1. Appeal and Error ⇐931(1)

On appeal from judgment in favor of defendants after trial before the court, the evidence is viewed in light most favorable to defendants.

2. Judgment ⇐505

Judgment dismissing action with prejudice as a result of dismissal with prejudice filed by attorney of record for plaintiffs was not subject to collateral attack in subsequent action between the same parties based on almost identical allegations on ground of lack of authority of attorney to file or dismiss first action with prejudice.

3. Judgment ⇐504(1)

A judgment valid on its face cannot be collaterally attacked on ground that attorney, appearing for parties in action, was not authorized to appear for such parties.

4. Attorney and Client ⇐70

Under statutes of Nevada and California, it will be presumed that attorney, being an officer of the court, acted within scope of his employment in filing and subsequently dismissing action with prejudice. N.C.L. 1929, § 600; West's Ann.Code Civ.Proc. § 283.

5. Judgment ⇐822(1)

Judgment dismissing with prejudice, as a result of dismissal with prejudice filed by attorney of record for plaintiffs in action instituted by attorney in Nevada was res judicata barring subsequent action in California between the same parties based on almost identical allegations, in absence of any facts or special circumstances which would preclude application of res judicata doctrine. N.C.L.1929, § 600; West's Ann. Code Civ.Proc. § 283.

6. Judgment ⇐713(2), 725(1)

A judgment is res judicata as to issues actually determined and issues necessarily involved, and even though causes of action are different, prior determination of an issue is conclusive in subsequent suit between the same parties as to such issue and every matter which might have been urged to sustain or defeat it.

7. Judgment ⇐589(1)

Where either of two remedies is available to complainant under the same alleged conduct of defendant, a judgment for defendant in an action which seeks one such remedy is a bar to subsequent action seeking the alternate remedy.

8. Judgment ⇐570(1)

A judgment of dismissal may be res judicata even though rendered without a trial upon the facts.

J. George Bragin, Hollywood, and H. Ward Dawson, Jr., San Francisco, for appellants.

Pearlson & Pearlson, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court in an action for fraud and mismanagement, plaintiffs appeal.

[1] *Facts:** On October 20, 1947, a complaint was filed in the Eighth Judicial

* The evidence is viewed in the light most favorable to defendant (respondent) pursuant to the rule set forth in Re Estate of Isenberg, 63 Cal.App.2d 214, 216 [2], 146 P.2d 424.

* Opinion vacated 289 P.2d 466.

District Court in the State of Nevada, County of Clark, being case No. 38224, in which the plaintiff was Nevada Desert Inn, Inc., a corporation, and Stanley Burke, also a defendant herein, was one of the defendants. The Nevada law firm of Morse and Graves by Harold M. Morse appeared of record as attorneys for plaintiff. Verification of the complaint was made by one Lela M. Anderson, who swore to the fact she was the Secretary of the Nevada Desert Inn, Inc., a Nevada corporation, and made the verification for and in behalf of said corporation. In the verification she stated that she had read the complaint and knew the contents thereof, and that the same was true of her own knowledge except as to such matters therein stated upon information and belief, and as to those matters she believed it to be true.

On November 16, 1950, said action No. 38224 was dismissed with prejudice by the Nevada court as a result of a Dismissal with Prejudice filed by plaintiffs' counsel, Morse and Graves, by Harold M. Morse.

April 11, 1949, the present action was filed and on December 21, 1953, after evidence was taken on the issue of res judicata, dismissed on the grounds that the Nevada action was res judicata as to the present action, and judgment entered accordingly.

Questions: First: *Did Lela M. Anderson and/or Harold M. Morse have authority to file the Nevada action No. 38224, and even assuming they had such authority, would it extend so far as to permit Mr. Morse, as attorney, to dismiss the action with prejudice?*

[2-4] This question the trial judge properly refused to consider and it will not be considered by this court for the reason that a judgment, valid on its face, cannot be collaterally attacked on the ground that an attorney, appearing for parties in the action, was not authorized to appear for such parties. The attorney being an officer of the court, it will be presumed that he acted within the scope of his employment. (Westwood Temple v. Emanuel Center, 98 Cal.App.2d 755, 759, 221 P.2d 146, hearing denied by the Supreme Court; May v. Rosen, 91 Cal.App.2d 794, 798 [3], 205 P.2d 1118; Parkside Realty Co. v. MacDonald, 167 Cal. 342, 347, 139 P. 805; Deegan v. Deegan, 22 Nev. 185, 37 P. 360, 361.)

This rule is supported by legislative enactments and appellate authorities in both California and Nevada. In California, the Code of Civil Procedure, section 283, reads:

"§ 283. Authority. An attorney and counselor shall have authority:

"1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the Clerk, or entered upon the minutes of the Court, and not otherwise;

"2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment. (Enacted 1872; Am. Code Amdts. 1880, p. 57.)"

In Bogardus v. O'Dea, 105 Cal.App. 189, 287 P. 149, 150, it was urged, as plaintiff does here, that the dismissal signed by an attorney could not operate as a retraxit, because a retraxit could not be given by an attorney, but only by the plaintiff in person. The reviewing court, in construing section 283, Code of Civil Procedure, stated at page 193, "This (referring to appellant's contention) was the rule at common law, but is not the rule in California, where, under the statutory provisions relating to attorneys at law (section 283, Code Civ. Proc.), 'this authority must be considered to be conferred upon the attorney of record in a cause.' (Citing cases.)" (See also Westwood Temple v. Emanuel Center, supra, 98 Cal.App.2d at page 759, 221 P.2d 146; Wilson v. Barry, 102 Cal.App.2d 778, 780 [1], 228 P.2d 331; In re Estate of Pailhe, 114 Cal.App.2d 658, 661 [2], 251 P.2d 76.)

A similar statute of the State of Nevada is almost identical in wording. Section 600 of the Nevada Compiled Laws, reads:

"600. Authority of Attorney. § 10. An attorney and counselor shall have authority: First—to bind his client in

any of the steps of an action or proceeding, by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise. Second—To receive money claimed by his client in an action or proceeding during the pendency thereof, or within one year after judgment and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction in the judgment."

Deegan v. Deegan, supra, announced the same rule as the appellate courts of California. (See also State v. California Min. Co., 15 Nev. 234, 243.)

[5] Second: *Was the doctrine of res judicata applicable as between the Nevada action and the California action?*

[6] *Yes.* The allegations set forth in the complaint in the Nevada action and the allegations in the complaint in the California action are almost identical. An action is res judicata and a bar to a second suit, not only as to issues actually determined, but also as to issues necessarily involved, and even though the causes of action be different, the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat it. (Krier v. Krier, 28 Cal.2d 841, 843 [1–2], 172 P.2d 681.)

[7] Also where a complainant has either of two remedies available to him under the same alleged conduct of defendant, a judgment in favor of defendant in an action which seeks one such remedy is a bar to a subsequent action which seeks the alternate remedy. (Suisun Lumber Co. v. Fairfield School Dist., 19 Cal.App. 587, 593, 127 P. 349; Wulfjen v. Dolton, 24 Cal.2d 891, 894 [1], 151 P.2d 846.)

[8] There is no merit in plaintiffs' contention that because the alleged facts as set forth in their complaint have not been determined there has not been a decision on the merits. In Olwell v. Hopkins, 28 Cal.2d 147, 150, 168 P.2d 972, a judgment of dismissal was held to be res judicata even though there was not a trial upon the facts. The court said, 28 Cal.2d at page 150, 168 P.2d at page 974, "A decision on the merits, however, is not necessarily a decision upon the facts."

Under the foregoing rules it is evident that the Nevada action was res judicata of the matters involved in the California action.

Third: *Were there special circumstances presented in the instant case which makes applicable the doctrine as announced in Greenfield v. Mather, 32 Cal.2d 23, 194 P.2d 1, and Guardianship and Estate of Di Carlo, 3 Cal.2d 225, 44 P.2d 562, 99 A.L.R. 990?*

No. There is a total absence in the record of any facts or special circumstances bringing the instant case within the purview of the two cited cases.

Affirmed.

MOORE, P. J., and FOX, J., concur.



131 Cal.App.2d 120

E. A. TALIAFERRO, doing business under the name and style of Davis Auto Exchange, Plaintiff and Appellant,

v.

INDUSTRIAL INDEMNITY COMPANY, Defendant and Respondent.

Civ. 16151.

District Court of Appeal, First District, Division 2, California

Feb. 28, 1955.

Suit by insured to enjoin prosecution of action at law by insurer to collect additional premium alleged by insurer to be due under policy. From adverse judgment of Superior Court, County of Contra Costa, Hugh H. Donovan, J., the insured appealed. The District Court of Appeal, Dooling, J., held that complaint, based on theory that insurer had illegally assessed an additional premium charge, and that insurer's threatened action and attachment would unlawfully and illegally interfere with insured's

business, was insufficient to state a cause of action.

Judgment affirmed.

1. Injunction ⇐118(3)

Complaint, based on theory that workmen's compensation insurer had illegally assessed an additional premium and that insurer's threatened action and attachment would unlawfully interfere with insured's business, was insufficient to state a cause of action for injunction against action by insurer to collect additional premium. Insurance Code, § 11750.3.

2. Injunction ⇐26(6)

Writ of injunction will not lie to enjoin judicial proceeding where plaintiff may obtain all relief to which he is entitled by way of answer, defense, cross-complaint, or intervention in such proceeding.

3. Action ⇐45(1)
Injunction ⇐26(4)

Claims for overcollections of workmen's compensation insurance premiums in previous years could all be joined in one action at law and did not furnish basis for suit to enjoin collection of additional premium assessments and to recover past overcharges on ground that such suit was necessary to prevent a multiplicity of actions. West's Ann.Code Civ.Proc. § 427.

4. Pleading ⇐236(7)

It is no abuse of discretion for trial court to refuse leave to plaintiff to amend his complaint to state an entirely different cause of action from that originally pleaded.

5. Injunction ⇐121

In suit by insured to enjoin prosecution of action at law by insurer to collect sum allegedly due under policy of insurance, allegations in amended complaint that money due insured for past overcharges by insurer were completely foreign to cause of action stated in original complaint and trial court did not abuse its discretion in refusing leave to insured to amend his complaint.

E. A. Taliaferro, in pro. per.

Thelen, Marrin, Johnson & Bridges, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment entered after a demurrer to his amended complaint was sustained without leave to amend.

[1] In his original complaint plaintiff sought to enjoin the commencement of a threatened action at law by defendant to collect $1,225 alleged to be due under a policy of insurance covering workmen's compensation liability. Plaintiff alleged that defendant had "illegally, unjustly, arbitrarily, unlawfully, and unreasonably fixed, determined, levyed (sic) and assessed against plaintiffs an additional premium charge allegedly due and payable" under its policy in an amount of $1,225, and that defendant threatens to sue plaintiff for that amount, to attach plaintiff's property and business and that they have assigned their claim to Wholesalers Adjustment Bureau for that purpose. It is further alleged that this would constitute an unlawful and illegal interference with plaintiff's business, damage his credit and credit rating and ability to finance and conduct his business and result in his irreparable injury. The prayer was for an injunction and damages.

After demurrer sustained to this complaint appellant filed his amended complaint containing substantially the same allegations and adding an allegation that pursuant to section 11750.3 of the Insurance Code plaintiff had a right to have a reconsideration of the test audit resulting in defendant's charge and an appeal to the Department of Insurance from any adverse decision of the California Inspection Rating Bureau and that the action of those "tribunals" was a condition precedent to the legal right to enforce such claim.

Plaintiff then added allegations that for the past seven years defendant had "wrongfully, erroneously and illegally charged and collected from plaintiffs sums of money" under its policies "upon the basis of wrongful and erroneous classification of plaintiffs employees which * * * was induced by defendants and relied upon by plaintiff as a result of misrepresentation of the rules, regulations and procedure pertaining to the classification of said employees according to the established practice of the fixing

of insurance and indemnity rates all of which was well known to defendants and unknown to plaintiff." It is alleged that the amount of such overcharges is unknown to plaintiff but amounts to more than $3,000. There is a further allegation that these facts were not discovered by plaintiff until 1952.

This is the complaint to which a demurrer was sustained without leave to amend. The amended complaint was defective in alleging many conclusions of law, but appellant argues that since it could have been amended to state a cause of action it was error to sustain the demurrer without leave to amend. Code Civ.Proc. § 472c; Wennerholm v. Stanford Univ. School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358.

[2] We are satisfied that under well settled rules the complaint could not be amended to state a cause of action. Insofar as it seeks to enjoin the prosecution of an action at law to collect the sum of $1,225 alleged by defendant to be due all of the matters relied upon by appellant in his claim that that demand is unwarranted could be set up as a defense to such action. If the amount was in fact erroneously assessed by defendant that would be a defense to an action to collect it. If the action of the California Rating Bureau and the Department of Insurance are conditions precedent to such cause of action (a question we need not consider) those matters could be interposed defensively to the action to collect this claim. The prosecution of a cause of action at law will not be enjoined because the plaintiff seeking the injunction has a good defense to it where that defense may be interposed in the threatened action. As the court pithily said in Bartholomew v. Bartholomew, 56 Cal.App.2d 216, 224, 132 P.2d 297, 302; "A man with a poor case is as much entitled to have it judicially determined by usual legal processes as the man with a good case." "The writ (of injunction) will not lie to enjoin a judicial proceeding where the complainant may obtain all the relief to which he is entitled by way of answer, defense, cross-complaint, or intervention in such proceeding." Johnson v. Sun Realty Co., 138 Cal.App. 296, 301–302, 32 P.2d 393, 395; Wolfe v. Titus, 124 Cal. 264, 268–269, 56 P. 1042; California Thorn Cordage, Inc., v. Diller, 121 Cal.App. 542, 547, 9 P.2d 594.

The allegations concerning a threatened attachment and its consequences do not entitle appellant to an injunction. The provisions of the Code of Civil Procedure relating to attachment afford a defendant such protection against unwarranted attachments as the legislature deemed adequate.

[3] Appellant relies on the added allegations of over-collections in previous years as showing that the action is necessary to prevent a multiplicity of actions. Under section 427, Code of Civil Procedure all of such claims could be joined in one action at law.

[4, 5] More fundamental, however, is the fact that the allegations of money due for past overcharges are completely foreign to the cause of action attempted to be stated in the original complaint. It is no abuse of discretion for a trial court to refuse leave to a plaintiff to amend his complaint to state an entirely different cause of action from that originally pleaded. Cyr. v. White, 83 Cal.App.2d 22, 31, 187 P.2d 834; Pagett v. Indemnity Insurance Co., 54 Cal.App.2d 646, 649, 129 P.2d 700.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

130 Cal.App.2d 806

Irving B. LITCHFIELD and Diana L. Litchfield, his wife, Helen Hyde, M. F. Kelly and Janet B. Kelly, his wife, Plaintiffs and Respondents,

v.

COUNTY OF MARIN, City of San Rafael, George Middleton and Thomas P. Boyd, Administrator of the Estate of Beatriz Michelena Middleton, Deceased, Defendants,

George Middleton, Appellant

No. 15049.

District Court of Appeal, First District, Division 1, California.

Feb. 17, 1955.

As Modified on Denial of Rehearing March 18, 1955.

Hearing Denied April 13, 1955.

Action to quiet title to realty plaintiffs had purchased at tax sale. The Superior Court, Marin County, Warren Steel, J., quieted title in plaintiffs, and defendants appealed. The District Court of Appeal, Finley, J., pro tem., held that evidence was sufficient to sustain trial court's finding that publication and notice of delinquency preceding sale to state, as cured by curative acts, was sufficient to give actual and adequate notice to owner.

Judgment affirmed.

1. Constitutional Law ⇐251

In passing curative statutes, Legislature cannot rise above federal and state constitutional requirements that property cannot be taken from individual owner without due process of law.

2. Taxation ⇐636

Proceeding by taxing agency to avail itself of property on which taxes have not been paid is action in rem, and same general rules apply as would apply to any such action.

3. Taxation ⇐636

Where realty directly sought to be reduced to dominion for purposes of sale to satisfy direct tax lies without territorial limits of taxing agency, proceeding in rem is not valid.

4. Taxation ⇐636

If taxing agency does not have constitutional authority to assess and collect tax upon property lying within territorial limits of taxing agency, action in rem will not lie to obtain direct dominion over the property for purposes of sale.

5. Taxation ⇐28

To have even de facto power to tax, purported taxing agency must have sovereign sanction, and any other agency assuming to transgress would be without any legal standing whatever.

6. Constitutional Law ⇐285

Questions of notice and due process are so inextricably part and parcel of each other that there could not be due process in proceeding to sell realty for taxes unless sovereign followed some procedure which, according to common experience, would reasonably give notice of impending interference with ownership or right to possession.

7. Constitutional Law ⇐285

Legislature, in prescribing notice to be given, as an essential element of due process, in proceeding to sell realty for taxes, is limited only by inferred constitutional mandate that notice must be such as would, according to common experience, be reasonably adequate to the purpose.

8. Taxation ⇐688

If, measured by common everyday experience, least notice actually required for sale of realty for taxes should appear reasonably adequate under the circumstances to inform owner of realty, then it is within constitutional power of sovereign agency to so limit it, and later curative statute may legally forgive failure to comply with requirement in excess of the minimum.

9. Taxation ⇐111

Sovereign can require reasonable vigilance on part of property owners in calling attention to any claimed irregularity in assessing or taxing of their property and can rely upon defense of estoppel where such is not done.

10. Taxation ⇐111

Property owner does not have privilege of shifting responsibility of watching after his own interests, for tax purposes, to

shoulders of those who represent the sovereign.

11. Taxation ⇐111

Taxpayer, who had failed, over period of years, to report removal of improvements from taxed realty and had failed, in good season, to complain of tax levied upon realty, was estopped from successfully relying upon such point to invalidate subsequent sale of the realty for taxes.

12. Taxation ⇐688

Failure of tax collectors to send notice by mail to last known address of last assessee prior to sale of taxed realty for taxes did not constitute fact which was jurisdictional and beyond reach of curative statutes subsequently enacted.

13. Taxation ⇐688

Failure to obtain consent of Board of Supervisors and of Controller prior to sale of realty for taxes did not constitute jurisdictional defect which was beyond reach of curative statutes thereafter enacted.

14. Taxation ⇐688

Failure to have affidavit of publication sworn to prior to sale of realty for taxes was not defect which was jurisdictional and beyond reach of curative statutes thereafter enacted.

15. Taxation ⇐688

Sale, for taxes, of 11 separate parcels of realty for 11 different prices did not constitute defect which was jurisdictional and beyond reach of curative statutes thereafter enacted.

16. Constitutional Law ⇐285

After title of realty sold for taxes had passed to state, and right of redemption had terminated, state could, without denying due process, sell the realty with or without notice to any individual property owner by simply complying with legislative requirements.

17. Taxation ⇐810(3)

In action to quiet title to realty purchased by plaintiffs at tax sale, evidence was sufficient to sustain trial court's finding that publication and notice of delinquency preceding sale to state, as cured by curative acts, was sufficient to give actual and adequate notice to owner.

18. Taxation ⇐816

Where, in action to quiet title to realty plaintiffs had purchased at tax sale, suggestion had not been made that any of the realty lay outside boundaries or beyond jurisdiction of taxing authority, former owner was not entitled to have judgment reopened for purpose of introducing additional evidence concerning layout of the realty in regard to streets and location of the lots.

19. Compromise and Settlement ⇐5(2)

In action to quiet title to realty plaintiffs had purchased at tax sale, wherein former owner's offer of settlement was not accepted by plaintiffs, refusal of trial court to inject itself into such matter was proper.

20. New Trial ⇐159

Where, on motion for new trial, movant did not offer anything which would indicate error or which, upon new trial, would have placed question of jurisdiction or denial of due process in issue, motion was properly denied.

M. Anderson Thomas, San Francisco, Eli D. Langert, San Francisco, for appellant.

Freitas, Freitas & Allen, San Rafael, for respondent.

FINLEY, Justice pro tem.

This is a second appeal in this action which was commenced by respondents for the purpose of quieting their title to certain real property in Marin County purchased at a tax sale. The first appeal is reported in 83 Cal.App.2d 730, 189 P.2d 750. Therein the court reversed a judgment quieting title in plaintiffs, the respondents here, and ordered a new trial on the ground that there was a defect in the proof of chain of title in plaintiffs. This appeal is from the judgment entered upon the new trial, again quieting title in plaintiffs to the property in question.

The facts are not materially disputed. The action concerns some twenty-six lots

situate in the city of San Rafael in Marin County, California. Prior to 1928 Beatriz Michelena Middleton and her husband, George Middleton, purchased the lots which were described in a single deed as delineated and designated on a map entitled "Lands of Forbes Subdivision, No. 3, San Rafael, Marin County, California." This property was purchased for the purpose of conducting a movie studio thereon and title was taken in the name of Beatriz Michelena Middleton who was an actress and part owner of a motion picture company.

The twenty-six lots so purchased were situate thirteen on each side of a street or roadway designated on the map as Central Avenue. Not all of them, however, faced upon this street or roadway. On the south side lots 21 to 29 inclusive and on the north side lots 30 to 36 inclusive faced thereon. Lots 1 to 4 were double width lots and lay south of and contiguous to lots 22 to 29 inclusive and faced upon Colloden Avenue. Lots 56 to 61 inclusive lay north of and contiguous to lots 30 to 36 inclusive and faced upon Forbes Avenue.

Prior to 1928 the Middletons constructed several buildings and made improvements upon lot 1, upon lots 30 and 31, upon lots 56, 57 and 58, and upon lot 61. All other lots, nineteen in number, were unimproved. About midsummer, or toward the end of the year 1930, all the buildings and structures theretofore erected on the lots mentioned were removed so that after 1930 no building improvements remained upon any of them.

Although this property appears on the plat or map of Forbes Subdivision No. 3 as 26 separate lots divided by a street, it was assessed as a unit. In addition the improvements were assessed to the whole property and not to the separate lots upon which they were constructed.

All taxes assessed were paid on all the lots until the fiscal year commencing July 1, 1928, but no payments were made thereafter. The property was sold to the state on June 22, 1929, and deeded to the state on June 23, 1934. It was assessed to Mrs. Middleton until sold to the state.

In 1938 a ten year installment program for the redemption of the properties was begun and it was restored to the tax rolls for 1939 and 1940, but after the initial payment no further installments were paid and it was again dropped from the rolls. Mrs. Middleton died in 1942. Between 1937 and 1941, and prior to her death in 1942, Mrs. Middleton sold ten of the twenty-six lots and these were apparently redeemed by the purchaser. On July 28, 1944, the tax collector received a written bid of $1500 for lots 24 and 25 as one parcel and requested authorization from the State Controller to sell all the lots. Two separate authorizations were issued by the controller, one for the sale of lots 24 and 25 as a unit at a unit price, the other for the sale of the remaining fourteen lots at specific prices which were the least amounts acceptable as bids for the respective lots.

Notice of sale of the two lots to be sold as a unit, namely, 24 and 25, was published in the Fairfax Gazette, a newspaper in Marin County, but not in San Rafael, the city in which the property is located. The publisher of the Gazette executed a certificate of publication but failed to swear to said certificate before a notary. Notice of sale of the remaining fourteen lots was published in the San Rafael Independent.

In connection with the sales the tax collector mailed two notices by registered mail addressed to Beatriz Michelena Middleton, San Rafael, California, and also a so-called "courtesy notice" to defendant George Middleton, which he admitted receiving before the date that any of the tax sales took place. In 1928 when the property became delinquent and was sold to the state the address of Beatriz Michelena Middleton appeared on the tax roll as "Warden Tract, S. R." In 1934 when it was deeded to the state the address appearing on the roll was merely "San Rafael." In 1940, after the property had been placed back on the rolls as a result of the redemption program the address appeared "care of A. P. Black, 114 Sansome Street, San Francisco, California."

In 1944 the Marin County Tax Collector, on behalf of the state, sold at public auction

the lots theretofore deeded to the state. Respondents were the high bidders and received deeds from the state. Thereafter, on November 30, 1944, respondents filed this suit to quiet title, naming as defendants the County of Marin, City of San Rafael, George Middleton and Thomas B. Boyd, administrator of the estate of Beatriz Michelena Middleton, deceased. The County of Marin and City of San Rafael filed disclaimers and Thomas B. Boyd was replaced by appellant George Middleton as administrator of the estate of Beatriz Michelena Middleton, leaving George Middleton, individually, and in such representative capacity, as the only remaining party defendant. The case was tried before the court without a jury and on the facts above summarized the court entered its decree quieting title in plaintiffs. Thereafter a supplemental motion to vacate the decision and a motion for a new trial by defendant were denied, and this appeal followed.

Appellant urges eleven reasons for reversal of the judgment. Stated in general terms the primary question to be answered is whether the curative statutes passed by the Legislature in the year 1943 and following were effective to cure any or all of the claimed irregularities in the process of assessing the property, in deeding it to the state, or in the procedure followed by the tax collector in selling it to respondents as tax delinquent property.

[1] We start with the elementary premise that under the provisions of both the federal and state Constitutions property may not be taken from the individual owner without due process of law. In passing curative statutes the state Legislature cannot rise above this constitutional limitation. It is quite generally conceded that the Legislature may legalize by rescript those acts and omissions which, subject to this limitation, it could have required or omitted to require in passing original legislation. City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397; Barrett v. Brown, 26 Cal.2d 328, 158 P.2d 567; Peterson v. Johnson, 39 Cal. 2d 745, 249 P.2d 17. This, then, brings us to the question: What in the process of assessment, or collection of a tax, or sale of property for nonpayment thereof, is jurisdictional as an element of due process and therefore mandatory, and what is nonjurisdictional and therefore subject to legislative regulation? In the case of Miller v. McKenna, 23 Cal.2d 774, at page 782, 147 P.2d 531, the court lists four jurisdictional requisites of due process not subject to waiver by curative statutes. Respondents contend that the list covers all jurisdictional requisites; that there are no others. Appellant as stoutly maintains that the list is not all-inclusive and points to the use by the court of the word *"among"* in Miller v. McKenna, supra, in the following discussion appearing in 23 Cal.2d on page 782, 147 P.2d on page 536: "But the Legislature cannot cure defects which are sometimes termed jurisdictional. *Among* the jurisdictional requisites are (a) a duly constituted taxing authority; (b) property to be taxed within the territorial jurisdiction of the taxing body; (c) property or subject matter legally subject to the tax; and (d) sufficient notice and opportunity for hearing to constitute compliance with due process. [Citing cases.]" (Emphasis added.)

In further support of the contention that this list is not all-inclusive appellant cites Ramish v. Hartwell, 126 Cal. 443, 58 P. 920, for the proposition that in addition to the four jurisdictional requisites listed in Miller v. McKenna, supra, there are two others, viz.: "the listing or assessment of the property, a levy of the tax, some notice of its delinquency, and that the property will be sold therefor * * *". 126 Cal. at page 448, 58 P. at page 922. This seems to be an enumeration of three rather than two requirements. Ramish v. Hartwell, supra, is cited by the court in Miller v. McKenna, supra, so it must be assumed that the court in the latter, which is also a much later pronouncement by our Supreme Court, had in mind the statement just quoted from Ramish v. Hartwell, supra, and either upon further consideration concluded that all the factors therein mentioned were not essentially jurisdictional or that the four requisites enumerated in Miller v. McKenna, supra, were sufficiently broad to encompass them.

It seems obvious from much of the discussion appearing in his brief that appellant is confusing use of the word jurisdiction as it applies to the carrying out by the assessor or tax collector of the necessary statutory procedural mandates and use of the word as applied to the constitutional sphere within which the Legislature may enact binding legislation. Appellant calls attention to such cases as Campbell v. Moran, 161 Cal. 325, 119 P. 89; Smith v. Furlong, 160 Cal. 522, 117 P. 527; Clayton v. Schultz, 22 Cal.App.2d 72, 70 P.2d 512, and Smith v. Boston, 161 Cal. 341, 119 P. 91. These cases all involved and were concerned with the question of whether statutory requirements had been followed with sufficient exactitude by the assessor or tax collector so that jurisdiction had been gained by the tax collector to legally exercise the power of sale on account of nonpayment of taxes. The question of jurisdiction as the word applies to authority of the legislative body to legally act was not involved excepting in Smith v. Furlong, where, in 160 Cal. on pages 527–528, 117 P. on page 529, the court has this to say: "In the Bank of Lemoore case, [Bank of Lemoore v. Fulgham, 151 Cal. 240, 90 P. 936,] the attack was on the validity of the deed *to* the state for failure on the part of the assessor to enter (as required by section 3680 of the Political Code) upon each subsequent assessment of the property after its sale for delinquent taxes the words 'sold for taxes,' with the date of sale. This was not done, and it was claimed that the making of such a memorandum by the assessor constituted a part of the notice which, in addition to the notice of sale to be given by publication, as provided by law, should be given to the delinquent owner, and that failure to give it amounted to depriving him of his property without due process of law. It was held that notice by publication of the sale being all the notice that a delinquent owner was constitutionally entitled to, it was not essential that the legislature should have provided for giving this memorandum notice at all; that the Legislature in the first instance might have dispensed with this notice provided to be given by the assessor entirely, or, having provided for it, make, as it did by section 3787, the deed *to* the state conclusive evidence that it had been given."

[2–5] A proceeding by a taxing agency to avail itself of property on which taxes have not been paid is obviously an action in rem and the same general rules should apply as apply to any such action. No in rem proceeding is valid where real property directly sought to be reduced to dominion for purposes of sale to satisfy a direct tax lies without the territorial limits of the taxing agency. Hicks v. Corbett, 130 Cal.App.2d 87, 278 P.2d 77. Even though property lies within the territorial limits of a taxing agency, if such agency has no constitutional authority to assess and collect upon it no action in rem will lie to obtain direct dominion over the property for purposes of sale. It certainly cannot be questioned as a matter of simple reason that any purported taxing agency must have sovereign sanction in order to have even de facto power to tax, and any other agency assuming to transgress would be without any legal standing whatever. The existence of a taxing agency duly sanctioned by law is then quite obviously jurisdictional to the exercise of this power, not as the word is applied to procedural questions but as it is applied to the naked power to exercise any such right at all.

[6–8] The questions of notice and due process are so inextricably part and parcel of each other that there could be no due process without the sovereign following some procedure which according to common experience should reasonably give notice of impending interference with ownership or right to possession. But there is no constitutional mandate of which we are aware which makes specific how that notice is to be given or which form it must take. Therefore the Legislature in prescribing the notice to be given as an essential element of due process is limited only by the inferred constitutional mandate that the notice must be such as would according to common experience be reasonably adequate to the purpose. It is not enough to say that because different sovereign agencies may differ in some requirements and that because some may employ different methods of conveying

notice to the owner than others, that the one requiring the least notice is thereby denying due process. If measured by common everyday experience the least notice actually required should appear reasonably adequate under the circumstances to inform the owner, then it is within the constitutional power of the sovereign agency to so limit it. If it can be so limited in the first instance, then later a curative statute may legally forgive the failure to comply with any requirement in excess of the minimum.

Appellant seeks to expand the general requirements enumerated in Miller v. McKenna, supra, by breaking them down into component parts and calling each of these component parts an additional requirement. But if we analyze the purported additional requirements listed by appellant we find that they are all encompassed by the four set forth in Miller v. McKenna.

Appellant cites as examples of alleged additional jurisdictional requisites "the listing or assessment of the property, a levy of the tax" mentioned in Ramish v. Hartwell, supra, 126 Cal. 443, at page 448, 58 P. 920, at page 922. With this position we do not agree. Were property never assessed or taxed the problem would never arise for there would be no question of sale for taxes if there were no tax. But if within the boundaries of a duly constituted taxing authority certain property was overlooked and not listed on the tax rolls or assessed for a time, can it be said that a tax rate fixed and levied during this time upon all nonexempt property in the district would impose no liability upon the overlooked property for its proportionate share of the tax within any reasonable limitation period that the law might provide? Appellant cites no authority on this proposition other than the general statement quoted from Ramish v. Hartwell, supra. No reason is advanced nor authority supplied for the proposition that it would be unconstitutional, or would deprive an owner of his property without due process of law for the sovereign to insist upon an owner whose property had been so overlooked paying his just tax after proper notice and opportunity to respond or that it would be depriving him of his property without due process of law to sell the property for nonpayment of taxes after reasonable notice if the owner did not so respond. It seems quite obvious that a temporary oversight in assessing or levying a tax upon a particular piece of property would not be a jurisdictional bar to collecting a proportionate tax on this property within a period of statutory limitation.

In any event, that particular point is not involved here. In the instant case we have the duly constituted taxing authority; property legally subject to be taxed within the territorial jurisdiction of this authority; an assessment and the levy of a tax; and notice and an opportunity for hearing which we consider quite adequate under the circumstances to have gained jurisdiction over the property for the purposes of a valid sale for nonpayment of the tax. See Barrett v. Brown, supra, 26 Cal.2d 328, 330–331, 158 P.2d 567.

[9–11] There is no constitutional reason why the sovereign cannot require reasonable vigilance on the part of owners in calling attention to any claimed irregularity in the assessing or taxing of their property, nor is there any constitutional prohibition against a sovereign agency relying on the defense of estoppel where this is not done. Appellant complains that the property was not assessed as separate lots or parcels but was assessed as a single unit, even though a graded and paved road ran through the property dividing it into two separate parcels. But there is no evidence that it had not always been so assessed while owned by the Middletons or that any complaint had ever been made at any time on this account. Appellant also complains that improvements on certain of the lots were still assessed and taxed after they were removed entirely from the property and the tax levied made a lien upon the real estate. Here also there is no evidence that the assessor was ever informed of the removal of the improvements or that any complaint had ever been made by the Middletons or any one else to the assessor or to the Board of Equalization. By following the simple expedient of reporting such removal the assessment

and tax on these improvements could have been adjusted. It is not the privilege of an owner of property to shift the responsibility of watching after his own interests to the shoulders of those who represent the sovereign. Appellant here having failed over a period of years to report the removal of the improvements and having failed in good season to complain of the tax levied upon them, he is now estopped at this late date from successfully relying upon this point to invalidate the sale. The improvements were within the territorial jurisdiction of the taxing body and properly subject to tax at the time of the original assessment and levy. No property was taxed which was not taxable. Any error was as to valuation only, which upon application the Board of Equalization would have corrected. The most that can be said is that the assessment may have been too high after the improvements were removed, but this did not constitute it an illegal tax. People v. Arguello, 37 Cal. 524; Blinn Lumber Co. v. County of Los Angeles, 216 Cal. 474, 14 P.2d 512, 84 A.L.R. 1304; Ambassador Hotel Corp. v. Los Angeles Co., 94 Cal.App. 143, 270 P. 726; Mahoney v. City of San Diego, 198 Cal. 388, 245 P. 189.

Also raised by appellant is the point that curative acts do not apply to pending litigation. This point was directly ruled upon contrary to appellant's contention in Miller v. McKenna, supra, 23 Cal.2d 774, where at page 781, 147 P.2d 531, at page 535, the court states: "No doubt may be entertained of the general power of the Legislature to enact statutes to validate prior tax proceedings. Many cases recognize that power. [Citing cases.] And a proper validating act may be effective as to pending litigation. [Citing cases.]" See also Barrett v. Brown, supra, 26 Cal.2d 328, 158 P.2d 567; City of Compton v. Boland, supra, 26 Cal.2d 310, 158 P.2d 397; City of San Diego v. Alpha Securities Corp., 99 Cal. App.2d 246, 221 P.2d 770.

[12–15] It will not be necessary here to discuss in detail the other points urged by appellant for reversal. Suffice it to say that we do not consider any one of them jurisdictional in nature and beyond the reach of the curative statutes passed in 1943 and thereafter. These points are listed by appellant as follows: "I. The original assessment in 1928 was totally void ab initio and was beyond the jurisdiction of the assessor or the curative acts. II. The tax sale to respondents was wholly illegal and void because of a jurisdictional defect, namely, the failure of the tax collector to send notice by mail to the last known address of the last assessee. III. The tax collector had no jurisdiction to sell because there is no evidence that the consent of the Board of Supervisors was obtained. IV. The tax collector had no jurisdiction to make the sale and the sale is invalid because the consent of the controller was insufficient. V. The tax collector had no jurisdiction to sell lots 24 and 25 because the affidavit of publication was not sworn to. VI. The tax collector was without jurisdiction to sell the property as eleven separate parcels for eleven different prices. VII. The sale by the state was void because the tax collector had no jurisdiction to segregate the tax into sixteen different assessments. VIII. The court erred in holding that the tax validation acts cured the errors in the assessment, levy and sale. IX. It was error not to allow the motion to vacate the memo of decision and allow the introduction of additional evidence. X. The court erred in not directing that if the title of the plaintiffs was good, the sale and deeds should be set aside upon the reimbursement of the plaintiffs by the defendant. XI. The court erred in denying the motion for new trial."

[16, 17] As will be seen, none of the errors specified from I to VIII inclusive fall within any of the four jurisdictional classifications outlined in Miller v. McKenna, supra, excepting the one numbered II. This point has been discussed above. The notice referred to by appellant in II is notice of sale *by* the state and not notice of transfer of title by deed *to* the state. It is not therefore jurisdictional in nature for after title has passed to the state and right of redemption terminated the state may without violating any rights of due

process sell the property with or without notice to any individual property owner by simply complying with legislative requirements. Mercury Herald Co. v. Moore, 22 Cal.2d 269, 138 P.2d 673, 147 A.L.R. 1111; Jacoby v. Wolff, 198 Cal. 667, 247 P. 195; City of Compton v. Boland, supra, 26 Cal. 2d 310, 158 P.2d 397. If the Legislature can require it can also forgive any such requirement by curative legislation. The trial court found that the publication and notice of delinquency preceding sale to the state, as cured of errors by the curative acts, was sufficient to give actual and adequate notice to the owner and therefore that jurisdiction consonant with due process had been gained to transfer title to the state. We find no compelling reason to differ with the trial court. We are satisfied that none of the other errors complained of are jurisdictional and that the validation acts of 1943 and 1945 were effective to cure any errors in procedure.

[18] Referring to point IX above, appellant's motion to reopen was predicated upon a proposal to introduce additional evidence concerning the layout of the property insofar as streets and location of lots are concerned. No suggestion is made that any of the property lay outside the boundaries or beyond the jurisdiction of the taxing authority. The motion was therefore properly denied.

[19] Point X refers to an offer of settlement made by appellant at some point during the proceedings and complaint is made that the offer was not accepted and that the trial court would not inject itself into this phase of the controversy. No citation of authority is necessary to establish that this point is not well taken.

[20] As to point XI, appellant on motion for new trial offered nothing so far as the record discloses which indicates error or which upon a new trial would have placed the question of jurisdiction or denial of due process in issue. The motion was, therefore, properly denied.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.

131 Cal.App.2d 144

Olin J. HESSELL and Olin J. Hessell, Jr., Plaintiffs and Respondents,

v.

Margaret E. HEALEY, Defendant and Respondent,

Charles G. Russell and P. T. Johnson, Individually and as copartners doing business as Motor Parts Depot, and Motor Parts Depot, a partnership, Defendants and Appellants.

Civ. 20357.

District Court of Appeal, Second District, Division 2, California.

Feb. 28, 1955.

Hearing Denied April 27, 1955.

Action by assignees of conditional buyer to recover under conditional sellers' warranty of title for amount which assignees had paid on contract for purchase of paint spray booth which had been installed on landowner's property and which landowner claimed as a fixture. The Superior Court, Los Angeles County, Thurmond Clarke, J., determined that booth was a fixture and rendered judgment for assignees against conditional sellers, and sellers appealed. The District Court of Appeal, Fox, J., held that evidence sustained finding that the booth was permanently affixed to and an integral part of property, and a fixture.

Judgment affirmed.

McComb, J., dissented.

1. Fixtures ⇐35(3)

Whether particular equipment is so affixed as to become a part of realty is essentially a question of fact.

2. Appeal and Error ⇐989

When a finding is attacked as being unsupported by evidence, power of reviewing court begins and ends with determination whether there is any substantial evidence supporting conclusion reached.

3. Appeal and Error ⇐996

When two or more inferences can be reasonably drawn from facts, a reviewing court is without power to substitute its deductions for those of trial court.

4. Appeal and Error ⇐931(1)

Where there is any reasonable doubt as to sufficiency of evidence to sustain a finding, reviewing court should resolve doubt in favor of finding.

5. Fixtures ⇐35(2)

In action by assignees of conditional buyer to recover under conditional sellers' warranty of title for amount which assignees had paid on contract for purchase of paint spray booth which had been installed on landowner's property and which landowner claimed as a fixture, evidence sustained finding that the booth was permanently affixed to and an integral part of property, and a fixture. West's Ann.Civ. Code, § 660.

6. Fixtures ⇐35(5)

Where case involving title to paint spray booth was tried on theory whether booth was a trade fixture, and trial court found that booth had become permanently affixed to and an integral part of the premises, express finding as to whether booth was a trade fixture within statute permitting tenants to remove trade fixtures under certain circumstances was unnecessary. West's Ann.Civ.Code, § 1019.

7. Fixtures ⇐35(5)

Where trial court, in case presenting issue whether paint spray booth was a fixture, found that booth had become an integral part of premises, finding whether booth could have been removed without injury to premises was unnecessary. West's Ann.Civ.Code, § 1019.

8. Fixtures ⇐15

Where paint spray booth installed in filling station on landlord's property became an integral part of the premises, tenants had no right to remove the booth. West's Ann.Civ.Code, § 1019.

9. Appeal and Error ⇐1052(1)

Where trial court found, on sufficient evidence, that paint spray booth installed by tenant on landlord's property was a fixture, allowing witnesses to give opinion that booth was permanently affixed to property was, if error, not prejudicial.

10. Evidence ⇐271(6)

In action by assignees of conditional buyer to recover under conditional sellers' warranty of title for amount which assignees had paid on contract for purchase of paint spray booth which had been installed on landowner's property and which landowner claimed as a fixture, testimony of conditional buyer, who, at time of installation, was a tenant under lease providing that he should not make any alterations or improvement without landowner's consent, that booth was not intended to be a fixture, was self-serving and properly excluded

A. James Ayers and Benjamin D. Brown, Los Angeles, for appellants.

Watling & Kelleher, Beverly Hills, for respondents Hessell.

Joseph Scott, J. Howard Ziemann, A. H. Risse, G. L. McFarland, Los Angeles, for respondent Healey.

FOX, Justice.

The basic issue on this appeal is whether a paint spray booth which was installed in a building at a gasoline service station was so attached as to become an integral part of the premises. The trial court made affirmative findings on this question. Appellants challenge the sufficiency of the evidence to sustain such findings, assert that findings were not made on material issues and claim prejudicial error in the admission and exclusion of evidence. We find no merit in any of these attacks.

The real property on which the service station was located was owned by respondent Healey. From August, 1946, to February, 1951, Rogers Automotive Service, Inc., was the lessee of the service station and Will E. Rogers, president of the corporation, was in active operation of it. In February, 1949, Rogers purchased through his corporation the paint spray booth here in controversy from appellants on a conditional sales contract. It was installed without the knowledge or consent of the owner of the property, Mrs. Healey, although the lease provided that "the lessee shall not

make any alterations in or upon or any additions to the improvements now located and situated upon the said premises without the written consent of the lessor * * *"

Rogers, who was delinquent on the conditional sales contract, sold his service station business, equipment and inventory to the plaintiffs, Hessell, in February, 1951. The Hessells were informed that the paint spray booth was being purchased from appellants on a conditional sales contract. They paid the appellants the balance due of $1,476.60, receiving a bill of sale providing that appellants "covenant and agree to warrant and defend the title to the property * * * against the just and lawful claims and demands of all persons whomsoever." When Mrs. Healey learned of the installation and claimed title to the booth as part of the realty, the Hessells demanded that appellants defend their title pursuant to the terms of the bill of sale. This demand was refused. Plaintiffs thereupon brought this action to quiet title to the paint spray booth, or for damages against appellants in the event the court found that title was in Mrs. Healey. Plaintiffs joined Mrs. Healey, the owner of the realty, and the vendors of the paint spray booth, Charles G. Russell and P. T. Johnston, individually, and as copartners doing business as Motor Parts Depot. The latter parties have appealed from the judgment which decreed that Mrs. Healey is the owner of the paint spray booth and that plaintiffs recover from them $1,476.60 (plus interest and attorneys' fees) which is the amount plaintiffs paid Russell and Johnston when the latter issued their bill of sale to the said booth, warranted title thereto, and agreed to defend the same against all claims and demands.

The booth was 28 feet long, 14 feet wide, and 9 feet high. It had a top but no floor. It was delivered unassembled. Such equipment in the city of Los Angeles, where this service station is located, is required to be installed inside a building. The building, however, at this service station was not large enough to completely house the paint spray booth. It protruded between 9 and 10 feet. The surface outside the building, which was blacktop, was not level with the concrete floor inside the building. It was therefore necessary at the outset to pour a concrete slab over the asphalt on the outside and thus build up the foundation so that it would be level with the floor of the building. This slab was around 19 feet by 16 or 17 feet. It varied in thickness from a fraction of an inch to 5 inches. Since the booth was not entirely within a building it was necessary to build a roof over the portion that protruded. This roof was about 3½ feet above the top of the booth and was affixed to the brick wall of the building.

The attachment of the booth to the inside of the building can be best described by quoting briefly from the testimony of two of the witnesses. Mr. O'Connor, the agent of the owner of the property, respondent Healey, described the situation as follows: "Then when I stepped inside the building I noticed the spray booth was in two sectional metal tops and sides and back. The front part had been—it had channel iron which was practically about two and a half to three inches in width, and put at right angles to the brick walls, and those channel irons were adhered by nails and by screws to the side of the wall.

"Looking up to the top, the spray booth had channel iron about three or four inches wide, heavy metal coming from the top of the metal spray booth bent down around to an I-beam, and that was welded.

"Q. They were welded? A. Yes.

"Q. You mean they welded the paint spray booth to the I-beam of the building? A. They were welded to the I-beam to give support and to hold the front part of that booth.

"Q. What else did you observe? A. And then I stepped inside, and inside that stall there was a wall which I presume was about fourteen inches of brick, and there was channel irons against it with which part of the spray booth was bolted—I should say nailed to the wall and a screw—and then on the top similarly like they had on the outside, but the ones that went on the inside they were bolts besides the welding, as over in the corners, and the spray booth was even welded in the open panels on the top."

Mr. Fulton, a witness on behalf of appellants, on cross-examination by Mr. Risse, gave the following picture of the manner in which the booth was affixed to the building:

"Q. Now, is this paint spray booth, as it is now affixed, is it rigid in the building? A. The way it is fixed—yes, it is very rigid.

"Q. And it is permanently affixed, when I am using the [word] 'permanently' I mean it will stay there and remain there, and could be operated for many years to come, could it not? A. Yes, it could.

"Q. And it is affixed solidly to the building from the floor to the ceiling, is it not? A. Yes.

"Q. You have got these lag screws in the floor? A. That's right.

"Q. And you have it welded to the ceiling? A. In four spots, yes.

"Q. And on the front part there is some angle iron that ties it to the pillars? A. The front section of the booth that protrudes.

"Q. And there is angle iron bolted to the top of the paint spray booth that is welded to the building? A. Yes. * * *

"Q. And how many pieces of iron would you say were welded to the I-beam? A. Three."

It was necessary to provide a vent for the paint spray booth so a hole about three feet in diameter was cut in the roof of the building. Two joists 2" x 12" were cut. The vent extended above the roof about three feet and had a sheet of metal placed over it to keep the rain from coming down.

The junior Hessell testified to the character of the installation in much the same fashion as did O'Connor. Pictures were received in evidence showing the incorporation of the paint spray booth into the permanent buildings of the service station.

[1–4] Whether particular equipment is so affixed as to become a part of the realty is essentially a question of fact, Bank of America Nat. Trust & Savings Ass'n v. New York Life Ins. Co., 16 Cal.App.2d 719, 723, 61 P.2d 364, and the decision in each case depends on its own facts. Alderman v. Baggett, 134 Cal.App. 501, 503, 25 P.2d 532. When a finding is attacked as being unsupported by the evidence the power of a reviewing court begins and ends with a determination as to whether there is any substantial evidence which supports the conclusion reached by the trier of the facts. Also, when two or more inferences can be reasonably drawn from the facts, an appellate court is without power to substitute its deductions for those of the trial court. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183. Finally, "if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, [an appellate court] should resolve that doubt in favor of the finding * * *." In re Estate of Bristol, 23 Cal.2d 221, 223–224, 143 P.2d 689, 690.

[5] Guided by these principles it cannot be said, as a matter of law, that the evidence in this record, disclosing as it does that the paint spray booth was installed with a new concrete base and with a new roof for the portion protruding from the building, by welding in a number of places, by screws and bolts, and by perforations of the roof of the building and by cutting and reinforcing the rafters, does not amply support the findings that the said booth was "permanently affixed to and an integral part of the real property." Civ.Code, sec. 660.

[6] Appellants complain that the court made no finding as to whether the paint spray booth was a trade fixture under section 1019 of the Civil Code.[1] An express finding on this question was not essential. The case was tried and decided upon the theory that it was a trade fixture. All the evidence would so indicate and we have assumed that it was such a fixture but such fact does not give appellants a right to remove it since the court found, on substantial

1. Section 1019 of the Civil Code reads: "A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises."

evidence, that it had become "permanently affixed to and an integral part of" the premises.

[7, 8] Appellants also vainly argue the court should have made a finding as to whether the booth could have been removed without injury to the premises. Such a finding was immaterial in view of the basic finding that the booth had "become an integral part of the premises" for under such circumstances there was no right to remove the booth. Civ.Code, sec. 1019.

[9] There was no prejudicial error in the court's permitting witnesses Hessell, O'Connor and Rogers (who was appellants' witness) to give their opinion that the paint spray booth was permanently affixed to the property. Each of the witnesses had already described in detail the manner in which the booth was attached to the building and the treatment that was provided for the portion that protruded both as to foundation and roof. Since the detailed testimony, as we have previously pointed out, amply supports the court's finding on this question, such error if error it was could not have been prejudicial.

[10] Appellants contend that it was prejudicial error to strike the testimony of the lessee, Rogers, to the effect that at the time the booth was installed he did not intend it to be a permanent fixture. They base such contention on the principle that the intention of the parties is important in determining whether a thing has become affixed and part of the realty or is still personalty. That principle, however, is not here applicable. Rogers' testimony was self-serving because there was no agreement or understanding between him and Mrs. Healey that this paint spray booth could be installed. In fact, its installation was not only without her knowledge and consent but contrary to the express terms of the lease which provided that the lessee "shall not make *any alterations* * * * *or any additions* to the improvements" on the premises without the lessor's written consent. (Emphasis added.) It is thus plain that the owner's consent to this installation was essential and that it must be evidenced in a specific affirmative manner. Such precise provision with respect to alterations and additions make it unmistakably clear that the lessee's intention alone in such matters was wholly insufficient to determine the character thereof. Consequently, it was not error to strike his testimony on that subject.

Lest there be any misunderstanding of the purport of this decision we specifically point out that this is not an action by a conditional vendor of a chattel against the lessor of the realty either to recover possession thereof or to obtain damages for its conversion since appellants had conveyed title to their vendee. Appellants' liability is predicated upon their unconditional warranty of title and agreement to successfully defend it against all claims and demands.

The judgment is affirmed.

MOORE, P. J., concurs.

McCOMB, J., dissents.



130 Cal.App.2d 821

In the Matter of the ESTATE of Harvey R. CUMMINS, Deceased.

Osa M. CUMMINS, Petitioner and Respondent,

v.

Jack A. CUMMINS et al., Contestants and Appellants.

Civ. 20509.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1955.

Proceeding to determine heirship to medical building built by husband and wife, prior to their marriage, on lot which they had purchased as single persons and in which each held an undivided one half interest. From adverse judgment of the Superior Court, Los Angeles County, Newcomb Condee, J., the contestants appealed. The District Court of Appeal, Fox, J., held

that evidence was sufficient to sustain finding that husband and wife had entered into antenuptial agreement to hold medical building as community property and that such agreement was consummated and confirmed during the marriage.

Judgment affirmed.

1. Appeal and Error ⇐1010(1)

Finding of facts supported by substantial evidence will not be disturbed by reviewing court.

2. Appeal and Error ⇐999(1), 1008(1)
Trial ⇐139(1)

Sufficiency of evidence is generally a matter for trial court or jury, and findings or verdict will not be lightly set aside by reviewing court.

3. Appeal and Error ⇐996, 1010(1), 1011(1)

Finding by trial court that property is either separate or community in character is binding and conclusive upon reviewing court, if it is supported by sufficient evidence, or if it is based on conflicting evidence or upon evidence that is subject to different inferences.

4. Husband and Wife ⇐266

In general, husband and wife may by simple agreement convert their separate property into community property and persuasive evidence of such agreement will rebut any presumption arising from form in which title is held.

5. Husband and Wife ⇐266

Husband and wife, who own separate property prior to their marriage, may, by antenuptial agreement, transmute such property into community property of the spouses, and such agreement may be oral if it is executed subsequent to marriage, as disclosed by acts and conduct in confirmation of pre-nuptial agreement.

6. Husband and Wife ⇐266

In proceeding to determine heirship to medical building built by husband and wife, prior to their marriage, on lot which they had purchased as single persons and in which each held an undivided one half interest, evidence was sufficient to sustain finding that husband and wife had entered into prenuptial agreement that building would be held as community property and that such agreement had been consummated and confirmed during the marriage.

7. Appeal and Error ⇐1010(1)

Sufficiency of evidence to establish a given fact, where law requires proof of fact to be clear and convincing, is primarily a question for trial court to determine, and if there is substantial evidence to support conclusion reached below, finding is not open to review on appeal.

8. Evidence ⇐236(3)

In proceeding to determine heirship to medical building built by husband and wife, prior to their marriage, on lot purchased by them as single persons and in which each had an undivided one half interest, testimony of husband's accountant, attorney and insurance agent, who handled insurance on building, relating to statements made by husband that medical building was community property were correctly received as declarations constituting admissions against interest. West's Ann.Code Civ.Proc. § 1870.

9. Evidence ⇐265(5)

In proceeding to determine heirship to medical building which had been built by husband and wife, prior to their marriage, on a lot purchased by them as single persons, each with an undivided one half interest, weight and effect to be given to testimony by husband's attorney and accountant, and agent, who had insurance on building, concerning statements by husband that medical building was community property, was for trier of facts.

10. Trial ⇐395(5)

A finding that certain property owned by married person is separate or community is finding of ultimate fact and evidence from which this ultimate fact is determined need not be found by trial court.

11. Appeal and Error ⇐843(2)

If a judgment is supported by findings which are amply sustained by the evidence, questions relative to other findings become immaterial upon appeal and may be disregarded.

Benjamin & Kronick, Los Angeles, for appellants.

J. George Bragin, Hollywood, for respondent.

FOX, Justice.

This appeal is solely from that portion of a judgment in a proceeding to determine heirship which decrees that all property in the estate of Harvey R. Cummins, deceased, not specifically designated as the decedent's separate property, is the community property of said decedent and his widow, Osa M. Cummins, in whom title to the said property is vested subject to administration.

The controversy herein finds arrayed on one side the widow of the decedent, who died intestate and without issue; on the other are appellants, who are the brothers and sisters and the issue of deceased brothers and sisters of Harvey R. Cummins. The principal object of their conflict is to determine the status of certain real property, and the income derived therefrom. The background of the dispute is as follows:

In August, 1943, the decedent, a medical doctor then serving as an officer in the United States Army, became acquainted with Osa Massen, a motion picture actress who came from Denmark and was naturalized in 1943. Two months after their meeting, Osa commenced an action for divorce against her husband, Allan Hersholt. She obtained an interlocutory judgment in October, 1943. A final decree was entered in August, 1945. Dr. Cummins and Miss Massen were married in February, 1947.

Prior to their marriage, Dr. Cummins and Osa, each of whom possessed substantial means of their own, were interested in investing in real estate and spent considerable time looking for a suitable purchase of income property. In October, 1945, they bought an unimproved lot located at 337 South Beverly Drive, Beverly Hills, California, for the purpose of erecting a medical building. The deed of conveyance was drawn to vest the title of an undivided one-half interest in Osa Massen, a single person and the other undivided one-half interest in Harvey R. Cummins, a single person. The deed was duly recorded to show the interests thus described and remained in this form until Dr. Cummins died.

During the year 1946, both Dr. Cummins and Osa contributed substantial amounts of money to finance the construction of the medical building, which was finished in September, 1946. The exact sums furnished by each from their private resources is not clearly indicated. Irving Leonard, an accountant who prepared income tax returns for Dr. Cummins and Osa subsequent to their marriage and who, in about May, 1947, set up books of account for the building, testified that Dr. Cummins informed him that Osa's cash investment was $40,000, and his own cash investment was $15,479. Mr. Leonard testified that these figures were entered in the ledgers of the books established to handle the building accounts. Appellants' brief refers to documentary evidence which suggests Osa's cash investment was $22,700 and that of Dr. Cummins $29,300. The balance of the funds required to complete the building came from a bank loan of $45,000 and from $22,000 in rentals advanced by prospective lessees of office space. About six weeks after the building was completed, a bank account was opened to handle receipts and disbursements connected with the building. The account was opened in the form of a partnership designated as the 337 South Beverly Drive Building, with Harvey R. Cummins and Osa Massen authorized to draw checks against the funds on deposit.

From the inception of the acquaintance of Osa and Dr. Cummins, the latter was in poor health. Although they were romantically interested in each other, Dr. Cummins was reluctant to marry because of his physical condition. Finally, Dr. Cummins learned definitely that he was the victim of a grave ailment, that the prognosis was poor, and that he lived in the shadow of impending death. During conversations with Osa, concerning their future, he stated that his failing health made it inadvisable for them to marry, since their marriage would be short lived. In the fall of 1945,

about the time they purchased the lot, Osa and the doctor decided to marry. In about October or November of that year, they discussed the status of the property they had bought in the light of their contemplated marriage and Osa testified it was agreed that they would hold it as community property. She further testified Dr. Cummins explained the meaning of community property to her and that they verbally agreed that everything they had should be community property after their marriage. She reiterated such testimony under cross-examination. Several weeks after the marriage, Osa testified to a conversation in her presence between Dr. Cummins and Mr. Leonard concerning the 1946 income tax returns. She quoted Dr. Cummins as saying: "Well, next year it won't be so complicated, now we are married, because we have agreed everything we own is community property."

Mr. Leonard, who prepared the tax returns for Dr. and Mrs. Cummins, did the accounting for their medical building, and had frequent business and social association with decedent, testified that in a discussion of the 1947 tax liability with Dr. Cummins, the latter told him he and Osa "owned everything together" and employed the term "community" in relation to their property. He testified that Robert Campbell, of the Treasury Department, had occasion to audit the Cummins' 1947 tax returns in July, 1950, and Campbell discussed these returns with Dr. Cummins and Mr. Leonard. Mr. Campbell's report, following these discussions, contains the statement that "All income is considered community." Dr. Cummins, according to Leonard, was apprised of this. Leonard also testified that Dr. Cummins specifically told him that everything after his marriage would be reported as community property.

Bret Beilin, who handled the insurance on the medical building, testified he discussed life insurance with Dr. Cummins after his marriage, during which time the question of mortgage protection arose. Dr. Cummins advised him he was uninsurable but was unconcerned about the mortgage because "they were making every effort to pay off the mortgage, and that they held the property in community property, and that being so, everything would revert to his wife and he was not worried about taking any more life insurance." Mr. Vanderzee, a loan officer of the bank which provided the original loan on the building, testified that on one occasion he inquired of Dr. Cummins why he was making such large payments on the mortgage. Dr. Cummins replied that he wanted to liquidate the obligation as rapidly as he could, so that it would not be a burden on his wife in the event anything happened to him. Dr. Cummins also stated: "What Osa owned was his and vice versa; in other words, it was a question of husband and wife."

Mr. Bragin, counsel for Osa in the case at bar, testified to a conversation in 1949 with Dr. Cummins relative to the making of a will. Dr. Cummins informed Mr. Bragin that everything he and his wife owned was community property and stated he would like to arrange it so everything they had would be placed in trust, so she would be protected after his death from persons attracted to her by her wealth. Mr. Bragin advised the doctor that he could not subject Osa's community interest in the property to a trust without her consent. Later that year, Dr. and Mrs. Cummins consulted Mr. Bragin with respect to a lawsuit that threatened Dr. Cummins in connection with the sale of their building. Mr. Bragin testified he advised them that so far as the purported sale was concerned, the would-be purchaser could not sue for specific performance, since Osa had not signed the agreement to sell the building, which was community property.

Copies of the income tax returns signed and filed by Dr. and Mrs. Cummins after their marriage were received in evidence. These returns disclose that all their income, including that from the building, was reported as community property. Partnership returns were also filed for state and federal income tax purposes covering the medical building in which Dr. and Mrs. Cummins are listed as each having a 50 percent interest. In this connection, Mr. Leonard testified that such returns were

prepared because it was advantageous, tax-wise, to operate the medical building as a partnership. He stated that the medical building books of account were set up in partnership format, with a fifty-percent capital account for each of the parties, as a matter of convenience in the handling of the operation. However, it is significant that Dr. Cummins used the funds from the medical building in the fashion of a husband managing the community estate. The records show that Dr. Cummins was the only one who drew money out of the partnership account. This sum amounted to $49,000 and was used for the family's living expenses and to meet other financial needs of either the doctor or his wife. Each of the parties also maintained relatively small bank accounts in their separate names and carried separate stock brokerage accounts.

One of the appellants, Simon Cummins, decedent's brother, testified he had been shown a written partnership agreement entered into by Dr. Cummins and Osa prior to their marriage which provided that if either partner died, the survivor should have the prior right to purchase the one-half interest of the deceased partner. Osa denied the existence of such an agreement. No copy of any partnership agreement was ever located.

At the time of his death, Dr. Cummins had standing in his name alone two commercial checking accounts and a deposit in a savings and loan association, all of which were opened after his marriage. There was evidence that prior to his marriage Dr. Cummins owned stocks which he carried in an account with a New York stock brokerage firm. During the existence of this account, which was closed on April 4, 1951, sums of money realized from these stocks were transferred to Dr. Cummins. Also standing in Dr. Cummins' name when he died were 1,000 shares of Citizens Underwriters Corporation stock, appraised at $4,000. These were purchased subsequent to the marriage with funds drawn from the medical building account and charged to Dr. Cummins' capital account. Osa testified this was bought and carried in Dr. Cummins' name because she carried no insurance, and it was felt if she died first, Dr. Cummins would have ready cash with which to pay inheritance taxes or other bills. Also outstanding when Dr. Cummins died was the balance owing him on a promissory note given by Irving G. Cummins prior to the marriage.

The court found to be separate property of decedent the money in the two checking accounts and the savings and loan deposit last mentioned, the 1,000 shares of Citizens Underwriters Corporation stock, and the balance owing on the promissory note. It found all the other property in the estate to be community property. These findings were embodied in the judgment and order of the court determining heirship. The appeal is taken only from that part of the judgment decreeing that all property in the estate not specifically designated as the separate property of decedent is community property, and that title thereto is vested in Mrs. Cummins as owner, subject to administration.

[1–3] Appellants' argument is directed primarily to evidence relating to the medical building and the income therefrom. They contend that there is no substantial evidence to establish that an oral antenuptial agreement had been entered into or consummated by decedent and his wife which transmuted their separate property into community property. In support thereof, they urge as controlling the fact that the original deeds were never changed, that the operation of the medical building was set up as a partnership with capital accounts allocated to the parties and some charges entered on decedent's account, that partnership income tax returns were filed, and certain other evidence carefully selected from among the oral and documentary testimony we have recited which they assert lends color and credence to their position. Such argument, of course, is properly addressed to the trier of facts, as the arbiter of their persuasive force; but this is a court of review only, and since, as will appear, there is evidence in the record giving substantial support to the findings attacked, we are not at liberty to

disturb such findings. Estate of Kane, 80 Cal.App.2d 256, 266, 181 P.2d 751. The principles controlling appellate review in cases of this character is cogently phrased in Estate of Trelut, 26 Cal.App.2d 717, 723, 80 P.2d 147, 150: "The sufficiency of the evidence is generally a matter for the trial court or jury, and the findings or verdict will not be lightly set aside. Following the general rule, a finding of a trial court that property is either separate or community in character is binding and conclusive upon the appellate court, if it is supported by sufficient evidence, or if it is based on conflicting evidence or upon evidence that is subject to different inferences. [Citation.]" Addressing itself to the same point, it was stated in Estate of Duncan, 9 Cal. 2d 207, 217, 70 P.2d 174, 179: "Upon this appeal, therefore, contestant is confronted with the added task of establishing the fact that there is no real conflict in the evidence and an entire failure of any substantial evidence to support the conclusion of the trial court, for, of course, the question of the sufficiency of the evidence is primarily a question for the trial court to determine, and if there be a conflict of the evidence, the finding of the lower court is not open to review on appeal." To prevail, appellant must show that there was no conflict in the evidence and that such evidence, as a matter of law, lends itself to no other reasonable inference than that the disputed portion of the property was the separate property of Dr. Cummins. The record as made presents a formidable barrier against the appellants' contention "that the documentary evidence adduced in this matter clearly overrides the oral testimony" and requires a reversal of that portion of the judgment appealed from.

[4, 5] The law governing this aspect of the case is reasonably clear. In general, a husband and wife may by simple agreement convert their separate property into community property, and persuasive evidence of such an agreement will rebut any presumption arising from the form in which title is held. Kenney v. Kenney, 128 Cal. App.2d 128, 274 P.2d 951; Stice v. Stice, 81 Cal.App.2d 792, 798, 185 P.2d 402; Estate of Raphael, 91 Cal.App.2d 931, 939, 206 P.2d 391. Thus, a husband and wife who own separate property prior to their marriage, may, by an antenuptial agreement, transmute such property into the community property of the spouses. Handley v. Handley, 113 Cal.App.2d 280, 283, 248 P.2d 59; Martin v. Pritchard, 52 Cal. App. 720, 724, 199 P. 846; Estate of Wahlefeld, 105 Cal.App. 770, 775–776, 288 P. 870; Vieux v. Vieux, 80 Cal.App. 222, 226–227, 251 P. 640. Such an agreement may be oral if it is executed subsequent to the marriage, as disclosed by acts and conduct in confirmation of the prenuptial agreement. Handley v. Handley, supra; Kenney v. Kenney, 220 Cal. 134, 136, 30 P.2d 398; Estate of Piatt, 81 Cal.App.2d 348, 351–352, 183 P.2d 919; Martin v. Pritchard, supra. As indicated in the cases last cited, the basic issue resolves itself into an inquiry as to whether there is sufficient evidence to justify a finding, express or implied, that such pre-conjugal agreement existed and that it was consummated and confirmed during the marriage.

[6] Contrary to appellants' assertion, there is no lack of such evidence. The court obviously credited Osa's testimony that late in 1945, when she and Dr. Cummins decided upon marriage, they agreed to hold the medical building as community property. That this agreement was fulfilled and carried into effect appears from the testimony of various witnesses, from documents introduced and from other significant circumstances, direct and indirect. We need do no more than here adumbrate such evidence. From Dr. Cummins' accountant, from an attorney whom he consulted, from his insurance agent and from a loan officer of his bank there came convincing testimony of declarations made by the decedent to the effect that he and Osa held their property in community. Statements substantially similar to those used by Dr. Cummins have been relied on in numerous cases to uphold a finding of an agreed oral transmutation of property from separate to community. Kenney v. Kenney, 220 Cal. 134, 136, 30 P.2d 398; Handley v. Handley, 113 Cal.App.2d 280, 284, 248 P.2d 59; Stice v. Stice, 81 Cal.App.

2d 792, 798, 185 P.2d 402; Estate of Raphael, 91 Cal.App.2d 931, 937, 938, 206 P.2d 391. In the years following their marriage, Dr. and Mrs. Cummins signed and filed income tax returns declaring that their collective income, from all sources, was community property. While not conclusive, such a course of conduct has frequently been regarded as evidencing an existing agreement to hold property in community. Handley v. Handley, supra; Estate of Raphael, supra; Frymire v. Brown, 94 Cal.App.2d 334, 339, 210 P.2d 707; Heck v. Heck, 63 Cal.App.2d 470, 475, 147 P.2d 110. On one of the returns appears a notation, following the totaling of the aggregate income, that "one-half community income to spouse in the amount of $10,482.42." Also, on the report of the U. S. Treasury auditor who discussed the 1947 returns with Dr. Cummins, appears the comment that "all income was considered community." During the marriage, Dr. Cummins used the income from the building to meet the living expenses of the parties without any charges against the accounts. Taking all this evidence in the light most favorable to the respondent, as we are compelled to do, we are satisfied that it abundantly sustains the court's finding that the property in question was community-owned at the time Dr. Cummins passed away. It was a question of fact whether the agreement of transmutation of separate into community property had been clearly established as a *fait accompli* from an inquiry into the circumstances surrounding the transaction. Marvin v. Marvin, 46 Cal. App.2d 551, 557, 116 P.2d 151; Estate of Raphael, supra, 91 Cal.App.2d at pages 939, 940, 206 P.2d 391.

Evidence with respect to the unaltered condition of the title to the property, the partnership operation of the building, and the like, relied upon by appellants, merely shows the existence of a conflict which the trial court resolved against them. The court could reasonably regard as perfectly natural and consistent with their community ownership of the medical building that a husband and wife should use the form of a co-equal business partnership as the medium by which to operate such a community asset. See McCall v. McCall, 2 Cal.App.2d 92, 94, 37 P.2d 496. Mr. Leonard testified that this was a convenient and tax-advantageous method of running such a business. Furthermore, the fact that the parties listed themselves as equal owners of the partnership does not inevitably require an interpretation that such partnership interest was separate in character. Rather, under the circumstances here present, it lends cogent support to an inference that this was additional confirmation of the oral agreement. For, after the purchase of the lots in which each had an undivided one-half ownership, the parties did not invest equal amounts toward the cost of constructing the building. Yet, whether we accept appellants' assertion that Dr. Cummins invested more than Mrs. Cummins in the building, or respondent's contention that she invested 72 percent against 28 percent by the decedent, the fact remains that regardless of such unequal investments, the partnership books set up after the marriage show, in conformity with the claimed agreement, that each had an equal interest in the enterprise, regardless of the amount they actually invested.

[7] The whole tenor of appellants' argument is that we should discredit the evidence offered by respondent and her witnesses, ignore the facts and circumstances tending to establish the existence of a confirmation and execution of the oral prenuptial agreement to treat the property as community, reappraise the evidence in their favor, and draw inferences contrary to those drawn by the trial court. That, however, lies outside the province of this court. Gillespie v. Ormsby, 126 Cal.App.2d 513, 529, 272 P.2d 949. Also lacking in force is appellants' claim that the evidence adduced lacks the degree of probative force required in cases of this character. The answer to this argument is contained in the following quotation from Simonton v. Los Angeles T. & S. Bank, 205 Cal. 252, 259, 270 P. 672, 675: "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily, as in other cases, a question for the trial court to determine, and, if there

is substantial evidence to support the conclusion reached below, the finding is not open to review on appeal. [Citations.]"

[8, 9] Appellants next argue that the court erred in admitting the testimony of Mr. Leonard, Mr. Beilin and Mr. Bragin relating to statements made by Dr. Cummins that the medical building was the community property of the decedent and his wife. This evidence, however, was correctly received as declarations constituting admissions against interest. Code Civ.Proc. § 1870(4); Estate of Blair, 126 Cal.App.2d 759, 762, 272 P.2d 866; Estate of Smead, 219 Cal. 572, 575, 28 P.2d 348; Estate of Hill, 167 Cal. 59, 138 P. 690. However weak such evidence may be standing alone, it is for the trier of fact to accord it the weight and effect to which he deems it entitled in view of the particular circumstances disclosed by the record. Estate of Blair, supra. Likewise lacking in merit is appellants' contention that if decedent already owned a one-half interest in the medical building, the declarations he made that it was community property "is certainly not against his interest, as it takes nothing away from him." The fallacy of such argument may be demonstrated by a simple hypothesis: assuming Mrs. Cummins had successfully maintained a suit for divorce based on extreme cruelty, the court, in its discretion, could have awarded her the entire building if found to be community property. Were any interest therein determined to be the separate property of Dr. Cummins, no such award could be made. We need not multiply illustrations, of which many are at hand, to indicate that the declarations were admissible under the authorities last cited.

[10, 11] Appellants urge that the material findings of fact and conclusions of law are not supported by the evidence and are in irreconcilable conflict. In this connection, they also assert the findings of fact as to the character of the property are actually conclusions of law. In this they are mistaken. "A finding that certain property owned by a married person is separate or community is a finding of an ultimate fact. [Citations.] The evidence from which this ultimate fact is determined need not be found by the court. [Citations.]" Thomasset v. Thomasset, 122 Cal.App.2d 116, 129, 264 P.2d 626, 634. Nevertheless, it is argued that paragraph 4 of the findings, in which it was found that certain bank accounts, 1,000 shares of stock, and the balance due on the promissory note, were the separate property of decedent, is inconsistent with the finding in paragraph 5 that all other property in the estate was community property. Respondent's brief purports to show that there is no inconsistency and asserts it merely reflects the trial court's conviction that the agreement of transmutation actually covered only the medical building. However, in view of the fact that only that part of the judgment relating to the community property has been appealed from, and since the sufficiency of the evidence to support the findings on which that part of the judgment is based has been amply demonstrated, we need not concern ourselves with other findings not essential to the part of the judgment appealed from. As stated in Jones v. Pleasant Valley Canal Co., 44 Cal.App.2d 798, 805, 113 P.2d 289, 293: "The ultimate fact to be found, however, is as to the respective rights of the parties, not as to how those rights were acquired. The trial court having arrived at the ultimate fact, any apparent conflict in the findings is immaterial; the judgment being supported by findings based on evidence sustaining those findings, the others will be disregarded. [Citations.]" It is fundamental that if a judgment is supported by findings which are amply sustained by the evidence, questions relative to other findings become immaterial upon appeal and may be disregarded. Logan v. Forster, 114 Cal.App.2d 587, 602, 250 P.2d 730; American Nat. Bank v. Donnellan, 170 Cal. 9, 15, 148 P. 188; Moore v. Mosher, 88 Cal.App. 2d 324, 325, 198 P.2d 714. Furthermore, no one has challenged the sufficiency of the findings as to the separate property of the decedent and no one has appealed from that part of the judgment based on those findings. The judgment as to the extent of the community property is fully supported by the evidence. Any possible error the court might have made, therefore, was in his findings as to separate property. But

appellants are not aggrieved thereby, since it redounds to their advantage. Under well-settled principles they are in no position to complain. Knapp v. Knapp, 23 Cal.App. 10, 14, 136 P. 719; Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 273, 83 P.2d 503; Collier v. Landram, 67 Cal.App.2d 752, 758, 155 P.2d 652; Morgan v. Veach, 59 Cal.App.2d 682, 694, 139 P.2d 976.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



131 Cal.App.2d 127

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Adolphus A. BERGER, Defendant and Appellant.

Cr. 3028.

District Court of Appeal, First District, Division 2, California.

Feb. 28, 1955.

Hearing Denied March 30, 1955.

Defendant was convicted of attempt to commit abortion. The Superior Court, City and County of San Francisco, Eustace Cullinan, J., entered judgment and order denying motion for new trial and defendant appealed. The District Court of Appeal, Dooling, J., held that act of boiling of surgical instruments disclosed attempt to commit abortion where intent with which this act had been done was established beyond any doubt.

Judgment and order affirmed.

1. Abortion ⇐1

The statute prohibiting use or employment of any instrument with intent to procure miscarriage makes those acts performed with intent to procure miscarriage the substantive offense, and any person who attempts to use or employ any instrument with same intent is guilty of attempt to commit abortion under the attempt statute. Pen.Code, §§ 274, 664.

2. Statutes ⇐211

While black letter headings of sections of code may be looked to in case of ambiguity, they are not conclusive of legislative intention.

3. Criminal Law ⇐304(2)

It is matter of common knowledge that sterilization of instrument to be used in surgical operation is first step taken in performance of operation in modern surgical procedure.

4. Abortion ⇐1

Act of boiling of surgical instruments disclosed attempt to commit abortion where intention with which this act was done was established beyond any doubt. Pen.Code, § 664.

Leslie C. Gillen, San Francisco, William F. Cleary, San Francisco, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Defendant appeals from a judgment convicting him of an attempt to commit an abortion and from the order of the trial court denying his motion for a new trial. Appellant was indicted jointly with Inez L. Burns. The indictment contained several counts but it was agreed that the prosecution would proceed on count 2 charging an attempt to commit abortion, appellant and his counsel waived a jury trial and stipulated to submit the charge to the trial judge on the testimony given before the grand jury.

The evidence may be summarized as follows: Adrienne Scheuplein, an investigator for the district attorney, went to the office of appellant, a licensed physician. She introduced herself as Kathryn Phillips and told appellant that she was pregnant and that she had come to him for the same

reason as the young woman who had referred her to him. He directed her to go to a laboratory for a test to establish pregnancy. She was later informed by telephone that the test was positive and requested to call again at appellant's office. When she went to his office the second time the co-defendant Burns was there. Appellant told Mrs. Scheuplein that it was difficult to do anything about her problem and asked if the operation could be performed at the place where she was staying. It was subsequently arranged that the operation should be performed at Mrs. Scheuplein's home. Appellant told Mrs. Scheuplein that a suitcase would be delivered at her home and that the person who would perform the operation would get in touch with her and he gave her specific instructions on preparing herself for surgery. The suitcase was delivered that night and the following morning Inez Burns arrived.

Mrs. Burns went to the kitchen and began making arrangements for the operation. The suitcase containing the surgical instruments was brought into the kitchen, the instruments were wrapped in towels and placed on the stove in pans of water to boil. A sheet was placed over the window to conceal it from the view of any person outside. Mrs. Burns placed cotton, jars of pitocin, ergotrate, metsol and ammonia and a large roll of gauze on a side table. Mrs. Scheuplein paid Mrs. Burns $525 in marked money. These activities occupied about 45 minutes during which Mrs. Burns talked of her past activities and reassured Mrs. Scheuplein about the pending operation. When the water in the pans containing the instruments was starting to boil Mrs. Scheuplein went upstairs, supposedly to disrobe, and the police arrived and arrested Mrs. Burns. Mrs. Burns admitted that she was there for the purpose of performing an abortion. Other details of evidence connecting appellant with these activities need not be stated since no claim is made that if Mrs. Burns was guilty of the crime charged the appellant could not under the evidence be found guilty also.

Appellant makes two arguments on appeal: 1, that under our statutory law there can be no such crime as an attempt to commit abortion; 2, that the evidence in any event is not sufficient to support the conviction.

[1] Penal Code, § 274 defines the crime of abortion as follows: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

It is appellant's position that this section itself makes an attempt to procure a miscarriage the substantive offense and hence Pen.Code § 664, which only applies "where no provision is made by law for the punishment of such attempts", is not applicable. Tersely appellant argues that there can be no such crime as an attempt to attempt. The argument is one of semantics rather than logic. The legislature could have made the actual inducement of a miscarriage the substantive offense in which event the acts prohibited by Pen.Code § 274 would have constituted an attempt (in which case other preceding acts might also be sufficient to constitute an attempt). But the legislature has chosen to make those acts performed with intent to procure a miscarriage the substantive offense and no logical reason appears why the attempt to commit that substantive offense does not fall within the definition of Pen.Code § 664. To apply the sections to this particular case: "Every person * * * who uses or employs any instrument * * * with intent thereby to procure" a miscarriage is guilty of the substantive offense. No good reason appears why any person who attempts "to use or employ any instrument" with the same intent is not guilty of an attempt under Pen.Code, § 664. While this question has apparently not been suggested before it is significant that the courts have held that a person may be guilty of an attempt to commit an abortion as that crime is defined in Pen.Code, § 274.

People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29; People v. Raffington, 98 Cal.App.2d 455, 220 P.2d 967; People v. Reed, 128 Cal.App.2d 499, 275 P.2d 633.

[2] Appellant points out that the black letter heading of section 275 Pen.Code which prohibits similar acts by a pregnant woman herself reads: "Submitting to an attempt to produce miscarriage." The offense is not the same, but even if it were, while the black letter headings of sections of the code may be looked to in case of ambiguity they are not conclusive. Ex parte Koser, 60 Cal. 177, 192; Aebli v. Board of Education, 62 Cal.App.2d 706, 738, 145 P.2d 601. We are satisfied that where, as here, the legislature makes certain acts a complete substantive offense the attempt to commit those acts falls under Pen.Code, § 664.

The more serious question is whether the acts performed by Mrs. Burns amounted to no more than mere preparation. The cases make clear that mere preparation to commit a crime does not constitute an attempt to commit it, but the drawing of the line between mere preparation and attempt in close cases is not an easy task. It may be drawn from the cases that where the intent to commit the substantive offense is as clearly established as it is here acts done toward the commission of the crime may constitute an attempt, where the same acts would be held insufficient to constitute an attempt if the intent with which they were done is equivocal and not clearly proved. Thus in People v. Miller, 2 Cal.2d 527, 531–532, 42 P.2d 308, 310, 98 A.L.R. 913, Mr. Justice Shenk, writing for the court, said: "The reason for requiring evidence of a direct act, however slight, toward consummation of the intended crime, is, as pointed out by the author in Wharton's Criminal Law, that in the majority of cases up to that time the conduct of the defendant, consisting merely of acts of preparation, has never ceased to be equivocal; and this is necessarily so, irrespective of his declared intent. It is that quality of being equivocal that must be lacking before the act becomes one which may be said to be a commencement of the commission of the crime, or an overt act, or before any fragment of the crime itself has been committed, and this is so for the reason that, so long as the equivocal quality remains, no one can say with certainty what the intent of the defendant is."

After reviewing certain cases Justice Shenk commented: "These cases illustrate the small class of cases where the acts of preparation themselves clearly indicate the certain unambiguous intent and suffice to constitute the attempt."

More concisely the court said in People v. Anderson, 1 Cal.2d 687, 690, 37 P.2d 67, 68: "Whenever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt."

The rule was thus stated in People v. Fiegelman, 33 Cal.App.2d 100, 105, 91 P.2d 156, 158: "Whenever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common-sense administration of the law with subtleties as to what constitutes preparation and what constitutes an act done toward the commission of a crime."

It may be added that even where the intent is clearly proved: "In order to establish an attempt, it must appear that the defendant * * * did a direct, unequivocal act toward that end; preparation alone is not enough, and some appreciable fragment of the crime must have been accomplished." People v. Gallardo, supra, 41 Cal.2d 57, 66, 257 P.2d 29, 35.

In People v. Gallardo the court held that arranging for abortions, filling out hospital cards of the intended abortees and accepting money for the proposed operations were not acts sufficient to constitute attempts to commit abortions, even though the intent of the defendant was clearly established. In People v. Buffum, 40 Cal.2d 709, 256 P.2d 317, it was similarily held that making arrangements for abortions to be performed in Mexico and transporting the women to Mexico for that purpose were mere acts of preparation and could not constitute attempts.

On the other hand in People v. Reed, supra, 128 Cal.App.2d 499, 275 P.2d 633, while the intended abortee was not yet on the operating table the defendant took a speculum from the sterilizer and ran cold water over it. He was arrested at that moment. The court concluded that this was sufficient to constitute an attempt saying, 128 Cal.App.2d 502, 275 P.2d 635: "Here defendant started to employ means to procure a miscarriage."

In the case before us the acts performed by appellant's confederate were one step removed from those in the Reed case. Appellant had placed the instruments in pans on the stove for the purpose of sterilizing them in boiling water, and the problem presented is, the intent with which this act was done being clearly and unequivocally established, did this amount to a mere preparation, or was it a first step in the commission of the intended crime itself and thus sufficient to constitute an attempt?

The case most closely in point on its facts appears to us to be People v. Lanzit, 70 Cal.App. 498, 233 P. 816. In that case defendant was convicted of an attempt to commit murder. He had prepared a bomb for the purpose of killing his wife. With an assumed confederate the bomb, without a fuse attached, was taken to the proximity of the wife's home. While attempting to attach the fuse, but before this had been accomplished, defendant was arrested. The court held that, the intent being clear, these acts went beyond mere preparation and constituted an attempt.

Similarly in People v. Stites, 75 Cal. 570, 17 P. 693, defendant had prepared a bomb with intent to blow up a railroad track. He was arrested while carrying the bomb away from the track, his intention being to approach the track at a more distant point. The court held that, while the act was equivocal, the intent was clearly proved as an independent fact, 75 Cal. at page 578, 17 P. 693, and hence the conduct was sufficient to constitute an attempt.

In People v. Gibson, 94 Cal.App.2d 468, 210 P.2d 747, defendant took a ladder in the nighttime with intent to burglarize some building in the locality. He had not yet selected the building to be burglarized when he was apprehended. The court affirmed a conviction of attempt to commit burglary since the intent was clearly proved by defendant's admissions. The court said, 94 Cal.App.2d at page 470, 210 P.2d at page 748: "It is not necessary that the overt act proved should have been the ultimate step toward the consummation of the design. It is sufficient if it was 'the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made'."

[3, 4] It is a matter of common knowledge that the sterilization of the instruments to be used in a surgical operation is the first step taken in the performance of the operation in modern surgical procedure. In a case where the intent was not clearly established the boiling of surgical instruments might be too equivocal an act to be held to constitute an attempt, but we have concluded that, since the intent with which this act was done in this case is established beyond any doubt, the boiling of the surgical instruments under the reasoning of the authorities cited was an act done toward the commission of the crime and hence sufficient to support the judgment.

Judgment and order affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

131 Cal.App.2d 181

Ernest A. JEFFS, Plaintiff and Appellant,

v.

Harold Glen LA GORE, Defendant and Respondent.

Civ. 4905.

District Court of Appeal, Fourth District, California.

March 1, 1955.

Hearing Denied April 27, 1955.

Action by pedestrian against westbound motorist who struck him while he was standing in marked cross-walk near center of street waiting for passage of eastbound motorist. From adverse judgment of the Superior Court, Kern County, Warren Stockton, J., the pedestrian appealed. The District Court of Appeal, Griffin, J., held that evidence sustained verdict against pedestrian on ground of his contributory negligence.

Judgment affirmed.

1. Automobiles ⇐244(50)

In action by pedestrian who was struck by westbound motorist while he was standing in cross-walk near center line of street, waiting for passage of eastbound motorist, evidence sustained verdict against pedestrian on ground of contributory negligence. Vehicle Code, §§ 505, 560(a), 670.

2. Automobiles ⇐217(2)

Pedestrian has duty to exercise reasonable care while crossing street in marked cross-walk, and to continue to be alert to safeguard against injury, and such duty continues throughout his passage.

3. Automobiles ⇐245(91)

In action by pedestrian against westbound motorist who struck him while he was waiting in cross-walk near center line of street for passage of eastbound motorist, wherein westbound motorist testified that he did not observe pedestrian in cross-walk until he was within about 10 to 20 feet from him, evidence was insufficient to permit submission of case to jury on last clear chance doctrine.

4. Trial ⇐260(8)

In action by pedestrian against westbound motorist who struck pedestrian as he was crossing street in marked cross-walk, pedestrian's instruction to effect that both driver and pedestrian were charged with same degree of care, but amount of care exacted of driver was far greater than amount exacted of pedestrian was properly refused in light of other instructions.

5. Appeal and Error ⇐1064(1)

In action by pedestrian against motorist who struck pedestrian as he was standing in cross-walk near center of street waiting for passage of eastbound motorist, giving of motorist's instruction on doctrine of imminent peril was not prejudicial.

6. Automobiles ⇐246(4)

In action by pedestrian against westbound motorist who struck pedestrian while he was standing in cross-walk near center line of street waiting for passage of eastbound motorist, requested instruction, that motorist was negligent as a matter of law for not yielding right of way to pedestrian as required by law, was incomplete when not followed by instruction to effect that violation of law was of no consequence unless it was proximate cause of injury, and was properly refused. Vehicle Code, § 560(a).

7. Negligence ⇐136(9)

Whether violation of statute is excusable or justified is question of fact for determination of jury unless court is compelled to say from facts produced that reasonable men could draw but one inference.

8. Trial ⇐296(3)

In action by pedestrian against westbound motorist who struck him while he was standing in cross-walk near center of street waiting for passage of eastbound motorist, instructions concerning violation of statute requiring motorist to yield right of way to pedestrian were not prejudicially erroneous in light of other instructions. Vehicle Code, § 560(a).

9. Automobiles ⇐246(56)

In action by pedestrian against motorist who struck him while he was crossing street in marked cross-walk, wherein motorist testified that he was not going over 25 miles per hour at time, motorist's instruction per-

taining to adequacy of brakes and maximum stopping distances was proper. Vehicle Code, § 670.

Dorsey, Bultman & Bianchi, Bakersfield, for appellant.

Mack, Bianco & King, Bakersfield, for respondent.

GRIFFIN, Justice.

A jury verdict for defendant was obtained in an action by plaintiff and appellant, a pedestrian, against defendant and respondent, driver of an automobile, in an intersection accident, resulting from a collision of defendant's car with the pedestrian in a marked cross-walk.

The questions presented are the sufficiency of the evidence to support the verdict, and claimed errors in giving and refusing certain instructions.

About 10 a. m. on October 17, 1951, plaintiff, then about 77 years of age, was attempting to cross 18th Street at M Street, in Bakersfield. 18th Street runs in a general east-west direction and M Street in a north-south direction. Each street is 54 feet 6 inches in width. 18th Street is a through boulevard and stop signs are indicated for traffic entering it from M Street. 18th Street is divided by a center white line and there are painted white-line cross-walks 14 feet wide.

[1] Plaintiff testified he was standing on the curb at the northwest corner of the intersection and looked in both directions for approaching traffic before he stepped into the street to go to the southwest corner of the intersection, walking in the center of the cross-walk indicated, and that no cars were noticed by him approaching from the east. He testified that as he was almost to the center line of 18th Street (the evidence is not clear as to the spot but indicates that it was between 3 and 6 feet north of the center line) he stopped and gave a car (the Waters car) approaching from the west, the "highball to go on through", and that that car passed in front of him on the south side of 18th Street near the center line. He then testified that he, at that time, looked to the east when he heard the brakes screech on a car (defendant's car) approaching him from the east and traveling on the north side of 18th Street near the center line; that it was then 10 or 15 feet from him; that he tried to get out of the road by proceeding onward but could not make it, and the next thing he knew he was hit. Apparently there was no other traffic on the street near that intersection. The place of impact was fixed at a point about 3 feet north of the center line and in the cross-walk. Plaintiff suffered a broken leg and considerable other injuries.

On cross-examination defendant offered in evidence plaintiff's deposition in which plaintiff testified that he stepped from the curb out into the street "a little ways * * some distance * * * about ½ way * * * not quite to the middle * * * about ¼ of the way across the street", and after looking in both directions he gave the Waters' car the "highball"; that at that time, after he had taken a few steps, he heard the screeching of brakes, looked up and for the first time saw defendant's car coming from the east, and that defendant started slowing down and his car was then about 10 feet from him. He later testified therein that he thought he had seen defendant's car "back there * * * on the street" before defendant started to put on his brakes; and he thought "he had plenty of room to go around me"; that the first time he saw the car it was "possibly fifteen or twenty feet east" of where he was standing. The brake skid marks commenced to show ten feet east of the cross-walk. The requirement as to stopping distance when traveling at 25 miles per hour is 58 feet. Sec. 670, Vehicle Code.

The witness Waters corroborated the plaintiff's testimony in general and he specifically stated that he did not notice defendant's car approaching on 18th Street at the time plaintiff waved him by, but after he proceeded on into the intersection, about the middle of it, he heard the squeal of brakes and, to his left, he observed a car going west on 18th Street and he immediately remembered plaintiff being in the cross-walk so he looked in his rear-vision mirror and defendant appeared to "kind of be try-

ing to run", and he was struck by defendant's car at a point about 6 feet north of the center line in the cross-walk; that defendant's car did not swerve to the left or right and there was about room enough for defendant's car to pass between plaintiff and the parked cars on the north side of the street.

Defendant testified he was a truck driver and was driving a Chrysler west on 18th Street near the center line at about 25 miles an hour; that as he approached the intersection he saw something flash to his right and thought it was a car approaching; that he looked back and "I was about in the middle of the *block* by that time" (he indicated a place on a diagram marked "L–1"). The diagram is not before us and it is difficult to determine where that place was, but from the testimony that followed it indicates that the witness meant the middle of the *intersection* rather than *block*. He testified that at that point and at that time he saw plaintiff just to the right of his right front fender walking "medium" with his face looking to the west; that he applied his brakes as soon as possible but was not able to stop in time; that he believed he was traveling about 10 miles per hour when his car hit plaintiff who was then about "midline" in front of defendant's car hood. He then testified he was looking straight ahead at all times until he momentarily glanced away, as indicated, and that he "was not in no particular hurry looking back"; and that there were no cars or other obstructions between his car and plaintiff at any time.

Police officers indicated there were about 35 feet of skid marks from the front wheels and 25 feet from the rear wheels of defendant's car in a straight line, commencing 10 feet east of the cross-walk and the left-hand marks were about 18 inches north of the center line of 18th Street.

Immediately after the accident defendant told the officers about the same story here related except the part about defendant's momentarily glancing away. They said that defendant gave no reason for not seeing plaintiff in the cross-walk at that time. He further testified he had a conversation with plaintiff at the hospital and plaintiff told him that as he was about to cross 18th Street he saw a vehicle "approaching the intersection" from the east; that it was not then in the intersection; that he felt sure he had time to go across the street before it arrived and did not know the car was going to hit him until it did. There was expert testimony as to how many feet per second a car would go traveling at various speeds.

It is apparent from the evidence that defendant was guilty of negligence in not keeping a proper look-out ahead, in not keeping his car under proper control, and in not anticipating the presence of a pedestrian in the cross-walk and failing to yield the right of way. Secs. 505 and 560 (a), Vehicle Code; Gray v. Brinkerhoff, 41 Cal.2d 180, 258 P.2d 834.

[2] Defendant alleged contributory negligence of plaintiff. There was sufficient evidence, if believed by the jury, that plaintiff was guilty of contributory negligence which would bar a recovery. Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 161 P.2d 673, 164 A.L.R. 1; Edwards v. McCormick, 79 Cal.App.2d 800, 181 P.2d 58. The fact that a pedestrian is in a cross-walk does not necessarily establish his freedom from negligence. It is the duty of a pedestrian to exercise reasonable care while crossing a street in a marked cross-walk, and to continue to be alert to safeguard against injury, and such duty continues throughout his passage. O'Brien v. Schellberg, 59 Cal.App. 2d 764, 140 P.2d 159. The implied finding of the jury in this respect has evidentiary support.

[3] Even in view of this finding, plaintiff contends that there were sufficient facts established to submit the last clear chance doctrine to the jury under proper instructions, and that the trial court erred in refusing plaintiff's instructions on that theory of the case.

If we take the sworn testimony of the respective parties to this action at the trial, it is clear that there was not sufficient evidence to support a finding of the jury that defendant observed the precarious position of plaintiff in the cross-walk at any time prior to the time he was in the intersection

about 10 to 20 feet from plaintiff. The fact that defendant then applied his brakes for the first time indicates that it was at that point he first observed plaintiff in the cross-walk in a position of danger. There was no evidence of previous screeching of brakes or of other skid marks on the street. The only evidence that might indicate that plaintiff might have previously seen defendant comes from the testimony of the police officer in which it is claimed by him that plaintiff told him at the hospital that as plaintiff was about to cross 18th Street he saw a vehicle approaching the intersection "from the east" and felt sure he had time to go across the street. Apparently this was when plaintiff was on the curb at the northwest corner of the intersection, and had no application to his conduct and the observations he made while in the cross-walk near the point of impact. It is apparent, then, that the evidence substantially shows that the first time defendant discovered plaintiff in this position of peril, there was no last *clear* chance for defendant to avoid the accident and accordingly the evidence does not substantially show that plaintiff has brought himself within the well-established rules so frequently set forth in the decisions in reference to the application of the doctrine. The trial court, under the evidence, was justified in refusing to give the proffered instruction. Poncino v. Reid-Murdock & Co., 136 CalApp. 223, 28 P.2d 932; Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915; Selinsky v. Olsen, 38 Cal.2d 102, 104, 237 P.2d 645; Peterson v. Burkhalter, 38 Cal.2d 107, 237 P.2d 977; Rodabaugh v. Tekus, 39 Cal.2d 290, 246 P.2d 663; Ralston v. Hewitson, 82 Cal.App.2d 143, 185 P.2d 644.

[4] It is next argued that the court erred in refusing plaintiff's instruction to the effect that both the driver and pedestrian are charged with the same degree of care, but the amount of care exacted of the driver of a motor vehicle is far greater than the amount of care exacted of a pedestrian, citing Pinello v. Taylor, 128 CalApp. 508, 514, 17 P.2d 1039; Dawson v. Lalanne, 22 Cal.App.2d 314, 70 P.2d 1002; Broun v. Blair, 26 Cal.App.2d 613, 80 P.2d 95, and Kuist v. Curran, 116 Cal.App.2d 404, 408, 253 P.2d 681.

This form of instruction was criticized in Warnke v. Griffith Co., 133 Cal.App. 481, 496, 24 P.2d 583 [Hearing denied by the Supreme Court] as being confusing to the jury where it was stated that in order to exercise the same degree of care defendants were required to exercise a greater amount of care. See also note BAJI 201–E; Schulman v. Los Angeles Ry. Corp., 44 Cal.App.2d 122, 128, 111 P.2d 924, and Reed v. Stroh, 54 Cal.App.2d 183, 128 P.2d 829.

We believe the principle attempted to be stated was sufficiently covered by other given instructions which were to the effect that negligence is a relative term; that the amount of caution required "varies in direct proportion to the danger known to be involved" in the undertaking; and that "it follows that in the exercise of ordinary care, the amount of *caution* required will vary in accordance with the nature of the act and the surrounding circumstances. To put it in another way, the amount of caution required by the law increases as does the danger that should be apprehended"; [This was given in the language of BAJI 102A]; that the duty of the driver of an automobile "requires him to be vigilant at all times, keeping a lookout for traffic and other conditions to be reasonably anticipated, and to keep the vehicle under such control that, to avoid a collision with any person or with any other object he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinary prudent driver in like position"; and that in determining the question of negligence the jury should take into account the situation and conduct of both parties. It also instructed on the basic speed law and the law pertaining to the requirement in reference to yielding of the right of way to a pedestrian in a cross-walk, in the language of BAJI [1950 Supp.] 201 [Alternate.]

In Cucinella v. Weston Biscuit Co., 42 Cal.2d 71, 265 P.2d 513, the Supreme Court discussed the particular instruction here offered and refused, and held that in view of the other instructions given on the subject matter no prejudicial error resulted.

We have reached the same conclusion in the instant case.

[5] Next, plaintiff complains of an instruction offered by defendant and given by the court on the doctrine of imminent peril. The instruction recites in part that "A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected, nor required, to use the same judgment and prudence that is required of him, in the exercise of ordinary care, in calmer and more deliberate moments * * *." The argument is that the instruction was correct as an abstract proposition of law but that it had no bearing on the issues because the evidence showed defendant was negligent as a matter of law; that he was not suddenly and unexpectedly confronted with peril, and that the alleged emergency was occasioned by defendant's own negligence. This instruction was not only applicable to defendant, if the jury believed he was free from negligence, but was also applicable to plaintiff if the jury believed plaintiff was not negligent. Since it appears from the the evidence that defendant clearly was negligent, Gray v. Brinkerhoff, 41 Cal.2d 180, 186, 258 P.2d 834, the instruction would be inapplicable and no doubt was disregarded so far as it pertained to the defendant. It may likewise have been disregarded as to plaintiff, due to his claimed contributory negligence, or it may well have been applied to the plaintiff and the jury, nevertheless, remained convinced of his contributory negligence. No prejudicial error appears. Stickel v. Durfee, 88 Cal.App.2d 402, 407, 199 P.2d 16; Armstrong v. Day, 103 Cal.App. 465, 470, 284 P. 1083; Emery v. Los Angeles Ry. Corp., 61 Cal.App.2d 455, 462, 143 P.2d 112; Cucinella v. Weston Biscuit Co., 42 Cal.2d 71, 78, 265 P.2d 513; Hartshorne v. Avery, 130 Cal.App.2d 517, 279 P.2d 123.

[6] The next point involves the modification by the court of a proffered instruction of plaintiff. It sets forth the provisions of section 560 of the Vehicle Code and reads in part: "(a) The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection * * *. A violation of the foregoing rule is negligence." (Last sentence struck out by the court.) Plaintiff offered an instruction in the language of BAJI 149–A to the effect that a violation of that section was negligence as a matter of law. This limited instruction was refused. It is contended that a violation of a statutory requirement is negligence as a matter of law and the court erred in not giving the instruction as offered, citing such cases as Clinkscales v. Carver, 22 Cal.2d 72, 76, 136 P.2d 777; Gallup v. Sparks-Mundo Engineering Co., Cal.App., 263 P.2d 104 [hearing granted see 271 P.2d 34] and Satterlee v. Orange Glenn School District, 29 Cal.2d 581, 588, 177 P.2d 279, which held that an act or failure to act below a statutory standard is negligence *per se*, or negligence as a matter of law, but that a presumption of negligence arising from performance of an act in violation of a statute is not conclusive but may be rebutted by showing that the act was justified or excusable under the circumstances. It also held that in a negligence action predicated on the violation of a statute it is necessary to show that the violation was a proximate contributing cause of the injury.

[7] A close question is presented from the evidence and all the circumstances related as to whether defendant was guilty of violating that section as a matter of law. In most of the reported cases where there is a conflict in the evidence, that question is usually left to the jury to determine. Standing alone, therefore, that instruction, as submitted, is not complete unless it is followed by an instruction to the effect that a violation of law is of no consequence unless it is a proximate cause of the injury found by the jury to have been suffered by the plaintiff. Satterlee v. Orange Glenn School District, supra; BAJI 149[b]. In addition, it should be left to the jury, under proper instructions, whether such violation was excusable or justified, unless the court is impelled to say that from the facts produced reasonable men can draw but one inference. This question was squarely pre-

sented in Edwards v. McCormick, 79 Cal. App.2d 800, 181 P.2d 58 [Hearing denied by the Supreme Court], where a pedestrian was struck in a marked crosswalk by defendant's car. A verdict for defendant was affirmed on appeal. The court said, 79 Cal. App.2d at page 803, 181 P.2d at page 60:

"The recent case of Satterlee v. Orange Glenn School District of S. D. Co., [29 Cal.2d 581, 590] 177 P.2d 279, appears to be in point. In that case, which involved an automobile collision and an alleged violation of the Vehicle Code, the court, quoting from Scalf v. Eicher, 11 Cal.App.2d 44, 54, 53 P.2d 368, said: 'Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact except in a case where "* * * the court is impelled to say that from the facts reasonable men can draw but one inference * * *."' It was therefore held proper for the trial court to refuse a requested instruction that plaintiff's violation of the Vehicle Code provisions relating to right of way constituted negligence, where such instruction did not tender the issue whether the circumstances were such as to excuse violation. There was a similar holding in Combs v. Los Angeles Railway Corp., [29 Cal.2d 606] 177 P.2d 293." See also Kuehn v. Lowthian, 124 Cal.App.2d 867, 269 P.2d 666; Gray v. Brinkerhoff, 41 Cal.2d 180, 184, 258 P.2d 834.

[8] The court did give several instructions bearing on the subject matter about which plaintiff also complains. It instructed the jury, in several different instructions, to the effect that "If a party to this action violated the statute just read to you, a presumption arises that he was negligent. This presumption is not a conclusive one. It may be overcome by other evidence showing that under all the circumstances surrounding the event the conduct in question was excusable, justifiable, and such as might reasonably have been expected from a person of ordinary prudence. [In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise.] [To prove that a violation of a statute * * * such as that charged in this case, was excusable and justifiable, so as to overcome the presumption of negligence, the evidence must support a finding that the violation resulted from causes or things beyond the control of the person charged with the violation.]"

This instruction follows the language of BAJI [1950 Supp.] 149 Alt. [New]. Although the court gave both portions of that instruction indicated within the brackets, which may have led to confusion, the subject matter was nevertheless sufficiently covered. See headnote BAJI [1950 Supp.] 149 Alternate [New]. The court then instructed the jury that in determining the question of negligence the jury should take into consideration the situation and conduct of both parties at the time of the alleged injuries, as disclosed by the evidence, and if the jury believed from the evidence that the injury complained of was caused by the negligence of the defendant alone then the plaintiff was entitled to recover. Since it is apparent from the evidence that the jury undoubtedly found defendant guilty of negligence in this respect no prejudicial error resulted.

[9] The last complaint involves an instruction offered by defendant and given by the court in the language of section 670 of the Vehicle Code pertaining to adequacy of brakes and maximum stopping distances permitted. The claim is that such an instruction was not applicable to any of the pleadings or issues presented by the evidence.

The adequacy of the brakes, and the distance within which a car should be stopped did bear on the truthfulness of defendant's statement that he was not going over 25 miles per hour at the time indicated. These were proper factors to be considered by the jury.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

131 Cal.App.2d 133

COMMERCIAL FACTORS CORP., Plaintiff and Appellant,

v.

KURTZMAN BROS. et al., Defendants and Respondents.

Civ. 20391.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1955.

As Modified on Denial of Rehearing March 18, 1955.

Hearing Denied April 27, 1955.

Action by assignee of account against buyers on New York judgment obtained by assignee confirming arbitration award given by New York arbitrator pursuant to arbitration agreement which was printed on reverse side of order blanks and which buyers were unable to see because order blanks were together in a pad, and no copy of which was furnished to buyers, who had no conversation with seller concerning arbitration. From adverse judgment of the Superior Court of Los Angeles County, Caryl M. Sheldon, J., the assignee appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding that no contract for arbitration of any disputes was ever entered into between the parties.

Judgment affirmed.

1. Appeal and Error ⇐1010(1)

Where trial court's findings of fact are supported by substantial evidence, weight and credibility of evidence will not be considered by reviewing court.

2. Judgment ⇐944

In action by assignee of account against buyers on New York judgment obtained by assignee confirming arbitration award given by New York arbitrator pursuant to arbitration agreement which was printed on reverse side of order blanks, evidence sustained finding that New York court never obtained jurisdiction over buyers, who were never personally served in city of New York or elsewhere with either a summons or complaint.

3. Contracts ⇐28(3)

In action by assignee of account against buyers on New York judgment obtained by assignee confirming arbitration award given by New York arbitrator pursuant to arbitration agreement which was printed on reverse side of order blanks and which buyers claimed was not shown to them and no copy of which was furnished to them, evidence sustained finding that no contract for arbitration was ever entered into by seller and buyers.

4. Judgment ⇐818(1)

A judgment of a sister state is always open to attack on ground of lack of jurisdiction of court rendering judgment over person of defendant.

Gitelson, Ashton, Moore & Coyle, Alfred Gitelson, Los Angeles, Leon M. Cooper, Beverly Hills, of counsel, for appellant.

Arthur V. Kaufman, Los Angeles, for respondents.

DORAN, Justice.

This is an action on a judgment obtained by appellant in the State of New York which confirmed an arbitration award given by a New York arbitrator. At the California trial, respondents attacked the jurisdiction of the New York court, and the trial court found that no arbitration contracts had been entered into between the parties; that respondents had not been personally served with process in New York, and that the judgment in that state was invalid.

In January, 1951, one of the respondent partners, whose place of business is in Los Angeles, went to New York to purchase merchandise, and visited the show rooms of William H. Prendergast Mills, Inc., plaintiff's assignor. After selecting certain goods the salesman took a pad of order blanks and wrote thereon the styles selected by the Kurtzmans. Three of the four orders were signed by one of respondent's partners but not by the seller; the fourth order blank was signed by neither buyer or seller.

The order blanks each contained the provision: "This order becomes a contract only when signed by the seller or confirmed in writing by the seller. * * * The undersigned hereby orders the above goods

upon the terms as stated, including the terms and conditions printed on the back of the contract and forming a part hereof". On the reverse of each order blank appears the printed provision that "Any complaint, controversy or question which may arise with respect to this contract that cannot be settled by the parties thereto, shall be referred to arbitration", and that "Rules of the Piece Goods Selling Division of the Wool Textile Industry" are made a part of the contract.

It was the respondents' testimony that these order blanks were together in a pad; that the buyer was unable to see the reverse of the order blanks, that no copy was then furnished to the buyer but one was later mailed; that there was no conversation concerning the arbitration provisions printed on the reverse and the buyer's attention was not called to such provisions. Merchandise was later shipped to respondents to the amount of about $12,000; payment of about $8,500 was made but the balance was not paid "Because the goods were rejected, imperfect goods". The accounts were assigned to the appellant.

Thereafter, appellant secured in New York a judgment affirming an arbitration award against the respondents upon substituted service. It is conceded that all notices, summons and other process were forwarded to the respondents by mail from New York, and that nothing was ever personally served on the respondents in reference to the New York action. The respondents were not residents of the State of New York nor engaged in business in that state.

As hereinbefore indicated, when action was brought in California on the New York judgment, the California trial court found that the New York judgment "is invalid, void, and of no force and effect", and that the New York court was without jurisdiction for the reason that "none of the said defendants were ever personally served in the City of New York or elsewhere with either a summons and/or complaint in said action, or any other process in connection therewith". The California court further found that "no contracts for arbitration of any disputes were ever entered into by and between" the parties.

It is the appellant's contention that the above findings of fact "are contrary to and not supported by the evidence", and that under the arbitration clause hereinbefore referred to, the New York court had jurisdiction to render the judgment which the California court was then forced to accept under the full faith and credit clause.

[1–3] The only evidence introduced by appellant in the California action was a certified and exemplified copy of the New York judgment roll, together with invoices sent to respondent. The testimony of one of the Kurtzman brothers, respondent, was then received, and no other evidence offered by either party. That this record showing amounts to substantial evidence in support of the trial court's findings of fact can hardly be doubted. Such being the case, there can be no appellate review of the weight and credibility of the evidence.

[4] It is well established that "a judgment of a sister state is always open to attack on the ground of lack of jurisdiction of the court rendering the judgment over the person of the defendant." First Nat'l Bank of Findlay v. Terry, 103 Cal.App. 501, 508, 285 P. 336, 339. And while it is undoubtedly true that the law highly approves the settlement of disputes by arbitration, it is equally true that buyers in one state should not be forced into arbitration in another state unless there has been a definite contract knowingly entered into containing such a provision.

In the present case the order forms were not signed by the seller as required by the order, and one of them was signed by neither party. From the buyer's testimony it is apparent that there was no discussion concerning arbitration. There is certainly nothing to indicate that, by ordering the goods in question the buyer had any reason to believe that legal jurisdiction was being conferred upon a New York court to enter a judgment against the buyer without personal service of summons and complaint.

As said in Arthur Philip Export Corp. v. Leathertone Inc., 275 App.Div. 102, 87 N.Y.S.2d 665, 667, "If a party wishes to bind in writing another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each par-

ty to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto. Here appellant says that it was wholly unaware of the existence of the arbitration clause set forth on the reverse side of the confirmation order * * *. A party should not be bound by clauses printed on the reverse side of a document unless it be established that such matter was properly called to its attention and that it assented to the provisions there stated. * * * 'In short, neither expressly or impliedly, neither directly or indirectly, did the parties ever discuss arbitration or bargain about it, and certainly they reached no agreement thereon.'"

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



131 Cal.App.2d 78

Lula P. STOGSDILL, Petitioner,

v.

SUPERIOR COURT of the State of California, In and for the COUNTY OF LOS ANGELES, Respondent.

Civ. 20879.

District Court of Appeal, Second District, Division 3, California.

Feb. 23, 1955.

Great aunt of minor brought habeas corpus proceeding against the Superior Court of the State of California, in and for the County of Los Angeles, to prohibit the Superior Court from proceeding with habeas corpus proceeding by aunt of minor to obtain custody of minor. The District Court of Appeal, Parker Wood, J., held that notice of appeal to Supreme Court by great aunt from order of Superior Court revoking her letters of guardianship, appointing aunt as guardian, and ordering that custody of minor be given to aunt, stayed all proceedings in the Superior Court for the enforcement of the order, until final determination of the appeal, and that therefore Superior Court did not have jurisdiction to proceed with habeas corpus proceeding, and that peremptory writ of prohibition should issue.

Peremptory writ of prohibition issued.

1. Guardian and Ward ⇐18
Prohibition ⇐10(2)

Filing of notice of appeal by great aunt of minor from order revoking her letters of guardianship, appointing aunt of minor as guardian, and ordering that custody of minor be given to aunt, stayed all proceedings in Superior Court, for enforcement of order until final determination of appeal, and therefore Superior Court did not have jurisdiction to proceed in habeas corpus proceeding by aunt to obtain custody of minor, and peremptory writ of prohibition would issue to restrain Superior Court from taking any further proceedings in connection with habeas corpus proceeding. West's Ann. Code Civ.Proc. § 949.

2. Courts ⇐207(5)

Where great aunt appealed to Supreme Court from order of Superior Court revoking her letters of guardianship, appointing aunt as guardian of minor, and ordering that custody of minor be given to aunt, District Court of Appeal had jurisdiction to issue writ of prohibition prohibiting Superior Court from taking any further proceedings in connection with habeas corpus proceeding by aunt to secure custody of child.

James B. Ogg, Alhambra, and Hooper, Miller & Astor and Z. Harry Astor, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Krag & Sweet, and Donald O. Krag, Alhambra, for Real Party in Interest, Marian Arnold

PARKER WOOD, Justice.

Petition for writ of prohibition. On July 27, 1954, the Superior Court of Los Angeles County appointed Lula P. Stogsdill guardian of the person and estate of Rebecca Rae

Levy, a minor. Lula P. Stogsdill is a great-aunt of the minor. On November 17, 1954, Marian Arnold, maternal aunt of the minor, filed a petition for appointment of herself as guardian of the person and estate of the minor. On November 26, 1954, Marian Arnold filed a notice of motion to vacate the order wherein Lula P. Stogsdill had been appointed guardian, upon the grounds (1) the appointment was obtained without notice to another maternal aunt, (2) there were misrepresentations in the petition for appointment, and (3) Marian Arnold was induced not to seek guardianship of the minor by reason of misrepresentations made by the guardian.

The hearing upon said petition of Marian Arnold for appointment as guardian, and upon the motion to vacate the order appointing Lula P. Stogsdill as guardian, came before Judge Emme on January 12, 1955. The hearing proceeded on that day and thereafter until January 18, when the cause was submitted. On January 14, the court set aside the appointment of the guardian (Lula) "for the purpose of hearing the Petitions for appointment of Guardians [being the petition of Marian, and the petition of Lula under which she had previously been appointed]." During the hearing, January 17, William S. Stogsdill, (son of Lula) filed a petition for appointment of himself as guardian of the person and estate of the minor.

On January 19, the petitions of Lula P. Stogsdill and William S. Stogsdill were denied, and the petition of Marian Arnold was granted. Letters of guardianship were issued to her on January 19.

On January 20, the court amended its order of January 19, nunc pro tunc, by adding thereto an order that Lula P. Stogsdill, William S. Stogsdill and Marlou Stogsdill (wife of William) are ordered and directed to deliver the minor forthwith to the newly appointed guardian Marian Arnold, who is permitted to remove said child from the State of California; and Donald O. Krag, counsel for Marian Arnold, is ordered to prepare findings.

On January 20, Lula P. Stogsdill, as guardian, filed a notice of appeal which stated that she appealed to the Supreme Court from the order of January 19 revoking her letters of guardianship and appointing Marian Arnold guardian and ordering that the custody of the minor be given to Marian Arnold.

On January 24, Marian Arnold filed an application for a writ of habeas corpus in the superior court, which recited that she was a resident of Baltimore, Maryland; she made application on behalf of the minor, who is three years of age; she was appointed guardian of the minor by said court on January 19, 1955; during the hearing of her petition and the petitions of Lula and William for appointment as guardian, the court, pursuant to stipulation, ordered that the minor remain with William and Marlou Stogsdill pending the determination of the three petitions; William and Marlou reside in Arcadia, California; on January 19, 1955, after the court had made its order appointing Marian Arnold guardian, she advised William S. Stogsdill that she and her husband (Carl Arnold) would come to William Stogsdill's home in Arcadia about 3:30 p.m. of that day to receive the minor child; Lula P. Stogsdill was served on January 20 with a copy of the nunc pro tunc minute order but she refused to deliver the custody of the minor to Marian Arnold; since said conversation with William S. Stogsdill on January 19, the minor has been held and detained by William S., Marlou, and Lula P. Stogsdill; said minor is held in custody and deprived of her liberty by said persons illegally and over the objections of Marian Arnold, the guardian of said minor.

On January 24, Judge Emme made an order that a writ of habeas corpus be issued, commanding William S., Marlou, and Lula P. Stogsdill to have the minor before said judge on January 26, at 1 p.m. Such a writ of habeas corpus was issued on said January 24.

On January 26, 1955, Lula P. Stogsdill filed in the District Court of Appeal her petition for a writ of prohibition wherein she stated that she was removed as guardian of said minor about January 17, 1955; Marian Arnold was appointed guardian of said minor about January 19; the attorney for

petitioner (Lula) called to the attention of the trial court that an order appointing a guardian after an issue of fact had been tried could not be made until findings of fact and conclusions of law had been made by the court; after such discussion she received a card, signed by the county clerk, which stated that the order made on January 19 was amended nunc pro tunc as follows: "Lula P. Stogsdill, Wm. S. Stogsdill and Marlou Stogsdill are ordered to deliver the child forthwith to the newly appointed guardian, Marian Arnold. Donald O. Krag is ordered to prepare findings."; findings of fact and conclusions of law have not been made; a writ of habeas corpus was issued on January 24, 1955, commanding William S., Marlou, and Lula P. Stogsdill to have the minor before Judge Emme on January 26, 1955, at 1 p.m.; said minor is an orphan and has always been a resident of California; on January 20, 1955 the attorney for petitioner (Lula) filed a notice of appeal "of the decision of the trial Court"; Marian Arnold is a resident of Baltimore, Maryland and it is her intention to remove the minor from the State of California in the event she is given custody of the minor; the superior court has no jurisdiction to hear the habeas corpus matter for the reason that the powers of the superior court ceased upon the filing of a notice of appeal. In said petition Lula P. Stogsdill asked that an alternative writ of prohibition be issued restraining the superior court from taking any further proceedings in connection with said writ of habeas corpus, and that the superior court be required to show cause why a peremptory writ of prohibition should not be issued.

On January 26, this court issued an alternative writ of prohibition.

On February 4, the judge signed and filed findings of fact, conclusions of law, and a judgment in the matters of the three petitions for letters of guardianship, and in the matter of the motion to vacate the order of July 27, 1954, appointing Lula P. Stogsdill guardian. The judgments were in accordance with the minute orders, pertaining to said matters, heretofore mentioned.

The return to the alternative writ, made by the superior court and Marian Arnold, included statements to the following effect: denied that Lula was removed as guardian, and alleged that the order appointing her was vacated; alleged that findings of fact and conclusions of law were not required inasmuch as no opposition was filed controverting the allegations of Marian's petition; the findings of fact and conclusions of law were signed and filed by the judge on February 4; denied that the minor has always been a resident of California, and alleged that she had resided in Indiana about six months; that the parents of the minor were deceased; Marian Arnold was appointed guardian before the notice of appeal was filed; that the order appointing Lula was vacated "as having been made as the result of deception practiced" by Lula on Marian and the court, and "as having been obtained" through the excusable neglect of Marian; no formal answer or objection to the motion to vacate was interposed by Lula. The return also stated in effect that the court found as follows: the order appointing Lula was made without notice to Edna Gonzales, a maternal aunt of the minor, who resided in Los Angeles County; the order appointing Lula as guardian was made after Marian had been deceived and misled "into believing" that the guardianship of Lula would be temporary; the appointment of Lula was contrary to the wishes of the mother of the minor, which wishes were expressed in writing shortly before her demise; the petition of Lula falsely stated that she was the only relative of the minor living in California and that she was the aunt of the minor, when in fact she was a grandaunt of the minor and when in fact Edna Gonzales, an aunt of the minor, was a resident of Los Angeles County; that it would be for the best interests of the minor to place her in the custody of Marian, pursuant to the wishes of the minor's mother. The return also stated that the conduct of Lula lulled Marian into inactivity and enabled William Stogsdill to file a petition for the adoption of the minor; Lula, William, and Marlou Stogsdill have endeavored to frustrate the order requiring that the custody of the minor be entrusted to Marian, their efforts having been to hide the minor despite

their knowledge of the terms of said order appointing Marian as guardian and awarding custody of the minor to her; that it is the intent of Lula, William, and Marlou to circumvent the order of the court and the wishes of the mother of the minor and thereby enable William and Marlou to adopt the minor.

[1] The filing of the notice of appeal by Lula P. Stogsdill from the order revoking her letters of guardianship, appointing Marian Arnold as guardian, and ordering that the custody of the minor be given to Marian Arnold, stayed all proceedings in the trial court, for the enforcement of said order, until final determination of the appeal. Rungie v. Superior Court, 55 Cal. App.2d 115, 130 P.2d 140, was a proceeding in prohibition to restrain the superior court from proceeding to enforce a judgment removing the guardian (grandmother) of a minor and ordering the delivery of the minor forthwith to the father of the minor. The petition therein alleged that the trial court intended to and would enforce the order ordering her (guardian) to forthwith turn over the custody of the minor to the father. The court therein said: "At the oral argument it was made to appear to the satisfaction of this court that an appeal had been taken from the order to which the alternative writ of prohibition was directed. Therefore, pursuant to the provisions of section 949 of the Code of Civil Procedure, this appeal automatically stayed all proceedings in the trial court until the final determination of the appeal (In re Stratton, 133 Cal.App. 738, 739, 24 P.2d 832), and an order issued in the present proceeding would be idle and of no effect." In Sacks v. Superior Court, 31 Cal.2d 537, 190 P.2d 602, a guardian of the estate of Mrs. Sacks was appointed, and she appealed from that order. During the pendency of the appeal the clerk of the superior court issued a citation for her to show cause why a guardian of her person and estate should not be appointed. She sought a writ of prohibition to restrain the superior court from proceeding under the citation issued by the clerk. She contended that the citation was void because, at the time of issuance, the appeal from the order appointing a guardian of her estate was pending and jurisdiction of the cause had been thereby removed from the superior court. The court held that the point was well taken and said in 31 Cal.2d at page 540, 190 P.2d at page 603: "A duly perfected appeal divests the trial court of further jurisdiction in the cause and of power to act other than with respect to specified excepted or collateral matters [citations]. Here the appeal from the order appointing a guardian of petitioner's estate removed that entire matter from the probate court to the court of review. The probate court was therefore without jurisdiction of the cause when the clerk issued the purported citation of May 1st."

It is obvious that the habeas corpus proceeding herein was a proceeding pertaining to the enforcement of the order made in the guardianship matter directing Lula, William, and Marlou Stogsdill to deliver the minor forthwith to Marian Arnold, "who is permitted to remove said child from the State of California." The petition for the writ of habeas corpus referred particularly to the guardianship proceedings, the order appointing Marian Arnold as guardian, the nunc pro tunc order directing that the child be delivered forthwith to Marian Arnold, and the refusal of the Stogsdills to so deliver the minor, and then the petition alleged that the minor was deprived of her liberty illegally by the Stogsdills. It thus appears that the habeas corpus proceeding was based solely upon the order regarding the custody of the minor. Since the appeal herein stayed further proceedings in the trial court to enforce the order made in the guardianship matter, and since the appeal divested the superior court of jurisdiction to proceed further to enforce the order made therein regarding the custody of the minor, the superior court does not have jurisdiction to proceed under said writ of habeas corpus. A peremptory writ of prohibition should issue.

[2] The respondent, Marian Arnold, has demurred to the petition for a writ of prohibition on the ground that this court does

not have jurisdiction to issue a writ of prohibition herein; that exclusive jurisdiction of the matter is in the Supreme Court, since the notice of appeal states that the appeal is to the Supreme Court. In Moon v. Superior Court, 59 Cal.App.2d 447, 139 P.2d 84, it was contended that the District Court of Appeal should not consider the petition for a writ of prohibition therein, because an appeal from an order involved therein was taken to the Supreme Court. The court therein said in 59 Cal.App.2d at page 449, 139 P.2d at page 85: "This rule appears to be one of comity rather than of jurisdiction; * * *." That such procedure is a matter of policy is shown by a statement in the Journal of The State Bar of California, Vol. XXV, No. 2 (March-April, 1950), by the Clerk of the Supreme Court. It is there stated (p. 137): "In line with its established policy of transferring appeals, the Supreme Court of California has announced that henceforth it will likewise transfer original proceedings to the District Courts of Appeal, with the following exceptions: [Here certain exceptions, not involved here, are stated.] * * *. It will therefore assist the court and at the same time expedite the consideration and disposition of original proceedings if they are filed in the first instance either in the Superior Court or the District Court of Appeal, both of which courts have concurrent jurisdiction with the Supreme Court in such matters." The demurrer is overruled.

A question discussed in the briefs is whether findings were required in the proceedings before Judge Emme. The petitioner here contends that the orders that were entered before findings were made are void. This contention is controverted by respondent upon various grounds. A decision of this question would be indecisive. If they were valid orders their operation was stayed by the appeal. If they were invalid because they were entered without findings the court should not have attempted to enforce them in a summary manner. It was made to appear upon the argument of the instant proceeding that the necessary steps will be taken by appeal to stay any attempted enforcement of the judgments signed February 4.

It is apparent from the views we have expressed that the status quo should be maintained pending final determination of the matters in issue.

Let a peremptory writ of prohibition issue prohibiting the superior court from proceeding under said writ of habeas corpus issued on January 24, 1955, pending the final determination of the matters in issue.

We concur.

SHINN, P. J., and VALLÉE, J., concur.

131 Cal.App.2d 168

SUPERMATIC PRODUCTS CORPORATION, a corporation, Plaintiff,

v.

E. O. HEGBERG and F. G. Moss, individually and doing business as Moss Refrigeration Company, a partnership; Moss Refrigeration, Inc., a corporation; Doe One, Doe Two, Doe and Roe, a partnership and Doe Corporation, Defendants.

SUPERMATIC PRODUCTS CORPORATION, a corporation, Plaintiff, Cross-Complainant in certain pleadings, and Appellant,

v.

William B. HUBBARD, individually and as a general partner doing business as The Hubbard Company, a limited partnership, Cross-Defendant in certain pleadings and Respondent.

Civ. 20548.

District Court of Appeal, Second District, Division 3, California.

March 1, 1955.

Rehearing Denied March 21, 1955.

Action by manufacturer of freezer cabinets against purchasers for sale price of freezer cabinets plus interest thereon wherein purchasers filed cross-complaint against manufacturer for costs incurred because of defective freezer cabinets delivered to purchaser. From order of the Superior Court, Los Angeles County, Ells-

worth Meyer, J., striking cross-complaint filed by manufacturer against supplier of sealer used in manufacture of freezer cabinets the manufacturer appealed. The District Court of Appeal, Vallée, J., held that cross-complaint filed by manufacturer against supplier of sealer without authorization from court to do so, whereby manufacturer sought to recover any amount purchasers might recover because of defective freezer cabinets, was properly stricken.

Affirmed.

1. Appeal and Error ⇐78(3)

An order striking a cross-complaint from file is, as to cross-defendant not otherwise a party to the action, a final judgment and is appealable.

2. Pleading ⇐354(11)

In action by manufacturer of freezer cabinets against purchasers for sales price of freezer cabinets plus interest thereon, wherein purchasers filed cross-complaint against manufacturer for costs incurred because of defective freezer cabinets, cross-complaint filed by manufacturer, without obtaining an order authorizing it to do so, against supplier of refrigerator sealer used by manufacturer in making freezer cabinets for any amount purchasers might recover from manufacturer, was properly stricken. West's Ann.Code Civ.Proc. §§ 389, 442.

Jerome L. Ehrlich and James Wolf, Los Angeles, for appellant.

Moss, Lyon & Dunn and Charles B. Smith, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from an order striking a cross-complaint from the files.

Plaintiff Supermatic Products Corporation, called Supermatic, filed a complaint naming E. O. Hegberg and F. G. Moss individually and doing business as Moss Refrigeration Company, a partnership, and Moss Refrigeration, Inc., a corporation, collectively called Moss, as defendants. The complaint alleges that Moss is indebted to plaintiff in the sum of $7,638 and interest, for freezer cabinets manufactured by Supermatic and sold and delivered to Moss. Answers were filed by Moss denying any indebtedness. Moss Refrigeration, Inc., filed a cross-complaint naming Supermatic as cross-defendant. One count of that cross-complaint alleges that some freezer cabinets which Supermatic had manufactured and sold to Moss had been returned to Moss by its customers because of improper and defective materials used in them; that Moss, at the request of Supermatic, had disassembled the freezers, returned the cabinets to Supermatic, and reassembled the freezers and returned them to its customers; that Supermatic agreed to reimburse Moss for all costs and expenses incurred in the shipping, disassembling, and reshipping, which amounted to $5,922.91 and had not been paid. Supermatic answered that cross-complaint, denying the allegations thereof and pleading various special defenses.

Contemporaneously with the filing of its answer to the cross-complaint of Moss Refrigeration, Inc., Supermatic, without obtaining an order authorizing it to do so, filed a cross-complaint naming as the only cross-defendants The Presstite Engineering Company, a partnership, The Presstite Engineering Company, a corporation, collectively called Presstite, and William B. Hubbard, individually and as a general partner doing business as The Hubbard Company, a limited partnership, called Hubbard. That cross-complaint is in five counts: three for breach of warranty, one for negligence, and one for declaratory relief. The basic allegations of all counts are that Presstite manufactured and Hubbard sold to Supermatic a specified refrigerator sealer which was used by the latter in the manufacture of the freezer cabinets sold to Moss; that Moss had alleged in its cross-complaint that Supermatic was indebted to it; that if Supermatic is liable to Moss for any such indebtedness, Presstite and Hubbard are liable to Supermatic therefor; and that Supermatic had incurred expenses in reworking freezer cabinets for which Presstite and Hubbard are liable. The count for declaratory relief alleges the foregoing facts; that Supermatic contends that if it is liable to Moss,

the warranty given to Supermatic by Presstite and Hubbard has been breached and the latter are liable to Supermatic for any amount Moss may recover from it; that Presstite and Hubbard deny these contentions.

[1] On motion of Hubbard the court ordered the cross-complaint of Supermatic stricken from the files on the ground it is not a proper pleading. Supermatic appeals from the order, claiming its cross-complaint is authorized by law. Since an order striking a cross-complaint from the files is, as to a cross-defendant not otherwise a party to the action, a final judgment, it is appealable. Trask v. Moore, 24 Cal.2d 365, 373, 149 P.2d 854.

Section 389 of the Code of Civil Procedure in part provides that:

> "[W]hen a complete determination of the controversy can not be had without the presence of other parties, the court must then order them to be brought in, and to that end may order * * * a cross-complaint to be filed, and summons thereon to be issued and served."

Section 442 in part provides:

> "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint."

In Alpers v. Bliss, 145 Cal. 565, at page 570, 79 P. 171, at page 173, the court stated:

> "The provision of section 442, Code Civ.Proc., giving to a defendant who may seek affirmative relief 'against any party' the right to file a cross-complaint at the same time that he files his answer, is limited to cases in which he seeks affirmative relief against a 'party' to the action. This section does not give him a right to file a cross-complaint for affirmative relief against one who is not already a party to the action, or bring new or additional parties into the action by including them in his cross-complaint as defendants thereto. He cannot bring a new party into the action without an order of the court therefor."

The rule thus stated has not been diviated from since that decision. Clark v. Kelley, 163 Cal. 207, 209, 124 P. 846; Reed v. Wing, 168 Cal. 706, 712, 144 P. 964; In re Estate of Visaxis, 95 Cal.App. 617, 621, 273 P. 165; Overell v. Overell, 18 Cal.App.2d 499, 502, 64 P.2d 483; Brady v. Kobey, 27 Cal. App.2d 505, 507, 81 P.2d 263; Metropolitan Casualty Ins. Co. v. Margulis, 38 Cal. App.2d 711, 714, 102 P.2d 459.

[2] Cases relied on by Supermatic are not analogous. In Casaretto v. DeLucchi, 76 Cal.App.2d 800, 174 P.2d 328, the defendant filed a cross-complaint in which he named the plaintiff and a new party. An *ex parte* order was made making the new party a party to the action. It was held that a defendant cannot bring a new party into proceedings based on a cross-complaint without an order of court and that the order bringing in such party may be an *ex parte* one. The question was not discussed in Vaccarezza v. Sanguinetti, 71 Cal.App.2d 687, 163 P.2d 470. In Sattinger v. Newbauer, 123 Cal.App.2d 365, 266 P.2d 586, the plaintiff sued Newbauer and Codd. Newbauer filed a cross-complaint against Codd seeking declaratory relief relating to the transaction sued upon. The cross-complaint did not name a new party.

Assuming, without deciding, that plaintiff, by reason of the cross-complaint filed by Moss Refrigeration, Inc., was a defendant within the meaning of section 442, since it did not obtain an order authorizing the filing of the cross-complaint against Presstite and Hubbard, the court did not err in striking it from the files.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

131 Cal.App.2d 251

Mae HELM, as Administratrix of the Estate of Irene Osgood, deceased, Plaintiff and Appellant,

v.

Katheryn S. HESS, Defendant and Respondent.

Civ. 4920.

District Court of Appeal, Fourth District, California.

March 2, 1955.

Action by administratrix to recover money allegedly lent by decedent to defendant. The Superior Court, Kern County, Warren Stockton, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that evidence supported finding that transaction had not been a loan but a purchase by decedent of a joint tenancy interest in defendant's property.

Judgment affirmed.

1. Mortgages ⇐218.13

Where it appeared that, if transaction were a loan, it was a loan secured by joint tenancy deed, recovery could not be had on pleadings framed as for recovery for an unsecured loan. West's Ann.Code Civ.Proc. § 726; Probate Code, §§ 706–716.

2. Deeds ⇐194(2)

Physical delivery of a deed raises an inference that grantor is immediately parting with title, but inference may be overcome.

3. Deeds ⇐120

Effect of an unconditional grant deed without reservation is to convey a fee-simple title upon delivery, divested of any condition on which delivery is made and which is not expressed in instrument. West's Ann.Civ.Code, § 1056.

4. Deeds ⇐192

All allowable presumptions attached to deed offered in evidence.

5. Money Lent ⇐7(3)

In action by administratrix to recover money allegedly lent by decedent to defendant, evidence supported finding that transaction had not been a loan but a purchase by decedent of a joint tenancy interest in defendant's property.

6. Appeal and Error ⇐901

On appeal, appellant is faced with burden of showing that there is no substantial evidence to support finding complained of.

7. Appeal and Error ⇐931(1), 1011(1)

When evidence is conflicting, findings on evidence are conclusive and all reasonable inferences are indulged in support of them.

O'Hara, O'Hara & Healy, Vallejo, Kenneth N. Hastin, Bakersfield, for appellant.

Frederick E. Hoar, Bakersfield, for respondent

GRIFFIN, Justice.

This action was brought by plaintiff and appellant as administratrix of the estate of Irene Osgood, deceased, against defendant and respondent Katheryn S. Hess (her second cousin) for the sum of $3,500, claimed to have been loaned by deceased to defendant, prior to her death. It is alleged that defendant acknowledged said indebtedness and agreed to pay it, and that only the sum of $75 has been paid thereon.

Defendant answered and denied generally these allegations and alleged that Irene Osgood, during her lifetime, purchased from defendant a joint tenancy one-half interest in certain real property then belonging to defendant for said sum, and that it was agreed that defendant would pay one-half of the rentals therefor to her; that defendant paid $25 per month as rental until plaintiff's death and that by virtue of her death defendant became owner of the entire interest. After trial of the issues the court found generally against plaintiff's contention and in favor of the defendant. The general question presented is the sufficiency of the evidence to support the findings.

Prior to 1949, defendant owned the property. It was valued at about $7,500–$8,000 and was subject to a note and trust deed for

$3,500. Defendant was paying it off at $60 per month. On September 27, 1949, according to a letter offered in evidence by plaintiff, defendant wrote Irene that she was having difficulty in meeting the payments and inquired as to whether Irene would buy up the note and trust deed and let defendant pay her back as rent because "if anything should happen to me * * * all I have goes to you in any event". She therein stated that if she left here "*we* can either sell it or rent it" (italics ours). Defendant stated at the trial that she was very close to Irene and discussed all of her (defendant's) troubles with her, including matrimonial difficulties she was having with her then husband.

It appears that on January 11, 1950, Irene gave defendant a check for $3,500. The trust deed was paid off, and on January 13, 1950, defendant conveyed the property to herself and Irene as joint tenants, by grant deed. It was duly recorded on January 17, 1950. On March 4, 1950, defendant wrote Irene a letter enclosing a policy of title insurance dated June 8, 1949, showing title in defendant subject to a trust deed of $3,500, and the joint tenancy deed, in which letter she stated that she was "making you a half owner". She enclosed a check for $40 and inquired "as to how you want the interest worked out on the loan and what per cent". Apparently these papers were found in deceased's safety deposit box with a note reading: "These are the papers that are to be returned when I get out of hock", signed "K".

Apparently, from another letter dated April 12, 1950, defendant enclosed "a small donation from Ed for payment on the house". It is defendant's claim that these sums represented Irene's interest in the past-due rentals payable to her, which totaled $75, and that she sent the joint tenancy deed and policy of insurance to Irene because she had "divorce trouble coming up" and she wanted her to have everything in case of her death; that the reason she wrote the note enclosed was because she hoped to "buy my property back from Irene"; that the $3,500 check she received was for the deed of the joint tenancy interest and she, defendant, well knew the effects of a joint tenancy deed and that if she died she wanted her property to go to Irene. Irene died on May 3, 1950.

Plaintiff produced witnesses that at the time of her death defendant said: "I owe Irene a lot of money * * * almost $3500", and that she asked: "Will I have to pay that right now, or what will happen"; that she was then told that she should not worry about that because it would all be worked out in the estate. Defendant did not deny these conversations but said she did not "recall" them. Defendant's ex-husband, who was present at the time, said no such conversation took place.

Defendant offered in evidence an affidavit for attachment filed in the instant action wherein plaintiff swore that the contract here sued upon "has not been secured by any mortgage, deed of trust, or lien upon real or personal property". The instructions to the sheriff were to levy upon the real property here in question "belonging to the defendant".

[1] From the complaint and the evidence produced it appears that plaintiff was relying solely on the theory that the $3,500 received by the defendant was an unsecured loan and no attempt was made to plead an equitable cause of action for the declaration of the joint tenancy deed to be a mortgage given as security for the loan and to foreclose said mortgage. If a *loan* of the money was in fact made, plaintiff's evidence indicates that the joint tenancy deed was given as security for such loan. Accordingly, no relief could be obtained by plaintiff in this action upon the pleadings as framed. Sec. 726, Code Civ.Proc. provides that there "can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter". See also Secs. 706–716, Probate Code; Wilson v. Anderson, 109 Cal.App. 467, 474, 293 P. 627; and 8 Cal.Jur.2d 507, sec. 182. The trial court was justified in finding against plaintiff on this ground.

The evidence as to whether the advancement of said sum was an unsecured loan or was given as the purchase price of a one-half interest in the joint tenancy property is in conflict. The contention of plaintiff that an *unsecured* loan was made is not too substantial. The indication is that if it was a loan at all it was one that was secured by the giving of the joint tenancy deed.

[2, 3] As opposed to plaintiff's theory, as pleaded, it is defendant's testimony, although somewhat uncertain and confusing, that she sold the one-half joint tenancy interest in the property for the $3,500 which she secured from Irene Osgood; that she intended to repurchase this interest from her sometime in the future; and that if she did not do so, upon defendant's death, she wanted Irene to have all of it. This is the contention made by defendant in her answer and likewise the contention of defendant made by her attorney in a letter addressed to plaintiff's attorney when demand was made by him for the payment of said amount to the estate. It does appear that defendant received the money and in turn executed a formal joint tenancy deed of a one-half interest therein. A sufficient consideration is recited. It was duly recorded, delivered to Irene Osgood, apparently accepted by her, and caused to be placed with her properties in her safe deposit box, and the court so found. On its face, the deed purports to transfer such interest by sale. It has been repeatedly held that a deed absolute in form, will not be held to be a mortgage in the absence of proof of an indebtedness to be secured; that clear and convincing evidence is required to prove that a deed absolute in form was given by way of security, and that it is a question of fact for the trial court to determine whether such evidence has been produced. Fowler v. Case, 89 Cal.App.2d 140, 146, 200 P.2d 130. Physical delivery of a deed raises an inference that the grantor is immediately parting with the title. Of course this inference may be overcome by evidence showing a contrary intent. Counter v. Counter, 104 Cal.App.2d 786, 232 P.2d 551; Knox v. Kearney, 40 Cal. App. 290, 180 P. 661. Under Civil Code section 1056, the effect of an unconditional grant deed without reservation from grantor to grantee is to convey a fee simple title upon delivery, divested of any condition on which the delivery is made and which is not expressed in the instrument. Security-First National Bank of Los Angeles v. Leatart, 75 Cal.App.2d 211, 170 P.2d 687.

[4] At the trial plaintiff offered the joint tenancy deed in evidence. Accordingly, all the allowable presumptions in its favor attached. Phillips v. Menotti, 167 Cal. 328, 139 P. 796; 15 Cal.Jur.2d p. 511, sec. 110, et seq.

Counsel for plaintiff then stated: "The only evidence we have is the evidence of a loan, that is the transaction. We are not attempting in this action to ask the court to construe this deed as a mortgage whatsoever. We feel this deed is completely extraneous to the transaction * * *." Whereupon counsel for defendant raised the point that so long as the deed stood intact it stood as an insurmountable obstacle to plaintiff's suit. Counsel for plaintiff replied: "* * * we are not trying to attack the validity of this deed, we never have * * * the deed is completely extraneous."

[5–7] We conclude that the evidence produced, together with the allowable inferences and presumptions adducible therefrom reasonably support the finding of the trial court. On appeal, plaintiff is immediately faced with the burden of showing that there is no substantial evidence to support the finding. When the evidence is conflicting, as it is here, the findings based upon that evidence are conclusive and all reasonable inferences are to be indulged in support of them. Rolland v. Porterfield, 183 Cal. 466, 191 P. 913.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

131 Cal.App.2d 85

Vivian SPROUL, Plaintiff and Appellant,

v.

William Thomas CUDDY and William Williams, doing business as Physicians Oxygen Service, Defendants and Respondents.

Civ. 20738.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1955

Action to recover for personal injuries sustained by bailee who had rented device known as invalid walker which had toppled over throwing her to the floor, allegedly as result of defendants' negligence and breach of warranty. The Superior Court, Los Angeles County, Henry M. Willis, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Fox, J., held that questions whether bailors, a part of whose business consisted of renting appliances to convalescents, had made such inspection of equipment rented to plaintiff as was necessary to discharge their duty of reasonable care and whether bailors had failed to use reasonable care to make invalid walker rented to bailee safe for its intended purpose, were for jury.

Judgment reversed.

1. Pleading ⇐291(2)

Failure of plaintiff to file affidavit denying due execution and genuineness of instruments annexed to answer merely means that plaintiff admits execution and genuineness of instruments, and does not preclude plaintiff from making defense to affirmative allegations of answer on any and all grounds except execution and genuineness. West's Ann.Code Civ.Proc. §§ 448, 462.

2. Release ⇐58(3)

Question of validity of purported release is ordinarily for trier of facts.

3. Pleading ⇐354(17)

Complaint should never be dismissed unless it appears to certainty that no basic right of action can possibly exist or no relief can possibly be granted.

4. Bailment ⇐9

Bailor of chattel impliedly warrants that he has exercised reasonable care to ascertain that chattel is safe and suitable for purpose for which it is hired. West's Ann.Civ.Code, § 1955.

5. Contracts ⇐167

Where there is statute upon subject covered by contract, it enters into and becomes part of such contract, if it can be reasonably so construed.

6. Contracts ⇐175(1)

Contracting parties are presumed to have had applicable law in view.

7. Contracts ⇐154

Clauses in contract must be reconciled and given reasonable construction in line with general intent therein expressed and rules of contract law.

8. Bailment ⇐33

In action for personal injuries sustained by bailee who had rented device known as invalid walker which had toppled over throwing her to the floor, questions whether bailors, a part of whose business consisted of renting appliances to convalescents, had made such inspection of equipment rented to plaintiff as was necessary to discharge their duty of reasonable care and whether bailors had failed to use reasonable care to make invalid walker rented to bailee safe for its intended purpose, were for jury. West's Ann.Code Civ.Proc. § 597.

9. Bailment ⇐9

Bailor for hire of chattel must use reasonable care to make it safe for its intended use or disclose its actual condition to bailee.

10. Contracts ⇐114

Except where discountenanced by public policy or some statutory inhibition, party may contract to absolve himself from liability for negligence.

11. Contracts ⇐189

Law looks with disfavor on contracts to avoid liability or to secure exemption from one's personal negligence, and provisions of such contracts will be construed strictly against person relying on them, especially when he is author of document.

12. Contracts ⇐189

To be sufficient as exculpatory provision against one's own negligence, party seeking to rely thereon must select words or terms clearly and explicitly expressing that this

was intent of parties, and seemingly broad language will not be isolated from its context and will be read with due regard to maxim of strict construction.

13. Bailment ⇐9

Instrument which had been prepared by bailor of invalid walker, which recited that licensee agreed to hold licensor harmless for any damage sustained in use of such chair, and which also recited that bailor used great care to have all of its equipment in good order and repair, failed to show clear intention of parties that bailor be exculpated from any and all liability for failure to exercise such care.

14. Pleading ⇐53(2)

Plaintiff suing on theory of negligence may set forth separate counts of specific and general negligence.

George W. Van Dyke and Owen M. Murphy, Long Beach, for appellant.

Sampson & Dryden, Los Angeles, for respondents.

FOX, Justice.

The instant case is presented for appellate review for the second time. Previously, plaintiff purported to appeal from a minute order dismissing her complaint, no judgment having been made or entered. The sole question before the court was whether such an order was appealable. Holding that it was not, the court ordered the appeal dismissed as premature, and reinvested the trial court with jurisdiction to reopen the case for further proceedings. Sproul v. Cuddy, 121 Cal.App.2d 197, 263 P.2d 92. Thereafter, the trial court made and filed its judgment in favor of defendants. From this judgment plaintiff appeals.

By her first amended complaint, plaintiff sought recovery of damages for personal injuries based on three separate causes of action. The first and second causes of action sound in negligence, while the third cause of action is predicated on breach of warranty.

The first cause of action alleges that plaintiff was convalescing from an operation on her right leg and was unable to bear weight thereon; that she agreed to rent a device from defendants known as an "invalid walker," which consists of a frame in which is mounted a hinged seat, the frame being supported by four hollow-tubed legs resting upon individual casters; that pursuant to this rental agreement, the "invalid walker" was delivered to her; that at the time of the delivery, through the negligence of defendants, one of the casters was not securely fastened to the leg of the "walker," thus placing it in a condition unfit for the use for which it was rented and rendering it unsafe and dangerous; that when plaintiff for the first time attempted to use the "walker," one of the casters became disengaged from the leg of the "walker," whereupon it toppled over and threw plaintiff on the floor, thereby causing her injuries which were the proximate result of defendants' negligence. Also included is a description of the injuries and damage allegedly sustained. The second cause of action states defendants' negligence in general terms, alleging that such negligence was responsible for an unsafe and dangerous condition in the "invalid walker," and that as a direct consequence thereof, plaintiff was caused to fall upon the floor and sustain injury.

Plaintiff's third cause of action proceeds upon the basis of a breach of warranty. It alleges that for an agreed monthly rental, defendants furnished her with an "invalid walker," knowing it was to be used to aid her in moving about the house; that defendants warranted the "walker" to be fit and proper for such use and plaintiff relied on this warranty; that the "walker," when delivered to her, was not fit for the intended purpose but was, instead, in an unsafe and dangerous condition. It is further alleged that as a direct result of the defective condition of the walker, it toppled over upon plaintiff's first attempt to use it, causing her to fall and sustain injuries.

In their answer, defendants admit they furnished an "invalid walker" to plaintiff on a monthly rental basis. They denied the allegations of negligence and breach of warranty and set up the affirmative defenses of unavoidable accident, contributory negligence, and assumption of risk.

By leave of court, defendants filed an amendment to their answer interposing a seventh affirmative defense, whereby they

alleged that plaintiff's husband, acting as her agent, arranged for and secured the rental of the "invalid walker," at which time he signed a document described as an "invoice and contract"; and that by reason of the notice and limitations contained in the said document, plaintiff is "barred and estopped" from prosecuting any action against the defendants. A copy of the document was annexed to this pleading as Exhibit "A" and incorporated therein by reference. Having failed to file any affidavit as required by statute, plaintiff admitted the genuineness and due execution of Exhibit "A". Code Civ.Proc. § 448. Plaintiff's subsequent demurrer to this pleading on the ground that the facts therein alleged do not constitute a defense and her motion that it be stricken as irrelevant were overruled.

We deem it advisable at this point to reproduce Exhibit "A" in full, to wit:

Exhibit "A"

Physicians Oxygen Service
4611 Melrose Avenue (Del)
Los Angeles 27, California (L.C.)
31
Day and Night Emergency Service
NOrmandy 2-7992—NOrmandy 6-300

All Types of Masks
Oxygen Tents
Penicillin
Aerosol
Equipment

--3/26--
Oxygen 10/26
Helium
Carbon-Dioxide
Carbogen

014542

Deliver to: Mr. Chester H. Sproul
Licensee

343 East 116th
Address Telephone Number

City PL 51763
Closest Intersection

We Rent
Hospital Beds
Wheel Chairs—Walkers
Therapy Lamps—Inhalators
Fracture Equipment
Roll Away Cots—Diathermies
Medical Specialties

Date 8/1/1951
A.M.
Delivery 8/1 P.M.

Due Date 9/1/51

Ordered by:
Mr. Sproul

Bill to:

Purchase Order No.
1454221

Terms: Net Cash on Delivery	No Refunds	Replacement Value	Rental Charge
(1) Invalid Walker with Crutch Support—Rented to 9/1/51		$97.50	$8.28

key
ReRental to 10/1/51 — 8.28 — C 42
11/1/51 — 8.28 — C 54

Licensee—Take Notice—Licensor uses great care to have all of its equipment in good order and repair, gives no warranty expressed or implied, as to condition, quality or any other matter of any equipment sent out, and will in no way be responsible for damages resulting from use thereof. Licensee acknowledges that the above merchandise and/or equipment has been inspected and received in good condition and accepted as is, and the Licensee agrees to save and hold harmless the Licensor, for any damage sustained in the use of said merchandise and/or equipment.

Licensee C. H. Sproul (w)

When the case was called for trial, and prior to the impanelling of the jury, proceedings were had in the chambers of the trial judge upon defendants' motion to dismiss the second cause of action on the ground that it merely duplicated the first count. This motion was granted. While still in chambers, defendants next moved to dismiss also the remaining first and third causes of action for the reason that Exhibit "A" constituted, as a matter of law, a bar to the prosecution of the action. Thereupon, the court undertook to hear and dispose of this issue in the manner of a special defense. Code Civ.Proc. § 597. During the ensuing colloquies between counsel and the court, the judge manifested his growing conviction that he might be able to adjudicate the controversy as a pure question of law, without the services of a jury, by construing the language of the purported release contained in Exhibit "A". Plaintiff's counsel made an abortive attempt to dissuade the judge from proceeding without affording him a chance to present oral evidence regarding the instrument. He pointed out to the court that "there is a question as to the receipt" (Exhibit "A") and that "a receipt is always subject to explanation by testimony to be introduced at the trial. What the testimony might be regarding this receipt, of course, no one knows." The judge appeared disinclined to proceed to trial, or to elicit facts concerning the transaction between the parties. He made no inquiry of plaintiff's counsel as to the nature of the evidence affecting the instrument that might be adduced. The judge stated: "I am going to send that jury away until two o'clock. I am going to shut the door and I am going to work on these motions. At two o'clock I will be ready to rule on them. If we have to try any of them with a jury, we will go ahead and impanel the jury and try the special defense first on that release business. If it is one that I should decide is not subject for a jury verdict, I will try it myself."

When the afternoon session of the court reconvened, the court addressed the jury, orienting them as to the proceedings which had taken place in chambers in the morning, and then announced his decision from the bench. He ruled that all of the counts of plaintiff's complaint be dismissed and directed that judgment be prepared accordingly. From the judgment ultimately entered, plaintiff has taken this appeal. Our review of the record and an examination of the applicable case law satisfies us that the judgment must be reversed.

[1] The obvious error of the trial court stems from its apparent assumption that because of plaintiff's failure to deny the genuineness and due execution of Exhibit "A" by affidavit, as required by section 448 of the Code of Civil Procedure, she was therefore irrevocably bound by the legal effect of its provisions, and further inquiry into the question either of its validity or its binding effect were unnecessary. Such is not the law. It was open to plaintiff, without further pleading, to introduce evidence to sustain any legitimate defense thereto except want of genuineness or due execution. Code Civ.Proc. § 462; Miller v. McLaglen, 82 Cal.App.2d 219, 224–226, 186 P.2d 48; Baird v. Pacific Electric Ry. Co., 39 Cal. App. 512, 514, 179 P. 449. As stated in Miller v. McLaglen, supra [82 Cal.App.2d 219, 186 P.2d 51]: "Failure to file an affidavit does not preclude a plaintiff from making any defense whatever to the affirmative allegations of the answer. He could, by evidence, controvert the instruments upon any and all grounds except that he could not controvert their due execution or their genuineness. He could controvert the instruments by evidence of fraud, mistake, undue influence, mental incapacity, want of consideration, failure of consideration, compromise, estoppel, that they were void because not fairly made or fully comprehended; he could question their legal effect; he could attack them by any other defense that would be open if the instruments were the basis of an action [citing numerous cases]." The pleadings do not reveal what, if any, defense plaintiff might have asserted against the admittedly genuine document, but under our system of pleading no such showing is required. Code Civ.Proc. § 462; Miller v. McLaglen, supra, 82 Cal.App. 2d at page 226, 186 P.2d 48; Baird v. Pacific Electric Ry. Co., supra. From the state of the record confronting the trial court, plain-

tiff was entitled to the presumption that she had evidence to offer in attacking Exhibit "A" consistent with its genuineness and due execution. Miller v. McLaglen, supra, 82 Cal.App.2d at page 226, 186 P.2d 48; Baird v. Pacific Electric Co., supra, 39 Cal.App. at page 515, 179 P. 449.

[2] The recent case of Palmquist v. Mercer, 43 Cal.2d 92, 272 P.2d 26, is here instructive. The lower court granted defendant Mercer's motion for nonsuit on the basis of a written release executed by plaintiff. There was no question as to its genuineness and due execution. The Supreme Court reversed this judgment, holding nonetheless that "the question of validity of the release should have been submitted to the jury as a factual issue to be determined in the light of the circumstances surrounding its execution." 43 Cal.2d 98, 272 P.2d 30. That it is ordinarily for the trier of the facts to pass upon the validity of a purported release is strongly emphasized in Jordan v. Guerra, 23 Cal.2d 469, 475–476, 144 P.2d 349, with abundant citation of authorities, and reiterated by this court in Pacific Electric Ry. Co. v. Dewey, 95 Cal. App.2d 69, 71, 212 P.2d 255. Furthermore, it is appropriate to point out that the precise nature of the instrument here involved cannot be established from a mere inspection of the document. If, as plaintiff alleged in her complaint, the rental was made upon a warranty of fitness, then the nature of the document signed—whether it was contractual in character or a mere invoice, delivery receipt, bill of parcels or other informal memorandum—becomes of extreme significance in the ascertainment of whether the language of disclaimer of warranty was binding upon plaintiff under the circumstances attending the transaction. See India Paint & Lacquer Co. v. United Steel Prod. Corp., 123 Cal.App.2d 597, 606, 611, 267 P.2d 408. As this court stated in the last cited case, in considering the effect of a statement of disclaimer of warranty upon an instrument delivered to a purchaser of goods: " 'The sole question seems to be whether the facts present a case where the person receiving the paper should, as a reasonable man, understand that it contained the terms of the contract which he must read at his peril and regard as part of the proposed agreement. The precise facts of each case are important in reaching a conclusion.' " 123 Cal.App.2d at page 611, 267 P.2d at page 418. Thus, the introduction of evidence was essential to clarify the legal status of Exhibit "A", which, on its face, is a hybrid instrument, whose tone, nature and effect would depend on the situation accompanying its execution and delivery.

[3] In view of the fact that various aspects of the case, in the light of the pleadings, would turn upon the determination of the issues of fact referred to hereinabove, it was error for the court to take the case from the jury before plaintiff even had an opportunity to make an opening statement of his case, and without even an inquiry by the court into the nature of the evidence plaintiff was prepared to offer. "A complaint should never be dismissed unless it appears to a certainty that no basic right of action can possibly exist or no relief can possibly be granted. It is a rare case when a litigant may be denied his day in court without a hearing." Miller v. McLaglen, 82 Cal.App.2d 219, 228, 186 P.2d 48, 53.

But there are other and equally compelling reasons for holding that Exhibit "A" does not, as a matter of law, release defendants from liability for every breach of warranty or every type of negligence. Assuming for present purposes that Exhibit "A" is in every respect valid, and further assuming that the limitation notice therein contained was fully binding on plaintiff, it may not be said that the language appearing therein exculpates defendants, as a matter of law, from possible liability for breach of warranty of fitness or for failure to use due care to see that the article furnished is reasonably fit for the purpose for which it was rented out.

[4–8] Turning first to the question of breach of warranty, the law is clearly settled that the bailor of a chattel impliedly warrants "that he has exercised reasonable care to ascertain that the chattel is safe and suitable for the purpose for which it is hired [citations]." McNeal v. Greenberg, 40 Cal.2d 740, 742, 255 P.2d 810, 812.

Civil Code section 1955 contains a statutory declaration of the obligations of a lessor of personalty: "One who lets personal property must * * * put it into a condition fit for the purpose for which he lets it * * *." It is an elementary principle of contract jurisprudence that where there is a statute upon a subject covered by a contract, it enters into and becomes a part of such contract, if it can be reasonably so construed. Brown v. Kling, 101 Cal. 295, 299, 35 P. 995; Bell v. Minor, 88 Cal. App.2d 879, 881, 199 P.2d 718; 12 Cal.Jur. 2d 348. The pertinent language of Exhibit "A" reads: *"Licensor uses great care to have all of its equipment in good order and repair,* gives no warranty expressed or implied, as to condition, quality or any other matter of any equipment sent out, and will in no way be responsible for damages resulting from the use thereof." (Italics added.) It is at once evident from any reasonable construction of this language, and bearing in mind the rule that contracting parties are presumed to have had the applicable law in view, Brown v. Kling, supra, that there appears no intent or purpose to exempt defendants from liability for a breach of the warranty of fitness, which, as noted in McNeal v. Greenberg, supra, obligates a bailor to exercise reasonable care to see that the chattel is fit for the intended purpose. Far from disavowing this warranty, which the law ordinarily implies as an incident to the lease of personal property, this language explicitly affirms and warrants that the "licensor [defendants] uses great care to have all of its equipment in good order and repair" before it is rented. Basin Oil Co. of California v. Baash-Ross Tool Co., 125 Cal.App.2d 578, 593, 271 P.2d 122. It clearly manifests a recognition and acknowledgment by defendants, at the very least, of their ordinary responsibility as bailors of personal property, rather than of any attempt to shed such obligation. The succeeding clause, that licensor "gives no warranty, expressed or implied, as to condition, quality, or any other matter of any equipment sent out," if it is to have any meaning or vitality in view of the warranty contained in the preceding language, must be construed to relate only to the specific subjects there mentioned and not as an attempt to negate or detract from the affirmation in the prior clause. To achieve the interpretation contended for by defendants, it would be necessary to ignore completely or render nugatory the opening language of the notice, which would be obnoxious to established canons of construction. In short, to avoid repugnancy, to reconcile the clauses and give a reasonable construction to the instrument in line with the general intent therein expressed and the rules of contract law, Royal Ins. Co. of Liverpool, Eng. v. Caledonian Ins. Co., 20 Cal.App. 504, 506, 129 P. 597; Todd v. Superior Court, 181 Cal. 406, 418, 184 P. 684, 7 A.L.R. 938; Broome v. Broome, 104 Cal.App.2d 148, 157, 231 P.2d 171, a fair interpretation of the paragraph is that if the bailor has exercised such reasonable care as is required of him to comply with his warranty of fitness, his disclaimer of warranties as to condition, quality, etc., insulates him against the strict liability of warranty in the event of the existence of defects or imperfections in the leased article which may have escaped detection despite his exercise of reasonable care. Basin Oil Co. of California v. Baash-Ross Tool Co., supra. It is thus clear that it was a question of fact for the jury as to whether defendants, a part of whose business consists of renting appliances to convalescents, had "made such inspection of their equipment as was necessary to discharge their duty of reasonable care." McNeal v. Greenberg, 40 Cal.2d 740, 742, 255 P.2d 810, 812.

[9] Passing now to the cause of action based on negligence, McNeal v. Greenberg, supra, states the general rule "that a bailor for hire of a chattel must use reasonable care to make it safe for its intended use or disclose its actual condition to the bailee." Therefore, the question posed is: Assuming, as we must, that defendants had failed to use reasonable care to make the "invalid walker" safe for its intended purpose, was the trial court correct in ruling, as a matter of law, that the language contained in Exhibit "A" exculpated defendants from the consequences of such negli-

gence? From an analysis of the language employed, the answer must be in the negative.

[10–12] This court was confronted with the identical issue here presented in Basin Oil Co. of California v. Baash-Ross Tool Co., 125 Cal.App.2d 578, 271 P.2d 122 (hearing denied). In that case, in holding that language of similar import did not relieve defendant from liability in tort for its negligence, we had occasion to examine the prevailing authorities in this and other jurisdictions and discuss the principles governing the interpretation of such attempted exculpatory statements. We epitomize what is there stated, so far as it is here germane and without reference to the authorities cited therein, 125 Cal.App.2d at page 594–597, 271 P.2d 122: Except where discountenanced by public policy or some statutory inhibition, a party may contract to absolve himself from liability for negligence; the law, however, looks with disfavor on such attempts to avoid liability or secure exemption from one's personal negligence, and construes such provisions strictly against the person relying on them, especially when he is the author of the document; to be sufficient as an exculpatory provision against one's own negligence, the party seeking to rely thereon must select words or terms clearly and explicitly expressing that this was the intent of the parties; and that seemingly broad language will not be isolated from its context and will be read with due regard to the maxim of strict construction. Here, as stated in the Basin Oil case, supra, 125 Cal.App.2d at page 596, 271 P.2d at page 132, Exhibit "A" must be construed most strongly against defendants "as being the product of its own draftsmanship and designed to whittle down the normal and ordinary rights of a customer. Burr v. Sherwin Williams Co., 42 Cal.2d [682, 693, 694] 268 P.2d 1041."

[13] Measured by the above criteria, it is at once apparent that not only does Exhibit "A" contain no reference to negligence, nor any clear and explicit indication that defendants were attempting to relieve themselves of their duty of using due care with reference to their rental of the "invalid walker," but the exact contrary appears from the opening asseveration that the licensor "uses great care to have all its equipment in good order and repair." This statement, even if attenuated so as to relate to reasonable care rather than "great care," permeates the entire limitation notice and is the pre-condition for the operation of the comprehensive exculpatory declarations which follow. It qualifies and limits, at least to the extent there announced, the ensuing language. Such an interpretation is plainly dictated by the principles to which we have hitherto adverted. It seems also to give all the language used a harmonious construction and avoids perverting the notice into nothing more than a semantic trap for the unwary. We deem it apposite to quote here, as we did in the Basin Oil case, the following significant language from Pacific Indemnity Co. v. California, etc., Ltd., 29 Cal.App.2d 260, 274, 84 P.2d 313, 320: "'the provision of a contract relieving one of the parties thereto from liability for his or its own negligence should be clear and explicit. While it is true that the language used in the quoted provision of the contract before us, that the agent shall hold the company "harmless from all claims, suits, and liabilities of every character whatsoever and howsoever arising from the existence or use of the equipment at said station," is broad and comprehensive, it is, as stated by the court below, provocative of some doubt. The defendant itself wrote the provision into the contract for its own benefit. It could have plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence. As it did not do so, we resolve all doubt, as we should, in favor of the plaintiff, and hold that it was not the intent of the parties to give to the contract as written the effect claimed by the company.'" Similarly, here, it cannot be reasonably contended that a party who announces that he uses great care to have his rental equipment in good order and repair was attempting to exculpate himself from liability if the facts should show that he used no care whatsoever, or indeed, was

grossly negligent. Here too, an issue of fact exists as to the quantum of care, if any, used by defendants with respect to their inspection of the device bailed to plaintiffs.

Defendants cite such decisions as Nichols v. Hitchcock Motor Co., 22 Cal.App.2d 151, 70 P.2d 654, and Stephens v. Southern Pac. Co., 109 Cal. 86, 41 P. 783, 29 L.R.A. 751. Those cases are readily distinguishable by virtue of the difference in the exculpatory language used. In none of those cases does there appear, as here, a positive assertion or commitment on the part of the lessor that he would exercise care in the conduct of his own activities as they related to the subject matter of the bargain. Defendants also rely on Werner v. Knoll, 89 Cal.App. 2d 474, 201 P.2d 45. That case differs from the present matter, in the first instance, as being concerned with a lease of real property executed between a landlord and tenant. Secondly, the language therein also shows a complete absence of any declaration on the landlord's part that he would conduct his affairs in and about the leased premises with care. Thirdly, it may be noted in passing that even in landlord-tenant situations, the rule of the Werner case has been limited in the recent cases of Butt v. Bertola, 110 Cal.App.2d 128, 138–140, 242 P.2d 32; and Barkett v. Brucato, 122 Cal.App.2d 264, 278, 264 P.2d 978, by the application of the maxim of strict construction of an exculpatory writing against its draftsman.

Plaintiff has suggested that so far as Exhibit "A" purports to relieve defendants of liability for breach of their obligations as declared in section 1955 of the Civil Code, it comes within the purview of section 1668 of the Civil Code as a contract against the policy of the law. We expressly refrain from passing upon this question, inasmuch as our views on the inefficicacy of the exculpatory language makes it unnecessary to consider this further issue.

[14] Finally, it was clearly error to dismiss plaintiff's second cause of action as a mere duplication of the first. The gravamen of plaintiff's first cause of action is a specific act of negligence. In her second cause of action she has alleged defendants' negligence in general terms. She has thus set up defendants' specific and general negligence in separate counts. This is in accord not only with approved, but exemplary, pleading practice. Bourguignon v. Peninsular Ry. Co., 40 Cal.App. 689, 692, 181 P. 669; Roberts v. Sierra Ry. Co., 14 Cal.App. 180, 192, 111 P. 519, 527; Ellis v. Jewett, 18 Cal.App.2d 629, 635, 64 P.2d 432; McCole v. Merchants Express Corp., 19 Cal.App.2d 149, 151, 64 P.2d 1130. The advantage to a plaintiff in clearly setting out the alleged negligence in both general and specific terms is illustrated in Leet v. Union Pac. R. Co., 25 Cal.2d 605, 617–619, 155 P.2d 42, 158 A.L.R. 1008.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.



131 Cal.App.2d 286

M. N. THACKABERRY, Plaintiff,

v.

Ben D. PENNINGTON, Lewis E. Dunham, William V. Heide and A. G. Davenport, Defendants.

M. N. THACKABERRY, Plaintiff and Respondent,

v.

William V. HEIDE and A. G. Davenport, Defendants and Appellants.

Civ. 20394.

District Court of Appeal, Second District, Division 3, California.

March 4, 1955.

Rehearing Denied March 30, 1955.

Hearing Denied April 27, 1955.

Action by an alleged third party creditor beneficiary of a memorandum agreement for payment to plaintiff of sums advanced by him to one of defendants for a down payment on purchase price of a tract of land and payment of the first installment due on such defendant's notes for the balance in connection with construction of houses

by a company incorporated by defendants on the balance of lots held by defendant purchaser in such tract after his conveyance of other lots therein to the corporation. From a judgment of the Superior Court of Los Angeles County, Samual R. Blake, J., for plaintiff, defendants appealed. The District Court of Appeal, Vallée, J., held that the agreement was not a promise by defendants to pay plaintiff amounts advanced within reasonable time after such conveyance, but that defendants' obligation was conditioned on plaintiff's conveyance to corporation of remaining lots, which were never conveyed thereto, and hence did not accrue.

Judgment reversed.

1. Contracts ⇐218

A memorandum agreement by corporation's stockholders to pay another amounts advanced by him to one stockholder for down payment on purchase price of tract of land and payment of first installment due on his notes for balance in connection with corporation's construction of houses on balance of lots in tract, held by such stockholder after his conveyance of other lots therein to corporation, was not promise to pay amounts advanced within reasonable time after such conveyance, but stockholders' obligation was conditioned on conveyance to corporation of remaining lots, which were never conveyed thereto, and hence did not accrue.

2. Contracts ⇐143

All parts and every word of agreement must be given effect, if reasonably practicable. West's Ann.Civ.Code, § 1641.

Barry Brannen and H. F. Poyet, Los Angeles, for appellants.

Arnerich, del Valle & Sinatra and B. R. Ware, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendants from a judgment for plaintiff in an action brought by him as an alleged third party creditor beneficiary of a contract. The contract sued on was executed on November 22, 1947 by Ben D. Pennington, Lewis E. Dunham, and defendants Heide and Davenport. Pennington and Dunham were named parties defendant but were not served. There is no conflict in the evidence.

A rather extended statement of the facts is necessary to an understanding of the question to be decided. On August 16, 1946 Pennington and his wife acquired title to the 150 lots in tract 603 from the McFaddens for $105,000. Plaintiff advanced the down payment of $30,000. The balance of $75,000 was evidenced by two promissory notes, each in the principal sum of $37,500, executed by the Penningtons and secured by two deeds of trust. Each note was payable in instalments of $17,500 on May 10, 1947; the balance on May 10, 1948. The deeds of trust provided that individual lots could be released upon the payment of specified release prices which would be credited to the promissory notes.

In October 1946 plaintiff and Pennington executed an agreement in which Pennington acknowledged that he and his wife held the title to the tract as trustees for plaintiff and himself and whereby they agreed: to form a corporation to be known as Pennington & Thackaberry, Inc., to which Pennington would convey the property; the property would be subdivided and lots sold by Pennington for cash; release prices would be paid on the trust deed notes; the balance would be deposited in a joint bank account and after payment of expenses, cost of improvements, and the advances of plaintiff, would be divided equally; and Pennington as his own enterprise could build on the lots and Thackaberry would have no interest therein. The agreement was not recorded.

Pennington & Thackaberry, Inc., was organized, but Pennington never conveyed the property to it. On several occasions, and as late as the first part of 1949, plaintiff requested Pennington to transfer the property to the corporation. Pennington promised to do so each time but never did. Plaintiff "didn't force the issue."

Between November 1946 and February 1947 Pennington sold 16 lots and commenced to build houses on them. On May 10, 1947 the first instalment became due on the promissory notes. The total of the re-

lease prices paid on the 16 lots was insufficient to pay it. On May 13, 1947, at Pennington's request, plaintiff advanced an additional $11,363.24 to meet the payment. In 1949 plaintiff received $3,411.51 from the sale of the 16 lots, of which $1,070.53 was the balance of the joint bank account.

Pennington had difficulty financing the construction of the houses on the 16 lots. In April 1947 he contacted defendant Heide, who was an officer of a mortgage and escrow company and was engaged in setting up subdivisions for the company. Pennington told Heide he had 134 lots in Santa Ana and wanted either to sell the lots or procure a loan for the construction of houses. Heide checked the title records and found that Pennington had title to the land, subject only to the McFadden deeds of trust. Later Pennington met Dunham, who was an officer of the same company as Heide, and defendant Davenport, a real estate broker who was associated with Heide in construction projects. Pennington told them he had bought the property for $105,000; plaintiff had put up $30,000; there was a trust deed payment coming due; he was in the process of constructing houses on 16 of the lots; and he needed money to finish the houses. He further stated Builders' Control had stopped all his disbursements. Heide then advanced money to Pennington.

In June, Pennington told defendants and Dunham that he needed $15,000 to finish the houses on the 16 lots and for bills on another construction job. He stated that the balance owing on the 134 lots was only $40,000 and that the reason he was broke was because he had to put up money for the May instalment on the promissory notes. He did not say anything about plaintiff's having advanced $11,363.24. Davenport suggested that Pennington ask the McFaddens to release 44 of the lots and he would try to arrange a loan on the property. Davenport testified it is common practice in housing projects for the landowner to give the builder several free lots so that he can place his construction loans on those lots and get his construction program started. Discussions were had between Pennington, Dunham, Heide, and Davenport with respect to forming a corporation for the construction of houses on the balance of the property, 134 lots, and to transfer one-third of the lots, 44, to the corporation. Defendants and Dunham told Pennington that if they obtained a loan, they expected to form a corporation, take the 44 lots, and construct houses on them on a speculation basis, "which was approximately a third of the 134 lots remaining, and then at a later date when we had finished the 44 lots, we would use those funds or profits, if there were any, to purchase the 90 lots which remained in the subdivision, and proceed then to build out the whole tract." Davenport told Pennington he was interested in forming a construction company provided all of the remaining lots, 134, were conveyed to the corporation. Pennington said the proposed corporation should return to plaintiff the money he had advanced, on condition the corporation be formed to take title to the 134 lots.

Defendants and Pennington discussed with the McFaddens the proposition of the latter's releasing 44 lots without the payment of the release prices from the deeds of trust. Davenport told them it was his idea to get the lots released and clear in order to borrow construction money on them so that the program could be started. He also told them that their corporation would endeavor to pay them the $40,000 owing on the deeds of trust out of the sale of the houses on the first 44 lots and that later Pennington would convey the title to the remaining 90 lots to the corporation and it would build houses on the lots. Pennington said, "That is correct." There was ample security for the $40,000 in the remaining 90 lots, and the McFaddens agreed to release the 44 lots.

Because Pennington needed $15,000 to finish the 16 houses and pay the moneys that Heide had advanced to him, Davenport contacted a Mr. Pollack, who was willing to buy the 44 lots for $15,000 and give Pennington an option to repurchase them within 90 days from June 26 at $400 a lot. McFaddens released the 44 lots on June 26. On the same day Pennington conveyed the lots to Pollack subject to right to repurchase, and on July 8 he received the $15,000.

Between June 20 and June 26, Pennington, Dunham, and defendants decided to form Anaheim Construction Company, sometimes referred to as the corporation, and that the four should hold the following offices. Pennington, president and director; Dunham, vice president and director; Heide, secretary-treasurer and director; and Davenport, director. Discussion was also had as to the disposition of stock: Pennington was to receive 40%, the three others were each to receive 20%. Heide testified that further discussion was had "with regard to the full 134 lots. We were going to take title to the 44 lots, and then at a subsequent date we would take title to the 90 and pay Thackaberry and McFadden. * * * We would construct houses on the 90 lots after we had finished the 44 lots."

The articles of incorporation of Anaheim Construction Company were filed in the first part of July. A permit to issue 100 shares of stock to Pennington in consideration of his transferring the 44 lots to the corporation was granted on August 28. The stock was not issued until November 5, when the certificate was placed in escrow as part of an escrow transaction in which Pennington repurchased the 44 lots from Pollack.

On July 17 Pennington gave Heide a power of attorney to act with Builders' Control in order to finish the houses on the 16 lots. In the early part of September, the curbs, sidewalks, and driveways still had to be put in, but the contractors would not perform their work because they were not receiving their money from Builders' Control. Heide and Davenport talked to the men and persuaded them to proceed with the work and, as officers of Anaheim, gave them a written guarantee that the corporation would see that they were reimbursed for completing the improvements on the 16 lots. Pennington told defendants and Dunham that in consideration of Anaheim's assuming this obligation the corporation would get the remaining lots, 134. On the strength of the corporation's commitment, the improvements were put in and the funds were released.

Efforts were then made to obtain a loan for the construction of houses on the 44 lots. After discussions with Laguna Federal Savings & Loan Association, Pennington, Dunham, and defendants agreed that Anaheim would apply to Laguna Federal and request it "not only [to] make the 42 loans, but also make the 90 loans at a subsequent date." Laguna Federal "was interested in proceeding with the 90 lots" but would only make loans on 42 of the 44 lots at that time. On September 11 Laguna Federal requested a personal indemnity agreement guaranteeing the construction of 42 houses on the lots, to be signed prior to the date of commencement of construction, and personal financial statements from the four incorporators of Anaheim. The agreement was executed in November.

At this time, in September, it was realized that Anaheim would have to pay Pollack the funds Pennington had borrowed. Heide personally gave Pollack $600 to extend the option two months, until November 26, which date was selected to have all other preliminary transactions closed.

On November 5 the corporation obtained final loan commitments from the Federal Housing Administration and the Veterans Administration and completed the final arrangements with Laguna Federal, with the exception of the personal indemnities. On that date two escrows were opened: one for the repurchase of the 44 lots from Pollack by Pennington for $12,600 together with an unsecured note in the amount of $8,400; and a second whereby Anaheim placed in escrow the 100 shares of its stock issued to Pennington in consideration for the 44 lots, with the agreement that prior to close of escrow Pennington would endorse the stock certificate and Anaheim would reissue the stock so that Pennington would receive 40 shares and the others 20 shares each, and Laguna Federal would deposit 42 notes and deeds of trust in the amount of $8,100 each for recordation. The two escrows were to be closed concurrently.

Between April 1947 and November 1947 Pennington, Heide, Davenport, and Dun-

ham had many discussions about the "full number of lots, the 134 lots of the entire subdivision, that the Anaheim Construction Company would build on those lots." Davenport testified, "Due to the necessity of having a certain amount of credit with the Federal Housing Administration and the Laguna Federal Savings & Loan Association, I suggested to the other members of the corporation that we do the construction of the 134 lots in three units. That would require less cash, and we would qualify. So that is why we divided it up into three units, and started out with the 44 lots and 42 houses. Then we were going to acquire more lots during the construction period, because it takes you at least 60 days to process your deal through the Federal Housing Administration and your lending institutions." He further testified he "wouldn't have gone into the deal on 42 houses." However, it was not until the first part of November that they had any "real heavy discussions" as to how the $40,000 due the McFaddens on the 90 lots would be handled and paid, because prior to that time they did not know whether the Federal Housing Administration would give them the requested number of loans or the type of loans they wanted, or if they could get a good sales program with the Veterans Administration.

About November 7 or 8, because of the personal credit of Heide, Davenport, and Dunham and their personal guaranty that all the houses within the subdivision would be completed free and clear of any liens, Laguna Federal allowed them to draw $12,600 from the construction fund and deposit it in the first escrow. A notation was made in the second escrow authorizing the transfer of $12,600 to the first. On November 15 the escrow instructions were amended whereby instead of the unsecured note provided for in the original instructions, a deed of trust executed by Pennington and Dunham on November 14, 1947 was placed in escrow securing payment of a note for $8,400 in favor of Pollack. The amendment also stated that the deed from the Penningtons to Anaheim was placed in the escrow to be recorded at its close. The deed was the conveyance of the 44 lots and was executed by the Penningtons on November 14.

Discussions were then had relative to Anaheim's taking title to the 90 lots because there wouldn't be enough profit in the 42 houses. Pennington was told by Heide, Davenport, and Dunham that Anaheim would pay the McFaddens out of the profits from the sales of the 42 houses and it would take care of plaintiff when it got the 90 lots and had constructed houses on them. Heide testified, "We said we wanted to have something definite; that when we got title to those 90 lots, that we would see—with our 60 percent of the corporation stock, that we would see that the corporation did thus and so. * * * that the corporation out of the sale funds of the 42 lots, that we would see that McFadden was paid, when we were able to procure the 90 lots, and also that we would take care of Mr. Thackaberry at the time we could get title to the 90 lots. The 44 lots we knew were going to be deeply encumbered by us trying to help out Mr. Pennington, and that he admitted in the conferences * * * that there would be very little profit out of the 44 lots, because we had taken on the obligation to pay Pollock back, and the corporation had assumed the monies that I had advanced to Ben Pennington * * * and we knew we would have to assume—other liabilities of Ben Pennington, which we did in the course of our business." Davenport testified, "The corporation was to pay the obligations by getting the first 44 lots clear. Then out of the proceeds of the sale of the houses Mr. McFadden could be paid off, and that would clear the balance of the lots. Then they would go after 45 more lots, and go borrow on them, and build those and have funds to proceed on. * * * During the construction period of the first 42 houses, we were to get title to the next 45 lots and proceed. * * * We estimated there would be profit of 10 percent, which would be some $42,000 profit on 42 houses. * * * We would endeavor to pay him [McFadden] out of the first 44. * * * Then by doing that we would clear the balance of the lots, and we could take another 45, and then we would start paying Thackaberry out of the next 45 houses, which

would be sufficient to pay Thackaberry off."

After many discussions, the memorandum agreement, on which plaintiff relies, was signed on November 22 without legal advice. It reads:

"Memorandum of Agreement, November 22, 1947

"In connection with the construction of houses by the Anaheim Construction Co., which has been Incorporated by the undersigned, on the balance of the lots in Tract 603, Magnolia Place, Santa Ana, California now held by Ben D. Pennington, it is agreed as follows:

"1. That A. J. McFadden shall be paid the sum of $40,000.00 out of the sales of the first 42 houses.

"2. That M. N. Thackaberry shall be paid in full for funds advanced in connection with the above Tract.

"3. That the stock in the Anaheim Construction Co. be divided as follows:

Ben D. Pennington,	40%
Lewis E. Dunham	20%
William V. Heide	20%
A. G. Davenport	20%
	100%

"Ben D. Pennington [Signed]
"Ben D. Pennington
"Lewis E. Dunham [Signed]
"Lewis E. Dunham
"William V. Heide [Signed]
"William V. Heide
"A. G. Davenport [Signed]
"A. G. Davenport"

On the 23rd, Laguna Federal was told that Anaheim was going to proceed with the 44 lots and that at a subsequent date it would get title to the 90 lots. Heide testified that the obligation to McFadden of $40,000 was not entered in the corporate books; the corporation never ratified the agreement of November 22 because it never received title to the 90 lots; no corporate action was taken concerning that agreement. Heide further testified that "This was a memorandum that as of a future date the officers would have the corporation act according to that memorandum, when we got title, it says, to the balance—that the Anaheim Construction Company got the balance of the lots in the subdivision, * * * would do the following, and that was, to-wit, that we would pay McFadden $40,000; that we would pay Thackaberry the funds that he had advanced in connection with the purchase of the 150 lots in that subdivision." Davenport testified the memorandum was an "individual agreement" in which the individuals were "bound to have the corporation do a certain thing upon the happening of a certain event. * * * upon the corporation getting the balance of the lots, the 90 lots"; the corporation did not take any action with regard to plaintiff's advancements. Defendants testified they did not know the amount Pennington owed plaintiff; therefore, the sum was not put in the agreement. They also testified that Pennington would not show them his agreement with plaintiff, and according to the title records Pennington had clear title to the 90 lots.

The two escrows of November 5 were closed on November 25; the next day construction was begun on the 42 lots and the houses were completed in December 1948. Between September 1948 and February 1949 all the houses were sold. All of the bills were paid. The secured note payable to Pollack for $8,400 was paid by Anaheim out of the receipts from the sale of the houses. The $15,000 risk capital which Pennington obtained from Pollack cost Anaheim $24,952. There was no profit from the construction of the 42 houses; Heide had to pay the last franchise tax due. Anaheim never paid any dividends or salaries.

McFadden was not paid anything while the 42 houses were being constructed, nor did he receive anything out of the sales of the 42 houses and the two lots.

Several times during the construction of the 42 houses there was discussion about proceeding with construction on the 90 lots and making a payment to McFadden. Meanwhile, unknown to defendants, Pen-

nington was surreptitiously selling the 90 lots. He sold the first one on February 11, 1948 and by October 1, 1948 he had sold a majority of them. The last lot was sold on January 30, 1950. The aggregate sales price of the 90 lots was $97,825. He did not repay plaintiff any of his advances except $3,411.51 from the proceeds of the sale of the 16 lots.

In November 1948 Heide learned that Pennington had sold 60 of the 90 lots to a construction company and that construction had started on two of them. He tried to talk with Pennington, but he was in Texas. When Pennington returned Heide asked him why he had sold the lots, that "I thought we were going to continue with our program as outlined." Heide testified that Pennington said "it wasn't any of my business, and he had already sold the lots, there wasn't anything he could do." Heide informed Davenport of the situation, and in December 1948 they decided to abandon the idea of going ahead on the 90 lots. On February 16, 1949 Davenport wrote a letter to Pennington advising him that he considered that Pennington had breached his contract in selling the 90 lots. That letter and several other pieces of correspondence were returned by the post office department. The 90 lots were never conveyed to Anaheim.

Plaintiff testified he visited the tract three or four times. In 1948 he saw houses constructed on lots in the area of the first 16 lots and in the area of the 44 lots. The last time he saw Pennington was in the first part of 1949 when he asked him to transfer the 90 lots to Pennington & Thackaberry, Inc. He knew at that time Pennington had transferred the 44 lots to Anaheim, but Pennington said he had not gotten anything out of the transaction. He did not meet or talk with defendants. In 1950 he learned that Pennington had sold the 90 lots.

Plaintiff never made any demand or request on defendants or Dunham for payment of the moneys he had advanced to Pennington. Davenport testified that it was not until the spring of 1950 when he went to plaintiff's office to learn where Pennington was that he met plaintiff for the first time. At this meeting, Davenport told plaintiff "what we had done down there, the houses we had built, and what the deal was." Plaintiff did not tell Davenport that defendants owed him any money. The first time Heide met plaintiff was during the trial of this action. This action was filed November 21, 1951. Prior to the filing of the action neither Heide nor Davenport knew the terms or conditions on which plaintiff had advanced the money to Pennington nor did either of them know the advances were covered by the agreement of October 1946.

The court, among other facts, found: that by the agreement of November 22, 1947, "Pennington, Heide, Davenport and Dunham, and each of them, jointly and severally, expressly promised and agreed that within a reasonable time after November 22nd, 1947 they and each of them would pay to the plaintiff in full all of the * * * funds advanced by him in connection with said tract"; the reasonable time within which defendants promised and agreed to repay plaintiff was nine months from November 25, 1947, the date when the 44 lots were transferred to the corporation, and which time expired on August 25, 1948; each defendant has refused and failed to pay the balance of $37,951.73 advanced by plaintiff, and the whole is now due and owing. Judgment was that plaintiff recover from defendants, jointly and severally, the sum of $37,951.73, together with interest from November 21, 1951, the date of the filing of the complaint.

[1, 2] Defendants contend the evidence does not support the findings and assign several errors with respect thereto. It is only necessary that we consider one of the claimed errors: The undertakings in the agreement of November 22, 1947 to pay McFadden and Thackaberry are conditioned on the conveyance to Anaheim of the balance of the lots in the tract and since the balance of the lots were not conveyed to Anaheim no liability to plaintiff-Thackaberry arose.

As was said earlier, the evidence is uncontroverted that defendants from their

very first discussions with Pennington planned to construct houses on all of the 134 lots in the tract in order to make the program profitable. After defendants had negotiated and secured the necessary construction loans on the 42 lots and had personally obligated themselves to Laguna Federal, the agreement of November 22, 1947 was executed.

The agreement is definite and certain with one exception.[1] The first six lines are that "In connection with the construction of houses by the Anaheim Construction Co., * * * on the balance of the lots in Tract 603 * * * now held by Ben D. Pennington, it is agreed as follows * * *." The only matter not made clear by this language is what lots are referred to by "the balance of the lots in Tract 603 * * * now held by Ben D. Pennington." The only lots then held by Pennington were the 90 lots. Title to the 44 lots had already been conveyed to Anaheim; "the balance of the lots" was the 90 lots. The word "connection" is defined by Webster to mean: union, mutual dependence, relationship, logical sequence, conjunction, etc. Conveyance of the 90 lots is an integral and essential part of the agreement. It is a condition precedent to the promises which follow. The promises that follow are in conjunction with the construction of houses by Anaheim on the 90 lots—that is, when Anaheim received title to the 90 lots from Pennington the promises would be performed. To construct houses on the "balance of the lots"—the 90 lots—Anaheim had first to obtain title thereto. The promises that follow are: (1) that when Anaheim received title to the 90 lots, McFadden "shall be paid" $40,000 out of the sales of the first 42 houses, and (2) that when Anaheim received title to the 90 lots, plaintiff "shall be paid" for funds advanced. The McFadden deeds of trust were on the 90 lots, not on the 44 lots. Because it was anticipated that a profit of $42,000 would be made from the construction of 42 houses on the first 44 lots, the parties agreed that from this source McFadden "shall be paid" and he would release the 90 lots from the deeds of trust. It is to be observed that the action is to recover the entire amount of plaintiff's advances, not in connection with the 44 lots, but in connection with the entire 150 lots in the tract. It would be unreasonable to assume that defendants intended to pay plaintiff on the conveyance of the 44 lots to Anaheim when his advances were for the purchase of the 150 lots.

To construe the memorandum as a promise of defendants to pay plaintiff the advances he had made on the conveyance of the 44 lots to Anaheim would be to completely disregard the condition of the first six lines of the agreement and ignore the elemental rule that, if reasonably practicable, all parts, every word, of an agreement are to be given effect. Civ.Code, § 1641; Hunt v. United Bank & Trust Co., 210 Cal. 108, 115, 291 P. 184. It would be excising and giving no meaning to six of the twelve lines of the agreement. The parties agreed, not that McFadden and plaintiff should be paid in any event or on the conveyance of the 44 lots to Anaheim, but that they should be paid in connection with the construction of houses by Anaheim on the 90 lots. Any obligation to pay plaintiff was conditioned on the conveyance of the 90 lots to Anaheim. Since the condition did not eventuate, the obligation did not accrue.

1. We recopy the memorandum for convenience:

"Memorandum of Agreement,
November 22, 1947

"In connection with the construction of houses by the Anaheim Construction Co., which has been Incorporated by the undersigned, on the balance of the lots in Tract 603, Magnolia Place, Santa Ana, California now held by Ben D. Pennington, it is agreed as follows:

"1. That A. J. McFadden shall be paid the sum of $40,000.00 out of the sales of the first 42 houses.

"2. That M. N. Thackaberry shall be paid in full for funds advanced in connection with the above Tract.

"3. That the stock in the Anaheim Construction Co. be divided as follows:

Ben D. Pennington,	40%
Lewis E. Dunham	20%
William V. Heide	20%
A. G. Davenport	20%
	100%"

The findings that by the agreement of November 22, 1947 defendants promised and agreed that within a reasonable time after that date they, and each of them, would pay plaintiff the funds advanced by him, and that such reasonable time was nine months from the date the 44 lots were transferred to Anaheim, are vital to the judgment. They are unsupported by any evidence. Without them the judgment cannot stand.

Reversed.

SHINN, P. J., and ASHBURN, J. pro tem., concur.



131 Cal.App.2d 298

Mary P. VERONIN, Plaintiff and Respondent,

v.

Michael J. VERONIN, Defendant and Appellant.

Civ. 20516.

District Court of Appeal, Second District, Division 3, California.

March 4, 1955.

Action by wife for divorce. The Superior Court of Los Angeles County, Walter R. Evens, J., entered interlocutory judgment of divorce, adjudging residence to be community property and awarding it to wife, and defendant husband appealed. The District Court of Appeal, Ashburn, J. pro tem., held that the evidence supported finding that residence purchased during marriage with community funds, but conveyed to husband and wife as joint tenants, was community property.

Judgment affirmed.

1. Evidence ⇐390(4)
Husband and Wife ⇐14(3)

Deed to husband and wife as joint tenants raised a presumption that they intended title to be so vested, but parol evidence was admissible to show mutual intention that the property should in fact be acquired and held as a community asset.

2. Husband and Wife ⇐254

That realty was purchased during marriage with community funds was not conclusive on question of whether realty constituted community property.

3. Husband and Wife ⇐264

In divorce action, evidence supported finding that residence purchased during marriage with community funds, but conveyed to husband and wife as joint tenants, was community property.

4. Appeal and Error ⇐1010(1)

Determination by trial court that presumption that husband and wife in taking title to realty as joint tenants intended title to be so vested has been rebutted is conclusive on reviewing court unless it is manifestly without support in the evidence.

Barry Sullivan, Los Angeles, for appellant.

Glen Behymer and Ralph W. Hoffman, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Defendant appeals from an interlocutory judgment of divorce granted to plaintiff wife on the ground of cruelty. The only contention urged on his behalf is that the court erred in adjudging the home, which stood of record in both names as joint tenants, to be community property and in awarding it to plaintiff alone.

In her complaint respondent alleged the residence to be community estate and added this: "Although the above described real estate is held in joint tenancy by the parties, they and each of them had heretofore agreed that the same should always retain its community property status, in addition to which said real property was acquired by the parties with community funds and through their joint efforts subsequent to their marriage." Defendant alleged and contended that the property was in fact owned in joint tenancy. The court found the quoted allegation to be true and awarded the home to plaintiff as her sole and

separate property. Appellant claims that parol evidence was not admissible to contradict the terms of the deed and that, in any event, the evidence is insufficient to support the finding.

[1] While a deed to spouses as joint tenants raises a presumption that they intended title to be so vested, Gudelj v. Gudelj, 41 Cal.2d 202, 212, 259 P.2d 656; Perkins v. West, 122 Cal.App.2d 585, 589, 265 P.2d 538, it is now thoroughly settled that parol evidence is admissible to show that they had a mutual intention that the property should in fact be acquired and held as a community asset. Gudelj v. Gudelj, supra; Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905; Huber v. Huber, 27 Cal. 2d 784, 789, 167 P.2d 708; Mademann v. Sexauer, 117 Cal.App.2d 400, 402, 256 P.2d 34; Perkins v. West, supra. And the remaining question is the sufficiency of the evidence in this case.

[2] The property was purchased during marriage with community funds, which fact is not conclusive; Gudelj v. Gudelj, supra, 41 Cal.2d at page 212, 259 P.2d 656, and the reason for the joint tenancy deed is disclosed by appellant's testimony on cross-examination. "Q. As a matter of fact, Mr. Veronin, isn't it true that when you went to the real estate office you and your wife told Mr. Miller that you wanted to buy this property as community property, and he said to you, 'If you are smart, you will have it put in joint tenancy, and if one of you died you would save the cost of probate'? A. That is right. Q. Did he say that? A. Yes."

[3] Plaintiff testified that at the time the property was acquired she and defendant "agreed to having it community property * * * agreed to hold it as community property"; that title was taken as joint tenants "because it would be more convenient for us"; that they talked every once in a while about whether the property was community or joint tenancy and always referred to it as community property. On cross-examination plaintiff said that the conversation before the purchase was as follows:

"A. Well, he said, 'If we buy the house it will be yours and mine.'

"Q. That is what he said? A. It will be community.

"Q. It would be what? A. Belong to him and me.

"Q. Belong to him and you? A. Yes.

"Q. What did you tell him? A. I said, 'All right.'"

Also: "Q. After you bought the property, after you received the deed to it, did you ever talk to Mr. Veronin about the property? A. No. Q. Never did? A. No." This testimony is the only portion to which appellant's counsel refers. The seeming contradiction was explained on redirect however. Plaintiff said that she was confused on cross-examination and "we always talked about the house being his and mine; you know, 'we are both owners.'"; that it was community property; and every once in a while they would talk about it. On recross she said they "talked about it all the time." That the evidence is sufficient to support the court's finding of community status is not open to doubt. See Davis v. Davis, 123 Cal.App.2d 753, 756, 267 P.2d 403.

[4] "A determination by a trial court that the presumption has been rebutted is conclusive on a reviewing court unless it is manifestly without support in the evidence." De Boer v. De Boer, 111 Cal.App.2d 500, 505, 244 P.2d 953, 956. To same effect are: Sandrini v. Ambrosetti, 111 Cal.App. 2d 439, 449, 244 P.2d 742; In re Estate of Baer, 81 Cal.App.2d 830, 833, 185 P.2d 412.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

131 Cal.App.2d 205

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Manuel MATA, Robert Marquez and Richard Venegas, Defendants and Appellants.

Cr. 5273.

District Court of Appeal, Second District, Division 1, California.

March 2, 1955.

Proceeding on application for leave to file supplemental opening brief and for leave to file brief amicus curiae on behalf of appellants. The District Court of Appeal held that where defendants had not filed affidavit at trial in support of motion for change of venue and no contentions had been made on motion for new trial of alleged prejudice against defendants by adverse newspaper publicity, and where such newspaper items had been published six months prior to trial, augmentation of record to include voir dire examination of jurors and proceedings and motions made prior to taking of evidence was not justified and without such record matters presented by supplemental brief and brief amicus curiae were without the record on appeal.

Applications denied.

1. Criminal Law ⇐126(1)

Where trial jury had been secured without delay or difficulty and in impaneling jury defendants had only used 11 of their 35 peremptory challenges, claim that cause should have been removed to another county was untenable.

2. Criminal Law ⇐1110(1), 1117

Where defendants had not filed affidavit at trial in support of motion for change of venue as required by statute, and where no contention had been made on motion for new trial of alleged prejudice against defendants by adverse newspaper publicity, and where such newspaper items had been published six months prior to trial, augmentation of record on appeal to include voir dire examination of jurors and proceeding and motions made prior to taking of evidence was not justified and without such augmentation of record matters presented in supplemental brief and brief amicus curiae were without the record on appeal. Pen.Code, § 1034.

PER CURIAM.

We have before us two applications, one filed by appellant Mata and titled "Application for Leave to File Supplemental Opening Brief and Supporting Affidavit and Supplemental Brief". The other is an application by Alianza Hispano-Americana (Spanish-American Alliance), a fraternal organization, to file a Brief Amicus Curiae on behalf of appellants.

In the application to file a Brief Amicus Curiae it is pointed out that "The Alianza Hispano-Americana, is concerned about the equality of treatment accorded minority groups and especially persons of Mexican ancestry and has, in this regard, created and established a special Civil Rights Department. Consistent with this policy, the Alianza has sponsored programs throughout the south-western part of the United States geared to achieve freedom of Spanish speaking peoples from discrimination in education, employment, housing and other phases of American life."

In support of this application to file the foregoing briefs appellants urge that because of adverse newspaper publicity concerning the events which gave rise to the trial, the appellants' motion in the Court below for a change of venue should have been granted; that the *voir dire* examination of the jury would disclose the influence of the newspaper publicity, consequently that the *voir dire* should have been included in the record on appeal.

In the court below appellants made application for augmentation of the record to include the following beyond the normal record on appeal:

1. The *voir dire* examination of the jury;

2. The proceedings and motions made by counsel preliminary to the taking of any evidence.

The application was denied by the trial judge on the ground that insofar as appellants' claim that the entire panel of

jurors was prejudiced against them and had prejudged the case, the record reflected that the accused were entitled to thirty-five peremptory challenges and used only eleven of them; that had the *voir dire* examination disclosed any indication of bias or prejudice the defense could have removed the jurors so biased or prejudiced, by challenge. That having failed so to do they could not be heard to complain. It was also pointed out by the trial court judge that no challenge for cause was made and denied by the court. That while a statement was made that appellants contended the jurors were prejudiced by what they read in the newspapers, no proof thereof was offered nor was any showing made of such prejudice during the empanelment of the jury at the trial. The trial judge held that the accused could not accept the jury under the foregoing circumstances, without exhausting their challenges, and then, after conviction, assert prejudice. People v. Mendez, 35 Cal.2d 537, 542, 219 P.2d 1.

[1] We are in accord with the holding of the trial court that where, as here, the trial jury was secured without delay or difficulty (in the instant case in a day and a half with only eleven of the defendants' thirty-five peremptory challenges being used), the claim that the cause should have been removed to another county is untenable. People v. Mendez, supra; People v. McCracken, 39 Cal.2d 336, 344, 246 P.2d 913.

[2] It is also noteworthy that while the statute, Penal Code, § 1034, requires that a motion for change of venue must be supported by affidavit, no such affidavit was filed herein. At least, no request was made for any such affidavit as part of the record on appeal.

And furthermore, appellants made no contentions at the hearing of their motion for a new trial with respect to the matters now urged and upon which they desire to be heard on appeal.

In the brief sought to be filed amicus curiae, the newspaper items referred to (and which are outside the record and were not presented to the trial court) appear to have been published in December, 1953, while the trial did not take place until May of 1954.

In view of the circumstances surrounding the instant applications, we are persuaded that the language of the Supreme Court of the United States in Stroble v. State of California, 343 U.S. 181, 195, 72 S.Ct. 599, 606, 96 L.Ed. 872, 883, is peculiarly applicable.

"* * * Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. He asks this Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury. * *"

The statement in the affidavit of counsel for appellant Mata that affiant is of the opinion that the *voir dire* examination would show that the entire jury panel was prejudiced against the appellants does not meet the requirement for "an affidavit to prove that any juror was in fact prejudiced by the newspaper stories."

Although we are inclined to permit augmentation of the record liberally in furtherance of justice, we have come to the conclusion that in this case ordering the augmentation would not be justified. And, without such augmentation of the record the supplemental brief offered by appellant Mata as well as the proffered brief Amicus Curiae would present for consideration by us matters wholly without the record on appeal.

The application of appellant Mata to file a Supplemental Opening Brief and the application of Alianza Hispano-Americana to file a Brief Amicus Curiae are, and each is denied.

131 Cal.App.2d 262

William Henry WILLIAMS, Plaintiff and Appellant,

v.

CITY OF ALHAMBRA, a Municipal Corporation, and Dudley Lapham, Defendants and Respondents.

Civ. 20356.

District Court of Appeal, Second District, Division 3, California.

March 3, 1955.

Action by applicant for position of city park caretaker to recover from city for injuries sustained while undergoing strength test. The Superior Court, Los Angeles County, Arnold Praeger, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained finding that the strength-testing device was not in a dangerous or defective condition within statute imposing liability on cities, under certain circumstances, for injuries resulting from dangerous or defective condition of city property.

Judgment affirmed.

1. Municipal Corporations ⇐852

That strength-testing device upon which applicants for position of city park caretaker were tested would register exertion greater than that which normally would be exerted by person, or greater than that which was necessary to qualify applicant for position, did not render the device, upon which applicant was injured, dangerous or defective within statute imposing liability upon cities for injuries resulting from dangerous or defective condition of public property. Government Code, § 53051.

2. Municipal Corporations ⇐857

In action by applicant for position of city park caretaker to recover from city for injuries sustained while undergoing strength test, evidence supported finding that the strength-testing device used was not in a dangerous or defective condition within statute imposing liability on cities, under certain circumstances, for injuries resulting from dangerous or defective condition of city property. West's Ann.Code Civ.Proc. § 2055; Government Code, § 53051.

3. Municipal Corporations ⇐734

Ordinarily, public parks are operated by municipalities as part of their governmental functions.

4. Municipal Corporations ⇐734

Public parks in city of Alhambra were operated in exercise of city's governmental functions, and city was not liable for alleged negligence in conducting examination of applicant for position of park caretaker.

Huston T. Carlyle, Los Angeles, for appellant.

Charles H. Lynch, Los Angeles, for respondents.

PARKER WOOD, Justice.

Appeal from judgment of nonsuit in an action for damages for personal injuries sustained as the result of alleged negligence of defendants.

Plaintiff, 56 years of age, was an applicant for the position of park caretaker in Alhambra. After receiving a notice to appear at the city hall, he went there on November 29, 1951, and talked with defendant Mr. Lapham, who was the personnel director and administrative assistant to the city manager. Mr. Lapham told him and six or seven other applicants that they would be required to take a physical strength test. It may be stated generally that in taking the test an applicant pulls against the tension of a spring scale that registers the strength exerted. The apparatus, as shown in a photograph (Exhibit 2), may be described as follows: a board, which is about 2½ feet long and 1 foot wide, lies flat on the floor or pavement and is the base of the apparatus; one end of a chain is attached to the middle of the board, and the other end is attached to a spring scale on which there is a dial that registers the strength exerted; the top of the scale is attached, by means of a hook and a ring, to the middle of a handle bar which is about 1½ feet long. The distance from the baseboard to the handle bar, when the connections between them (chain,

scale and hook) are fully extended, is about 2½ feet. The person taking the test stands on the baseboard with one foot on each side of the chain, takes the bar in his hands, and pulls upward. The pulling rotates a pointer on the dial of the scale which shows the strength exerted. The applicant who has the highest score receives the highest rating in the examination. If an applicant fails in the physical strength test, his name is not placed on the eligible list. On the day of the examination herein, applicants for the position of park caretaker were assigned to take the strength test in alphabetical order, and plaintiff was the last one on the list. No medical examination was given to any of the applicants prior to the strength test. The first phase of the test was a back-strength test. Then the applicants were given instructions by Mr. Lapham regarding the second phase of the test which, according to the testimony of appellant, was a leg-and-arm-strength test. They were instructed to stand on the board with their knees flexed and, while holding the bar in their hands, to place it on their thighs. The apparatus was then adjusted to the size of the applicant by adjusting the chain. The applicant was instructed to raise the bar with his arms and to exert pressure with the muscles of his legs and thighs, and to give it "all you got." After the other applicants had taken the second phase of the test, appellant took his position on the baseboard and took the bar in his hands. Mr. Lapham then told him to be sure that it was in "the most comfortable place that you can lift with." Appellant began to exert himself to his full capacity because some of the records made by other applicants in the first test were higher than appellant's record and he wanted to make as good a showing as possible. He exerted himself with all of his ability and at that time he felt a severe pain in his back and he fell to the pavement. He sustained an injury to his back and was taken to a hospital. While he was lying on the pavement he asked Mr. Lapham if he (appellant) had lifted anything and Mr. Lapham replied "you sure did, 580 pounds." He testified that prior to taking the examination he was in excellent health. He stated in his application for the position that his health was good and he had no physical defects.

Mr. Lapham, called as a witness by plaintiff under section 2055 of the Code of Civil Procedure, testified that he had no medical training or experience. Before he was employed by the defendant city the Civil Service Board had issued a bulletin giving instructions as to how the apparatus was to be operated. He followed those instructions in giving the tests. Prior to giving the tests here involved he had given the same tests for the position of park caretaker three or four times, and he had also given the tests to hundreds of applicants for other positions. There was no age restriction regarding the examination. The second phase of the test was a leg-strength test, and applicants for park caretaker were instructed that the pressure was to be exerted with the leg and thigh muscles. The pressure which could be exerted on the apparatus was in excess of that which a person could normally exert. In Alhambra a park caretaker is required to do the work of a groundman and gardener, to do general clean-up and maintenance work in the park and park buildings and to act as a construction helper. He thought that a park caretaker in Alhambra would not lift anything heavier than 100 pounds.

In response to questions by counsel for appellant, Mr. Lapham demonstrated how the apparatus, which was in the courtroom, was operated. He demonstrated the manner in which the chain was adjusted (depending upon the height of each applicant), and how pulling the bar causes the scale to register the strength which was exerted. He then demonstrated the two tests which the applicants took on the day appellant was injured.

[1, 2] Appellant contends in substance that the apparatus, used in giving the physical strength test, constituted a dangerous or defective condition of which defendants had knowledge and which they failed to remedy within a reasonable time after acquiring such knowledge. Section 53051 of the Government Code imposes liability upon a city for injury to persons "resulting from the dangerous or defective condition of public property if the legislative body,

board, or person authorized to remedy the condition: (a) Had knowledge or notice of the defective or dangerous condition. (b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition." Appellant argues that the evidence would support a finding that the apparatus was dangerous "because it provided for a pull and exertion by the applicant" beyond the requirements of the position of park caretaker and beyond human strength. No specified amount of pulling or pressure was required to be exerted. The test was competitive, and the purpose of it was to determine the relative strength of the individual applicants. The fact that the apparatus would register pressure or exertion greater than that which normally could be exerted by persons, or greater than that which was necessary to qualify an applicant for the position of park caretaker, would not justify a conclusion that the apparatus was dangerous or defective. Appellant also argues that a dangerous condition was created in that: the test was given without a medical examination of the applicants, and irrespective of their age or health; the applicants were told to "give it all you got"; and the test was given under the supervision of a person having no medical training. As above shown, Mr. Lapham had previously given the same test, with the apparatus here involved, to hundreds of applicants for various positions with the defendant city. On the day of the examination herein, six or seven other applicants for the position of park caretaker had completed the last phase of the strength test before the appellant took it. It does not appear that any of those applicants sustained an injury while taking the tests. There is no evidence herein that the apparatus used in the tests was dangerous or defective. It cannot be said that a dangerous or defective condition existed within the meaning of section 53051 of the Government Code.

[3, 4] Appellant contends further that a city in operating its public parks is acting in a proprietary capacity, and therefore the defendant city is liable for negligence in conducting the examination irrespective of whether there was a dangerous condition. Plaintiff was applying for a position as park caretaker and presumably, if he had been employed, he would have been available for assignment to duty in any of the parks in Alhambra. There is no evidence herein from which it can be concluded that a certain park or any park in Alhambra was operated by that city in a proprietary capacity. Ordinarily, public parks are operated by municipalities as a part of their governmental functions. See McKinney v. City and County of San Francisco, 109 Cal. App.2d 844, 845–846, 241 P.2d 1060; Meyer v. City and County of San Francisco, 9 Cal.App.2d 361, 363, 49 P.2d 893; Crone v. City of El Cajon, 133 Cal.App. 624, 629, 24 P.2d 846; Kellar v. City of Los Angeles, 179 Cal. 605, 609, 178 P. 505. In the McKinney case [109 Cal.App.2d 844, 241 P.2d 1061] it was held that the defendant city in operating a zoo as part of its public park and playground facilities "was engaged in a governmental capacity." In the Meyer case, it was held that the defendant city in operating a miniature train in a public park was acting in a governmental capacity. In the Crone case [133 Cal.App. 624, 24 P.2d 848] it was held that the defendant city in operating a swimming pool in a public park "was exercising a governmental function and acting in a governmental capacity". In the Kellar case it was held that the defendant city in maintaining a summer camp for children was acting in a governmental capacity, and it was stated therein, 179 Cal. at page 609, 178 P. at page 506, that playgrounds and recreation centers maintained by a city for the general use of children, "where so conducted as to partake in no degree of the nature of a private business enterprise, do not substantially differ from a public park", insofar as the question of exercising governmental power is concerned. In the present case it must be concluded that the public parks in the City of Alhambra were operated by that city in the exercise of its governmental functions.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

131 Cal.App.2d 259

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Odell HAYWOOD and Juanita Odellia Henderson, Defendants,

Juanita Odellia Henderson, Defendant and Appellant.

Cr. 5244.

District Court of Appeal, Second District, Division 2, California.

March 3, 1955.

Prosecution for statutory rape. From adverse judgment of Superior Court, Los Angeles County, Ralph K. Pierson, J., one of defendants appealed. The District Court of Appeal, Fox, J., held that the evidence was sufficient to sustain the conviction.

Judgment affirmed.

1. Rape ⇐52(1)

Evidence sustained conviction of mother for statutory rape of her daughter, on theory that mother aided and abetted her codefendant. Pen.Code, § 31.

2. Rape ⇐51(3)

In prosecution for rape, sexual penetration may be shown by circumstantial as well as direct evidence.

3. Rape ⇐52(2)

In prosecution for statutory rape, evidence warranted inference that an act of intercourse took place and that sexual penetration had been accomplished.

4. Criminal Law ⇐742(1), 747

Credibility of witnesses is for determination of trier of fact, and conflicts and inconsistencies in testimony of an individual witness are to be resolved by fact-finding authority.

5. Criminal Law ⇐553

In prosecution for statutory rape, trial judge was entitled to accept as true testimony of complaining witness on direct examination rather than conflicting testimony which she later gave.

6. Criminal Law ⇐372(1)

In prosecution of mother for statutory rape of daughter on theory that mother aided and abetted in commission of crime, testimony of daughter that mother had stated she would bring men to daughter, that mother thereafter did bring men who paid daughter money which she placed in medicine chest and money was sometimes gone when she returned to get it, disclosed plan or scheme and was admissible as tending to show that mother furnished codefendant as customer to daughter. Pen. Code, § 31.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant Odell Haywood was convicted of statutory rape, the victim being a sixteen year old girl. Defendant Juanita Odellia Henderson was convicted of the same offense on the theory that she aided and abetted her co-defendant in the commission of this crime and was therefore a principal under the provisions of section 31 of the Penal Code. Defendant Henderson appeals from the ensuing judgment.

In the evening of November 18, 1953, Officer Cartwright observed Haywood and Mrs. Henderson, the mother of the prosecutrix, in the Cat and Fiddle restaurant. Haywood left the restaurant and got into his car. A moment later Mrs. Henderson also left the restaurant and got into her car. She drove away and Haywood followed her. The prosecutrix lived with her mother in the city of Compton. Some 20 minutes after Mrs. Henderson arrived home Haywood came in. A young girl met him in the living room where her mother was engaged in a telephonic conversation. Haywood said hello to Mrs. Henderson. The girl and Haywood then walked past the mother into the bedroom. Haywood gave the girl a ten dollar bill which she placed in the medicine chest in the bathroom. She then returned to the bedroom where, she testified, she had an act of intercourse with Haywood.

The officers had followed the defendants to the Henderson home. They thereupon took up a vantage point where they could observe what took place in the bedroom. Although the Venetian blind was drawn, there was a crack through which it was possible to see inside the lighted room. The officers described the position of the girl and Haywood on the bed, the position with relation to each other, and Haywood's movements. In a few moments they entered the house and went directly to the bedroom. They also related the physical condition in which they found Haywood.

On entering the house, one of the officers observed a $10.00-bill in Mrs. Henderson's right hand. She moved the cushion on the sofa with her left hand and apparently attempted to hide the bill. The officers, however, seized it while still in her hand.

The prosecutrix testified that a few months prior to November, 1953, her mother had caught her engaging in an act of sexual intercourse and was "quite mad." Shortly after this incident, however, appellant told her she would bring the men. Thereafter men came to the house and had intercourse with the prosecutrix for money. They did not come by invitation of the prosecutrix but always arrived about 20 minutes after her mother came home. Appellant was in the house when the acts of intercourse took place. The prosecutrix placed the money given her by the men in the medicine chest. The money sometimes remained there but on other occasions it was gone when she returned. Appellant gave her money when she asked for it.

Appellant confessed her part in the offense to the police, but denied it at the trial.

[1–5] Appellant's first contention is that the evidence is not sufficient to support the judgment of conviction. Her theory is that the corpus delicti of the crime of rape was not shown, in that the essential element of "penetration" was not proved. There is no merit in this point. This element of the offense "may be proved by circumstantial as well as direct evidence." People v. Vicencio, 71 Cal.App.2d 361, 365, 162 P.2d 650, 652. Without reciting the details of what the officers saw when looking through the window and when they entered the bedroom, it certainly may be said that the trier of fact could clearly infer that an act of intercourse took place and that the element here in question was established. Furthermore, the prosecutrix testified on direct examination that she knew what an act of sexual intercourse was and that she had committed such an act with Haywood. This testimony disclosed there was penetration. Appellant, however, emphasizes that on cross and redirect examination the girl gave contradictory testimony on this point. Relying on this testimony, appellant asserts that "It would therefore appear to be conclusive that an act of sexual intercourse was not accomplished between Haywood and the complaining witness." Such conclusion, however, does not necessarily follow. It is, of course, fundamental that the credibility of a witness is for the determination of the trier of fact. Hence conflicts and inconsistencies in the testimony of an individual witness are to be resolved by the fact finding authority. People v. Frankfort, 114 Cal.App.2d 680, 700, 251 P.2d 401; People v. White, 115 Cal.App.2d 828, 831, 253 P.2d 108; People v. Ashley, 42 Cal.2d 246, 266, 267 P.2d 271. Thus the trial judge was entitled to accept as true the testimony of the complaining witness on direct examination rather than the conflicting testimony which she later gave. People v. Crawford, 24 Cal.App. 396, 403, 141 P. 824; People v. Holman, 72 Cal.App. 2d 75, 89, 164 P.2d 297.

[6] Appellant vainly argues that "the court erred in admitting evidence of misconduct between the complaining witness and third persons." Her theory is that "other acts of sexual intercourse between the complaining witness and third persons would not tend to prove or disprove any of the material facts alleged in the information." Appellant, however, misconceives the nature of the charge against her. It is based on the theory that she aided and abetted in the commission of the offense. The testimony of the prosecutrix revealed that appellant had stated she would bring

men to the prosecutrix and that thereafter she did bring them; that these men arrived about 20 minutes after appellant arrived; that the men paid the prosecutrix $10 which she placed in the medicine chest; and that the money was sometimes gone when the prosecutrix returned to it. This testimony disclosed a plan, scheme and pattern identical with the appellant's acts and conduct in the instant matter. Such testimony tended to show that appellant in fact furnished Haywood as a "customer" to the prosecutrix. The evidence was therefore clearly admissible. People v. Woods, 35 Cal.2d 504, 509, 218 P.2d 981.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



131 Cal.App.2d 98

George E. CROTHERS, Plaintiff and Appellant,

v.

GENERAL PETROLEUM CORPORATION, a corporation, et al., Defendants and Respondents.

Civ. 4686.

District Court of Appeal, Fourth District, California.

Feb. 24, 1955.

Rehearing Denied March 22, 1955.

Hearing Denied April 20, 1955.

Action against petroleum corporation by assignee of royalty interest to establish right to interest in oil produced on land after conveyance of land by granting corporation and surrender of oil prospecting permit. The Superior Court, Fresno County, Strother P. Walton, J., after verdict for plaintiff, granted motion for judgment notwithstanding verdict, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that fact that petroleum corporation did not inform broker's royalty interest assignee that such interest was not landowner's royalty did not operate to estop corporation from denying that such royalty had been granted, in view of fact that corporation was under no duty to inform assignee to contrary, and in view of fact that assignee had made no effort at time of assignment to check title or ascertain information as to corporation's interest in property.

Judgment affirmed.

1. Mines and Minerals ⇐55(4, 7)

Where petroleum corporation had purchased surface rights and acquired assignment of oil prospecting permit, but did not have lease on oil and gas underlying land involved, broker's oil and gas royalty interest, received for arranging sale, and dependent on actual production of oil and gas, was not transfer of mineral fee interest but merely an agreement to pay such royalty if corporation produced any oil from property, and broker's assignee of part of royalty interest received only such interest as broker had.

2. Mines and Minerals ⇐55(8)

In action by assignee of royalty interest granted by petroleum corporation to establish right to interest in oil produced on land involved, after surrender of gas and oil prospecting permit, evidence was insufficient to establish that petroleum corporation had fraudulently represented that it owned gas and oil lease on land involved, and that royalty interest conveyed to seller's broker for arranging sale to corporation was landowner's royalty.

3. Mines and Minerals ⇐6, 55(7)

Termination of oil and gas prospecting permit results in termination of all interests created under it, and, consequently, royalty interest agreement granted by petroleum corporation, which had no oil and gas lease but only prospecting permit, terminated upon surrender by petroleum corporation of oil and gas prospecting permit, and thereby extinguished rights of assignee of such interest under royalty grant.

4. Estoppel ⇐95

Fact that petroleum corporation did not inform broker's royalty interest assignee that such interest was not landowner's royalty did not operate to estop corporation from denying that such royalty had been granted, in view of fact that corporation was under no duty to inform assignee to

contrary, and in view of fact that assignee had made no effort at time of assignment to check title or ascertain information as to corporation's interest in property.

5. Estoppel ⇐118

In action by assignee of royalty interest granted by petroleum corporation to establish right to interest in oil produced on land, after surrender of oil prospecting permit, evidence was insufficient to show that assignee was prejudiced by failure of petroleum corporation to inform him the interest he had acquired was not landowner's royalty, or that such silence was culpable.

Henry C. Clausen and Richard G. Burns, San Francisco, for appellant.

D. W. Woods and Martin J. Weil, Los Angeles, for respondent General Petroleum Corp.

MUSSELL, Justice.

This is an action in which plaintiff seeks to establish his right to 1% of all oil and gas produced from land in Fresno county. A jury trial resulted in a verdict for plaintiff and thereafter the trial court granted defendants' motion for judgment notwithstanding the verdict. Plaintiff appeals from the judgment entered upon the granting of this motion.

On August 28, 1908, four certificates of purchase issued by the Registrar of the State Land Office and each covering 40 acres of land involved herein were assigned to Standard Investment Company, a corporation, hereinafter referred to as "Standard". On October 18, 1918, the State of California issued patents to these parcels of real property "subject to any valid interferring rights existing at date of selection, excepting and reserving to the United States all oil and gas deposits in the land so selected, and to it, or persons authorized by it, the rights to prospect for, mine and remove the oil and gas deposits from the same." Standard acquired the rights of the patentees and on August 10, 1921, oil and gas prospecting permit, serial number Visalia 09656, was issued to this corporation by the United States Department of the Interior. On March 15, 1923, defendant General Petroleum Corporation offered in writing to purchase from Standard the fee title and the prospecting permit on the four parcels of real property involved for the sum of $20,000 on the following basis: (1) That fee title be vested in Standard Investment Company with mineral reservation in the government free and clear of all encumbrances; (2) Consent to the assignment of Standard's prospecting permit to General Petroleum's nominee; and (3) Not less than a six months' extension of time on the prospecting permit from date. On March 19, 1923, this offer was accepted by Standard and in the acceptance Standard stated that application for an extension of six months time on the prospecting permit was being made. On March 28, 1923, Standard assigned all its interest in the United States government prospecting permit to General Petroleum Corporation and on April 24, 1923, Standard deeded the property involved to General Petroleum and this deed was by its terms made "subject to the restrictions contained in the list approved by the Secretary of the Interior certifying the said lands to the State of California."

The transfer of the surface rights and the prospecting permit from Standard to General Petroleum was apparently brought about through the efforts of one Edwin G. Hammer, a broker, who testified that he "received a verbal understanding" from Mr. Hyde, who owned the Standard Investment Company, to offer the property for sale or lease; that he introduced Mr. Hyde to Mr. A. L. Weil, vice-president and general counsel for General Petroleum and that they carried on their own negotiations.

On March 15, 1923, Mr. Weil wrote to Mr. Hammer as follows:

> "On consummation of the deal with Hyde, and the delivery by him to the General Petroleum Corporation of a satisfactory title to his property, the General Petroleum Corporation will pay you $1000.00 commission and two per cent (2%) royalty on the oil and gas produced from the property. This obligation to pay royalty, however, is not to control in any way our operations of the property."

On August 31, 1923, Hammer wrote General Petroleum, stating:

"With reference to the Hyde deal and your esteemed favor of the 15th. of March last, being desirous of getting my affairs in order, would you kindly at your convenience send me an agreement from General Petroleum Corporation covering my two percent royalty interest in the 160 acres you acquired from Hyde, either an assignment or in some concrete form, whichever plan you deem advisable or agreeable to your goodself and the Corporation."

In response to this request Mr. Weil, on September 4, 1923, replied as follows:

"This is to evidence the arrangement heretofore made with you that you are to receive two per cent (2%) royalty on the oil and gas produced from the property acquired by this company from the Standard Investment Company, and being more particularly described as follows: (Description of property.)

"The amount of royalties which you receive are to be determined on the same basis as the royalty paid to the government under the government lease.

"It is understood that this obligation arises simply out of the production of the property, and imposes no obligations whatever on the General Petroleum Corporation to operate."

On or about December 12, 1923, Hammer executed and delivered to plaintiff George E. Crothers, a former judge of the superior court and then a practicing attorney, a "Grant and Assignment of Royalty Interest", stating therein:

"In consideration of the sum of One thousand ($1000.00) dollars and other good and valuable considerations, the undersigned, Edwin C. Hammer, of the City and County of San Francisco, State of California, hereby grants and assigns unto George E. Crothers, of the City and County of San Francisco, State of California, a one per cent (1%) royalty on the gas and oil produced from the following described property: (Description of property)

"The amount of the royalty which said George E. Crothers is to receive is to be determined on the same basis as the royalty paid to the Government under Government leases.

"It is understood that the royalty interest in the undersigned Edwin C. Hammer which is assigned and granted hereunder is a one-half interest in that certain agreement between General Petroleum Corporation and Edwin C. Hammer, evidenced by a document of which the following is a copy:." (Here follows a copy of the letter of September 4, 1923, from General Petroleum Corporation to Edwin C. Hammer.)

After receiving this assignment plaintiff Crothers had it recorded and wrote to General Petroleum notifying them as follows:

"Please take notice that the undersigned is the owner of a one per cent royalty in all gas and oil produced in the following described property: (Description of property.)

"I understand that the above described property is the property in which you acquired your interest from the Standard Investment Company and upon which you are seeking to obtain a government lease.

"I enclose herewith for your files duplicate original Grant and Assignment of said one per cent royalty interest from Edwin C. Hammer to George E. Crothers, dated, signed and acknowledged this date before Julia W. Jones, commissioned Julia W. Crum, which you will kindly keep on file in your office and make due note of the same in your records."

On December 15, 1923, General Petroleum acknowledged receipt of this letter enclosing the assignment of Hammer dated December 12, 1923.

Plaintiff testified that he did not make any check of the records of Fresno county to determine the status of the title to the property in which he was buying a royalty

and did not request an abstract of title because the cost of checking might be more than the cost of the property and that "besides he was willing to take the word of A. L. Weil and the 'Standard Oil'." However, he further testified that he did not talk to Mr. Weil about the property or about General Petroleum's interest in it, either before or after he bought the royalty, but discussed the matter only with Mr. Hammer.

After acquiring the permit General Petroleum drilled a well on near by property to a depth of 500 feet and later made an arrangement with an adjoining operator, known as "Snowolene", which drilled a test well on other adjoining property. Thereafter General Petroleum assigned all its rights under the prospecting permit to the Springs Company, subject to the Hammer royalty. Subsequently another well, known as the "Mitchell Well", was drilled near the property involved herein. In the latter part of 1927 the Springs Company made an investigation of the area and its general manager came to the conclusion that the wells were well placed structurally and had tested the area satisfactorily. No oil was found in paying quantities and he therefore recommended that the permit be surrendered to the United States. The Springs Company then on October 7, 1927, relinquished all of its right, title and interest in the United States oil and gas prospecting permit Visalia No. 09656 to the United States Department of the Interior. This relinquishment was accepted and the permit canceled as of October 6, 1928. Apparently nothing further was done with the land until October 1, 1941, when the United States Department of the Interior issued an oil and gas lease covering the property to one Frances Reay. On June 24, 1943, Reay assigned the lease to Loren Hillman and on February 20, 1945, Hillman assigned the lease to Standard Oil Company of California. Subsequently the Standard Oil Company, by mesne conveyances, acquired the ownership of the surface. After acquiring the lease, Standard Oil Company drilled on the property and succeeded in obtaining a producing oil well. In 1949, when plaintiff discovered that the property was producing oil, he made demand upon the defendants General Petroleum Corporation and Standard Oil Company for an amount equal to 1% of the oil produced. When this demand was refused, this action was filed.

[1] Defendant General Petroleum Corporation acquired only the surface rights to the property involved herein by the deed to it from Standard Investment Company and the grant to General Petroleum's predecessors in interest from the State of California reserved to the United States all oil and gas in the said lands. General Petroleum also acquired an assignment of a prospecting permit issued by the Department of the Interior. It is evident that General Petroleum did not by the deed and permit acquire ownership of the oil and gas underlying the land involved. Its rights were to prospect for oil under the terms of the permit. On consummation of the deal with Standard Investment Company involving the deed and transfer of the permit, General Petroleum promised to pay Hammer $1,000 commission and 2% royalty on the oil and gas produced from the property, subject to the conditions stated in the letter of Mr. Weil of March 15, 1923, that "this obligation to pay royalty, however, is not to control in any way our operations of the property". General Petroleum was not bound to operate the property and so informed Hammer in writing, not only in its letter of March 23, 1923, but also in its letter of September 4, 1923, written in response to Hammer's request for an agreement. It seems quite clear that General Petroleum promised to pay the 2% royalty to Hammer only in the event General Petroleum produced oil and gas from the premises. This they did not do and the prospecting permit was surrendered after testing the area for oil production. While Hammer testified that he did not know of the existence of the prospecting permit and was informed by Standard that it owned the property, he was nevertheless bound by the statements in the letters which he received from General Petroleum. When on December 12, 1923, Hammer executed a

"Grant and Assignment of Royalty Interest" and delivered it to plaintiff, he, Hammer, conveyed and assigned only such interest as he then had which was conditioned upon the drilling and production of oil and gas upon the premises by General Petroleum. Plaintiff was well aware of the contents of the letter of September 4, 1923, to Hammer from the General Petroleum Corporation for this letter was set forth in the assignment to plaintiff of December 12, 1923. Plaintiff, after recording this assignment, stated in his letter to General Petroleum as follows: "I understand that the above described property is the property in which you acquired your interest from the Standard Investment Company and upon which you are seeking to obtain a government lease." This letter clearly indicates that plaintiff understood that General Petroleum's promise to pay royalty to Hammer was not made as an owner of the underlying oil and gas in the property but that it was seeking to obtain a government lease thereon. Furthermore, plaintiff made no effort to ascertain the condition of the title to the property, stating that the cost of an investigation would be more than he had paid for the assignment.

[2] Appellant argues that "The gist of the wrong here is that General Petroleum led its agent Hammer to believe it owned the oil and gas rights in the Fresno property. It then purported to transfer to 2% mineral fee interest to Hammer; and Hammer in turn purported to convey the same to Judge Crothers by a 'Grant and Assignment.' Judge Crothers believed he was getting a landowner's royalty; and when he gave General Petroleum notice of his ownership, nothing was done to discourage his belief. Thus whether it be said that General Petroleum covenanted to give a landowner's royalty or fraudulently represented that it had one to give or simply is estopped to deny the fact, it is clear that justice entitled plaintiff to recovery by reason of the documents and representations together with his reliance thereon." We are not in accord with these contentions. The record shows that Hammer was acting for the Standard Investment Company in attempting to find a buyer or lessee of their property. There is no testimony in the record that A. L. Weil or any one else in General Petroleum informed Hammer or plaintiff that General Petroleum was the owner or lessee of the oil and gas underlying the property involved. The promise of General Petroleum to pay 2% royalty was not a transfer of a 2% mineral fee interest as contended by appellant. It was an agreement to pay plaintiff in the event General Petroleum produced oil and gas from the property.

[3] The right of General Petroleum to operate the property involved by drilling for oil and gas was limited by the United States prospecting permit and ceased upon its surrender and cancellation. Hammer's right to royalty also ceased with the cancellation of this permit. In La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 140, 114 P.2d 351, 135 A.L.R. 546, it was held that the termination of an oil and gas lease would result in the termination of the interest created under it and in the instant case the same rule applies as to the interest created under the United States prospecting permit.

[4] Appellant argues that it was the duty of General Petroleum to inform him that he was not acquiring a landowner's royalty by his assignment from Hammer and that General Petroleum was estopped to deny that such a royalty was in fact acquired. However, as was said in Stern v. Sunset Road Oil Co., 47 Cal.App. 334, 345–346, 190 P. 651, 656:

> "In order to constitute an estoppel it must be shown that there was an intentional and deliberate declaration, act, or omission on the part of the party sought to be estopped. There must be an intentional deceit or gross negligence shown (Lackmann v. Kearney, 142 Cal. 112, 75 P. 668), and if silence is relied upon to constitute the estoppel, such silence must be willful or culpable and result in another placing himself in an unfavorable position on the faith in or understanding of a fact which the person remaining silent can contradict. (Eltinge v. Santos, 171

Cal. 278, 152 P. 915, Ann.Cas.1917A, 1143). But where there is no duty to speak mere silence will not create an equitable estoppel. (Winans v. Sierra Lumber Co., 66 Cal. 61, 4 P. 952; Lux v. Haggin, 69 Cal. 225, 4 P. 919, 10 P. 674.)"

[5] In the instant case plaintiff had a ready means of ascertaining the facts and there is nothing in the record to indicate that he sought information from General Petroleum as to its interest in the property. General Petroleum's dealings were with Hammer and not plaintiff and it had no duty to inform plaintiff as to his rights under his assignment. As was said by this court in C. I. T. Corporation v. Hawley, 34 Cal.App.2d 66, 72, 93 P.2d 216, 219:

"An estoppel may arise from silence as well as from words or conduct. But this is only where there is a duty to speak, and where the party upon whom such duty rests has an opportunity to speak, and, knowing that the circumstances require him to speak, remains silent. The circumstances attending the entire transaction must be such as to make it reasonably probable that the person seeking to set up the estoppel has suffered prejudice by the other's unreasonable acquiescence. There must be something wilful or culpable in the silence. Eltinge v. Santos, 171 Cal. 278, 152 P. 915, Ann.Cas.1917A, 1143; Stern v. Sunset Road Oil Co., 47 Cal. App. 334, 190 P. 651; Code Civ.Proc., sec. 1962, subd. 3."

Here, there is no substantial evidence that plaintiff suffered prejudice by unreasonable acquiesence on the part of General Petroleum and there is no evidence to indicate culpable silence on the part of the corporation or its agents. Plaintiff had only such rights as could be and were transferred to him by Hammer and the mere silence of General Petroleum did not increase or diminish such rights under the circumstances here shown.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.

131 Cal.App.2d 156

Vitina R. MONASTERO, Plaintiff and Appellant,

v.

LOS ANGELES TRANSIT COMPANY, and Forrest Weaver Meyette, Defendants and Respondents.

Civ. 20511.

District Court of Appeal, Second District, Division 3, California.

Feb. 28, 1955.

Action for personal injuries allegedly sustained by plaintiff when doors of defendant's streetcar were closed upon her, allegedly, as result of negligence on part of streetcar operator. The Superior Court, Los Angeles County, Robert H. Scott, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Ashburn, J. pro tem., held that evidence established unreliability of plaintiff's own testimony so thoroughly that jury could do nothing but reject it in toto, leaving her without any evidence of negligence on part of motorman.

Affirmed.

1. Appeal and Error ⇐930(1)

On appeal, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences must be indulged in to uphold verdict, if possible.

2. Appeal and Error ⇐989, 996

When verdict is attacked as being unsupported, power of reviewing court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury, and when two or more inferences can reasonably be deduced from facts, reviewing court is without power to substitute its deductions for those of jury or trial court.

3. Carriers ⇐318(8)

In action to recover for personal injuries allegedly sustained by plaintiff when doors of defendant's streetcar which she was then boarding were closed upon her, allegedly as result of negligence of part of streetcar operator, evidence established unreliability of plaintiff's own testimony so thoroughly that jury could do nothing but

reject it in toto, leaving her without any evidence of negligence on part of motorman.

4. Attorney and Client ⇐23

In personal injury action, action of trial court in appointing defendants' counsel to aid plaintiff, who was unrepresented by counsel, in preparing instructions, was not error, where all such instructions prepared for plaintiff by defendants' counsel were from book of approved jury instructions of superior court and where it appeared that defendants' counsel made conscientious effort to help judge help plaintiff in matter of such instructions.

5. Attorney and Client ⇐62

Party to litigation has privilege to represent himself.

6. Attorney and Client ⇐62

One may be his own attorney if he so desires, but layman with resources who insists upon exercising privilege of representing himself must expect and receive the same treatment as if represented by an attorney.

7. Attorney and Client ⇐62

A litigant is permitted to present his own case, but, in so doing, should be restricted to same rules of evidence and procedure as is required of those qualified to practice law before courts.

8. Trial ⇐255(11)

In personal injury action, trial court did not err in failing to give res ipsa loquitur instruction on its own motion, where plaintiff made no request for such instruction.

9. Trial ⇐255(1)

In civil action, court is under no duty to give appropriate instructions where no such instructions are requested, and failure to request instruction results in waiver of any right thereto.

10. Carriers ⇐316(1)

If passenger is injured through some unforeseeable conduct of another passenger no presumption of negligence arises against carrier.

11. Negligence ⇐121(2)

In personal injury action, fact that plaintiff had fully as much knowledge of cause of accident as had defendant was well-nigh conclusive of inapplicability of res ipsa loquitur.

12. Negligence ⇐136(6)

Where evidence is conflicting or subject to different inferences, it is for jury, under proper instructions, to determine whether each of conditions necessary to bring into play rule of res ipsa loquitur are present.

13. Appeal and Error ⇐1066

Even though evidence does not afford basis for certain instruction, giving of instruction must be in fact prejudicial before appellant can successfully complain.

14. Appeal and Error ⇐1066

In personal injury action, action of trial court in instructing on issue of contributory negligence, was not prejudicial error, notwithstanding that evidence did not afford basis for such instruction, where case did not turn upon contributory negligence, but rather upon rejection of plaintiff's testimony, which resulted in absence of any evidence of negligence on defendants' part.

Nathan Greitzer, Los Angeles, for appellant.

Trippet, Newcomer, Yoakum & Thomas, Melvin L. R. Harris and Fred C. Quimby, Jr., Los Angeles, for respondents.

ASHBURN, Justice pro tem.

Plaintiff appeals from a judgment for defendant which was entered pursuant to a jury verdict. The action is for damages for personal injuries. Plaintiff claims that defendant Meyette, the operator of defendant's streetcar, negligently closed the doors on her, thus inflicting the alleged injuries. She challenges the verdict upon several grounds, one of which is insufficiency of the evidence.

[1, 2] The verdict being against her, appellant's claim in this regard must be examined in the light of the settled practice

of resolving all conflicts and conflicting inferences in favor of respondent. The rule is thus stated in Juchert v. California Water Service Co., 16 Cal.2d 500, 503, 106 P.2d 886, 888: "As is always true on such appeals, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible. It is elementary that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. And when two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury or trial court."

The defendant's streetcar was at the end of the line and passengers were boarding it at the left front side. Plaintiff was one of a group who were so engaged. The car had two folding doors, the right or rear one of which was open for the purpose, the other being closed. According to defendant Meyette, a large woman with a big package was ahead of plaintiff and as she ascended she hit or pulled the lever which operated the doors, the open one began to close, the operator saw it, reached over and immediately adjusted it so the door reopened. He did not see the door close on plaintiff. He thought that plaintiff might have been brushed by the door, so he asked if she was all right and she said, "Yes, I am." Later she claimed to have been injured and he took her name and address. Plaintiff called as a witness one Carol Whitacre who boarded the same car, but she testified that she had no recollection of seeing plaintiff or of any occurrence such as plaintiff described; that she did not recall seeing plaintiff until she came to see the witness later. Other than plaintiff's own testimony that of Meyette was the only evidence as to what happened on the occasion in question. Her testimony is interesting, though not elevating. For she concluded by telling the jury: "The fact that I lied is deliberate and I hope that will be taken for what it is worth, because everything else—everything I have told here is absolutely the truth."

Plaintiff's own testimony operates in an unintended way to strengthen that of the operator Meyette. She said that he opened both doors for the passengers, that the heavy-set woman went first up the left side of the entrance, then back down and up the right side and leaned against the bar dividing the doors; that while Meyette stood there making change plaintiff was on the second step, holding the bar with her left hand, and Meyette closed both doors at that time; the doors hit her; they closed on her before she could get all the way in, "* * so all I had was my head out and my arm and my one leg, and the other foot was on the stair, on that second step." Both doors struck her and one foot was on the step and the other "* * * was out because I was trying to get out." Plaintiff also testified that Miss Whitacre told her to try to get out, but the doors would not budge and that Meyette saw her stuck between them. As previously stated neither Miss Whitacre nor defendant Meyette saw any such occurrence. Plaintiff conceded that Meyette, when she asked him to take her name and address, said, "It wasn't my fault; the colored woman was the one who moved the lever."

In the history she gave to Dr. Lyon plaintiff said that one of the passengers had grabbed the door control and the door closed on plaintiff. At the trial she said Meyette closed both doors, that she definitely saw him do it. Some 16 days after the incident in question (which occurred on December 31, 1951), plaintiff signed a written statement for the representative of defendant in which she said: "I boarded behind two other passengers at the front exit doors and the woman in front of me got on and in so doing grabbed a lever which operates the doors and the front doors closed on me—" At the trial she testified: "Q. However, that is your signature, is that right? A. That is right, but the reason I—anything I said to your adjustors, I didn't give them the right story for the simple reason that they came in and they were very obnoxious to me and I didn't want them to

know the truth. * * *" Also: "That is why I wouldn't give any one of them a correct statement. I am doing all my—I am giving all my facts right here. That is why I am having a case right here, and anything that is in here you might just as well discount because I just didn't want to say a word—" Again: "Q. Miss Monastero, just so I understand it now, the statement that you gave to the adjuster, the statement I hold in my hand, you intended that not to be the truth, is that right? A. That's right."

[3] On August 15, 1952 plaintiff's deposition was taken. She, a college graduate, understood that she was sworn to tell the truth, whereupon she testified:

"Q. Do you know what it was that caused the doors to close? A. No.

"Q. Do you know where the lever is on the streetcar that operates those doors? A. No.

"Q. And you didn't see anybody operating the lever? A. No." This she readily disposed of at the trial, saying: "What I wanted to say, anything on that deposition I would appreciate your not taking any stock in, Judge Scott, for the simple reason that earlier, before the deposition was taken, I called up Mr. Shepard, who at the time was representing the L.A.T.L. and asked him for the name and address of Mr. Meyette, and he would not give it to me." Further questioned she testified:

"Q. Now in your deposition that was taken, you also intended that not to be the truth, is that right? A. That is correct."

Also: "The Court: Did you intentionally testify falsely under oath at the time of the taking of the deposition? The Witness: I did, because this is the place I consider an oath to be taken and tell the truth right here. They gave me quite a dissertation about that. They can put me in prison if they want to. * * *

"Mr. Hillsinger: * * * Q. The deposition you gave also was not intended to be the truth? A. That's right. If you notice, there are lots of inconsistencies, even as to the questions you asked me about. Nothing jibes in this particular thing. Nothing jibes." All this was summed up in her closing argument in these words: "Regarding the inconsistencies in the deposition taken August 15, and the signed statement to L.A.T.L. adjuster, and statements made at the trial, wrong data, as I mentioned before, was intentionally given in both the above instances. I knew all along what the streetcar operator's testimony would be and did not wish to give the actual facts until trial in court with the judge and the jurists. * * * Miss Monastero: I am sorry. Apropos the inconsistencies in the deposition, my attorney in the case was quite perturbed over what I did when I told him and admonished me accordingly. I consequently advised him I would relieve him—* * * As I said, I came here to present the facts. The fact that I lied is deliberate and I hope that will be taken for what it is worth, because everything else—everything I have told here is absolutely the truth." So thoroughly did plaintiff establish the unreliability of her own testimony that the jurors could do nothing but reject it *in toto,* leaving her without any evidence of negligence on the part of the motorman.

[4] In keeping with her own method of presentation is the point upon which plaintiff's present attorney relies. He states it in this way: "The trial court erred in appointing counsel for the adverse party, to wit, counsel for the defendants to assist the plaintiff in the trial of her action and in the preparation of jury instructions as her counsel." This startling charge is groundless.

Plaintiff conducted the trial *in propria persona.* This does not appear to have been due to financial reasons. She was then earning $325 a month. And she has had three different attorneys in this case, one who filed the complaint, another who argued a motion for new trial and her present attorney upon appeal.

[5] The trial judge labored long and patiently to convince plaintiff of the folly of conducting a jury case in person, she being untrained in the law. He offered to arrange a continuance in order to enable her to get an attorney for the trial but she was insistent upon her right to represent herself. This, of course, was her privilege. Gray v. Justice's Court, 18 Cal.

App.2d 420, 63 P.2d 1160; Culley v. Cochran, 107 Cal.App. 525, 290 P. 484, but she thereby subjected herself to the same restrictive rules of procedure as does any trial lawyer.

[6] Ackerman v. Southern Arizona Bank & Trust Co., 39 Ariz. 484, 7 P.2d 944: "Under the law one may be his own attorney if he wants to be. A layman with resources who insists upon exercising the privilege of representing himself must expect and receive the same treatment as if represented by an attorney—no different, no better, no worse."

[7] Knapp v. Fleming, 127 Colo. 414, 258 P.2d 489: "A litigant is permitted to present his own case, but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise, ignorance is unjustly rewarded."

To same effect is Biggs v. Spader, 411 Ill. 42, 103 N.E.2d 104, 107.

The trial judge explained this to plaintiff with particular reference to instructions. Witness this colloquy: "The Court: The court requires the parties to produce before the trial starts the instructions which are to be given to the jury. Those are instructions that have to be carefully prepared, applicable to the facts of the case. That is the function of the attorney in the case and not the function of the court. The court merely considers and passes upon the instructions that are offered and selects those that are applicable. "Miss Monastero: Well, what type of instructions do you mean? Perhaps I might be able to set it up for you. "The Court: Miss Monastero, the court is suggesting again that if you have any reasonable degree of desire to win this case, if you think you have a case, you are being completely unjust to yourself in not having the benefit of an attorney's labors in the preparation and presentation of your case. You cannot do it properly without a lawyer." Again: "The Court: All right. Do you know anything about instructions at all? "Miss Monastero: No. I just read his instructions as they are there." Being unable to persuade plaintiff of the practical necessity of legal representation, the court, addressing defendant's attorney, said: "The Court: Mr. Hillsinger, the court will impose upon you the added burden of assisting the court, as an officer of the court, by handing to Miss Monastero instructions that ordinarily would be requested in connection with matters of this kind, and we will do the best we can.

"Mr. Hillsinger: I will have those instructions the first thing in the morning, your Honor."

Notwithstanding the cautions just mentioned the court continued throughout the trial to assist plaintiff in the presentation of her case, guiding her as to peremptory challenges, assisting her in examining jurors as to cause for challenge, advising her of the right to examine defendant Meyette under section 2055, Code of Civil Procedure, advising efforts to compromise, emphasizing the duty of defendant to exercise the highest degree of care and carefully scrutinizing all proffered instructions. At the close of the case plaintiff said this: "At this time I do want to thank Judge Scott for having been of such wonderful assistance in helping me actually present my case to a conclusion, especially after he indicated my testimonies weren't actually correct when the deposition was taken, and the original statement wasn't correct. At the same time I do want to thank him too for trying to keep this in as orderly a procedure as possible, being I was inexperienced, and I want to thank you all for taking the time to come and bearing this out with me. Thank you very much."

The record discloses that all instructions requested by plaintiff and given (presumably furnished to her by defendant's attorney), were taken from BAJI.[1] The judge carefully modified most of the requests tendered by both parties, and gave two instructions on his own motion, both of which were designed to clarify the rights of plaintiff. The instructions as given were not slanted in defendant's favor. The record indicates only a conscientious effort on the part of defendant's attorney, Mr. Hill-

1. Book of Approved Jury Instructions of Los Angeles Superior Court.

singer, to help the judge help the plaintiff in the matter of instructions. And appellant's brief does not claim error in any of those which were given (except as to contributory negligence) or in refusal to give any of plaintiff's requests. Counsel does assert that the court should have given a *res ipsa loquitur* instruction on its own motion, a matter presently discussed.

Experience in trial of cases indicates that all too often litigants who appear *in propria persona* deliberately attempt to capitalize upon their own ignorance or appearance of ignorance. In this case plaintiff forced upon the trial judge the necessity of preparing all of plaintiff's requested instructions or seeking assistance where it could be found. And so he called upon counsel for defendant to help,—to carry "* * * the added burden of assisting the court, as an officer of the court, by handing to Miss Monastero instructions that ordinarily would be requested in connection with matters of this kind. * * *" In no sense of the word did the court appoint counsel for the adverse party to assist plaintiff in the trial or "in the preparation of jury instructions as her counsel." In no manner or degree was plaintiff prejudiced by Mr. Hillsinger's selection of BAJI instructions for her to request or by the court's giving the same after appropriate modifications.

[8, 9] Appellant asserts error because the court did not give a *res ipsa loquitur* instruction on its own motion. She did not make such a request. The court is not required so to do in a civil case even if the instruction be appropriate. The duty rested on plaintiff to request it; otherwise any right to the instruction was waived. Ornales v. Wigger, 35 Cal.2d 474, 479, 481, 218 P.2d 531.

[10] If a passenger is injured through some unforeseeable conduct of another passenger no presumption of negligence arises against the carrier. Steele v. Pacific Electric Ry. Co., 168 Cal. 375, 379, 143 P. 718; see, also, 140 A.L.R. 1194, 1202, 1205. The rule is illustrated by these cases: Ken-Ten Coach Co. v. Davis, 289 Ky. 329, 158 S.W.2d 624 (one passenger closed door on foot of another); McDonnell v. New York Cent. & H. R. R. Co., 35 App.Div. 147, 54 N.Y.S. 747 (passenger inadvertently set emergency brake causing sudden stop of train); Pennsylvania R. Co. v. Cook, 180 Md. 633, 26 A.2d 384, 140 A.L.R. 1188 (passenger pulled cord and caused premature start of train); Eaton v. New York N. H. & H. R. R., 227 Mass. 113, 116 N.E. 815 (one passenger jostled another knocking her against brake wheel); Intriligator v. Goldberg, 299 Mass. 333, 12 N.E.2d 730 (one taxicab passenger slammed door on hand of another). In all such instances the element of exclusive control of defendant over the instrumentality causing the injury was absent at the time of the accident.

[11, 12] Moreover, this is a case in which plaintiff has fully as much knowledge of the cause of the accident—not only the fact but the cause—as has defendant. And that is well-nigh conclusive of the inapplicability of *res ipsa loquitur*. Billeter v. Rhodes & Jamieson, Ltd., 104 Cal.App.2d 137, 147, 231 P.2d 93; Alexander v. Wong Yick, 25 Cal.App.2d 265, 269, 77 P.2d 476; Biondini v. Amship Corp., 81 Cal.App.2d 751, 768, 185 P.2d 94. But the Supreme Court has recently said: "It seems clear, however, that the doctrine may be applied even though the defendant is not in a better position than plaintiff to explain what occurred if it appears more probable than not that the injury resulted from negligence on the part of defendant." Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 445, 247 P.2d 344, 349. And Baker v. B. F. Goodrich Co., 115 Cal.App.2d 221, 229, 252 P.2d 24, 29, points out that "Where the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of res ipsa loquitur are present." If the Zentz language, quoted above, means that the jury rather than the court must determine whether "it appears more probable than not that the injury resulted from negligence on the part of defendant" that would indicate such an instruction would have been appropriate upon the basis of plaintiff's testimony considered apart from the conflicts in it. But it is clear that the jurors, who unanimously and promptly found against plaintiff, would have rejected the inference had such an in-

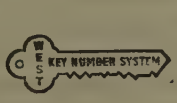
struction been given. This is true because that imponderable could not possibly outweigh the shocking self-stultification of the plaintiff.

[13, 14] Appellant further complains of the giving of instructions on contributory negligence. That defense was alleged. Plaintiff argued the question to the jury. Defendant's attorney did not do so. Plaintiff requested an instruction dealing with the subject. The evidence does not afford basis for such an instruction, but the giving of one must be in fact prejudicial before appellant can successfully complain. Kirk v. Santa Barbara Ice. Co., 157 Cal. 591, 595, 108 P. 509. This case did not turn on contributory negligence. The verdict rested upon a rejection of plaintiff's testimony, which resulted in an absence of any evidence of negligence on defendant's part.

There has been no miscarriage of justice here. The judgment is a righteous one.

Affirmed.

SHINN, P. J., and VALLÉE, J., concur.



PEOPLE of the State of California, Plaintiff and Appellant.

v.

ONE 1948 CHEVROLET CONVERTIBLE COUPE, License No. 1 P 46718, Engine No. FAA 433685, Defendant.

Bank of America National Trust and Savings Association, a national banking association, Legal Owner and Respondent.

Civ. 20432.

District Court of Appeal, Second District, Division 3, California.

Feb. 25, 1955.

Rehearing Denied March 21, 1955.

Hearing Granted April 25, 1955.*

Proceeding to forfeit automobile on ground that an occupant was found in illegal possession of a narcotic. The Superior Court, Los Angeles County, James G. Whyte, J., rendered judgment directing that automobile be released to legal owner, and state appealed. The District Court of Appeal, Vallée, J., held that extrajudicial statement by person in possession of automobile at time of arrest that he knew, prior to arrest and seizure, that occupant had narcotic, was hearsay and inadmissible as against legal owner.

Affirmed.

1. Forfeitures ⇐5

To warrant forfeiture for unlawful transportation of narcotics, it must be established that automobile was used to transport narcotics, or that narcotic was unlawfully kept, deposited, or concealed in vehicle or unlawfully possessed by an occupant, and that person in control of vehicle had knowledge during time preceding arrest and seizure that vehicle was so used, or that narcotic was in vehicle or in possession of an occupant. Health and Safety Code, § 11610.

2. Forfeitures ⇐5

To justify judgment of forfeiture against legal owner of automobile on ground that narcotic was unlawfully in possession of an occupant, state must establish that person in control of automobile had knowledge prior to arrest and seizure that narcotic was in possession of occupant. Health and Safety Code, § 11610.

3. Evidence ⇐314(1)

Hearsay is inadmissible over proper and timely objection unless it falls within one of the well-defined exceptions to the hearsay rule.

4. Witnesses ⇐37(1)

Generally, a witness may testify only to facts which he knows of his own knowledge or which are derived from his own perceptions. West's Ann.Code Civ.Proc. § 1845.

5. Evidence ⇐317(2)

A witness' testimony as to statements made by another, not the party to be bound thereby, is hearsay, and if offered to prove fact asserted, is prima facie within hearsay rule and inadmissible unless within an exception. West's Ann.Code Civ.Proc. §§ 1850, 1870(7).

* Opinion vacated 290 P.2d 538.

6. Evidence ⇐314(1)

Evidence is hearsay when its probative force depends upon competency and credibility of some person other than witness.

7. Evidence ⇐317(2)

Fact that statement or declaration is that of a codefendant does not ordinarily alter operation of hearsay rule.

8. Evidence ⇐241(1)

No person can be bound by declarations of another who is not his agent and not expressly or by implication authorized to make them.

9. Evidence ⇐317(2)

The hearsay rule does not forbid introduction of evidence that a statement was made, where making of the statement is significant irrespective of truth or falsity of its content.

10. Evidence ⇐314(1)

The hearsay rule excludes extrajudicial deliberate utterances in terms affirming a fact.

11. Evidence ⇐314(1)

Where declarant's conduct is an assertion such as a witness would make in testifying, whether in words or symbols used as a substitute for words, and evidence is offered as tending to prove truth of the matter asserted, it is hearsay.

12. Evidence ⇐272

A declaration against interest must be against interest of party against whom it is offered.

13. Evidence ⇐222(10)

A declaration against interest is not admissible against and does not bind coparties. West's Ann.Code Civ.Proc. § 1848; West's Ann.Civ.Code, § 3520.

14. Evidence ⇐317(5)

In proceeding to forfeit automobile on ground that an occupant was found illegally in possession of a narcotic, extrajudicial statement by person in possession of automobile at time of arrest that he knew, prior to arrest and seizure, that occupant had narcotic, was hearsay and inadmissible as against legal owner. Health and Safety Code, § 11610.

15. Evidence ⇐269(1)

When intention, feelings, or other mental state of a person at a particular time, including his bodily feelings, are material, evidence of such person's declarations at the time indicative of his then mental state, even though hearsay, are competent.

16. Evidence ⇐268

Declarations are admissible to show present state of mind of declarant, as of time declarations are made, when state of mind is relevant.

17. Evidence ⇐268

Particular declarations of pain or suffering, to be admissible under exception to hearsay rule, must be as to a present, existing, bodily condition, and declarations as to past pain or suffering are not admissible.

18. Evidence ⇐269(1)

In proceeding to forfeit automobile on ground that an occupant was found in illegal possession of a narcotic, declaration by person in possession of automobile at time of arrest and seizure that he knew, prior to arrest, that occupant had the narcotics, was not within hearsay exception relating to declarations as to present state of mind, and was inadmissible against legal owner. Health and Safety Code, § 11610.

19. Evidence ⇐314(1)

The hearsay rule is not a technical rule, but a sound rule established for security of life, liberty, and property.

20. Evidence ⇐314(1)

The theory of the hearsay rule is that deficiencies underlying bare untested assertion of a witness may best be brought to light and exposed by cross-examination.

21. Witnesses ⇐266

Right to cross-examine witness of adverse party is vital to administration of justice.

22. Criminal Law ⇐517(1)

In a criminal prosecution, a confession is inadmissible until adequate foundation is laid by proof that it was made freely and voluntarily, without duress, threat,

intimidation, inducement, promise of leniency, immunity, or hope of reward.

23. Forfeitures ⚖5

A forfeiture proceeding, although nominally in rem against goods, is in reality directed against those who have property interest in goods.

24. Evidence ⚖314(1)

The hearsay rule applies in proceedings in rem.

25. Evidence ⚖266

In proceeding to forfeit automobile on ground that an occupant was found in illegal possession of narcotic, that declaration by person in possession of automobile at time of arrest and seizure was admissible against the res did not render it admissible against legal owner.

26. Courts ⚖89

District Court of Appeal was bound by precedent to exclude hearsay statements offered to show knowledge.

Edmund G. Brown, Atty. Gen., Donald D. Stoker and W. B. Thayer, Deputy Attys. Gen., for appellant.

Samuel B. Stewart, San Francisco, Hugo A. Steinmeyer, and Joseph S. Potts, Jr., Los Angeles, for respondent.

VALLÉE, Justice.

The People instituted this proceeding by filing a "Notice of Seizure and Intended Forfeiture Proceedings" of an automobile, as provided by sections 11612 and 11613 of the Health and Safety Code. The notice alleged that the automobile had been seized pursuant to section 11611 of that code and that it "was used to unlawfully keep, deposit, conceal, convey, carry or transport marihuana, and marihuana was unlawfully in the possession of an occupant thereof." The notice was directed to Mrs. V. E. Phillips, the registered owner, to Ronald Leon Phillips, referred to as Phillips, "who may have an interest in said vehicle," and to Bank of America, the legal owner. Mrs. Phillips and Phillips defaulted. Bank of America answered. It denied that the vehicle was being used in violation of the narcotic laws and denied that any narcotic was unlawfully in the possession of any occupant thereof.

The cause was tried by the court sitting without a jury. The court found: Phillips had no interest in the vehicle; on August 3, 1953, at the time of the arrest of Phillips, Robert J. DeCordova, Don C. Clothier, and Merlin A. Dean, the vehicle was seized by police officers; at that time the vehicle was in the possession of Phillips, son of the registered owner; the vehicle was being used to transport marijuana on the person of Don C. Clothier, an occupant thereof; against the registered owner, only on the basis of the admissions of Phillips that he was aware at the time of the arrest and seizure of the presence of marijuana on the person of an occupant of the vehicle at the time of the seizure.

The court further found that as against the legal owner, Bank of America, the admissions of Phillips being inadmissible hearsay and there being no other sufficient evidence of the facts, Phillips had no narcotics in his possession at the time of the seizure of the vehicle, and had no knowledge whatever of the presence of any narcotic in the vehicle or in the possession or on the person of any occupant thereof.

Judgment was that the vehicle be forfeited to the state subject to the interest of Bank of America in the sum of $855.02, which was in excess of the value of the vehicle on the date of seizure, and that the vehicle be released to Bank of America in satisfaction of its lien against it. The People appeal.

A police officer testified that at the time of the arrest and seizure, Phillips, Clothier, DeCordova, and Dean were in the vehicle—Clothier behind the wheel, Phillips in the rear seat. The officers ordered them out of the car and over to the sidewalk. As they did so, Clothier dropped a can containing marijuana into the bushes. A small seed was found under the left-front seat and another under the floor mat in the rear. The seeds were not definitely identified as marijuana. A package of wheat-straw cigarette papers was found in Clothier's shirt pocket.

After the arrest and prior to the trial of the present proceeding, Phillips pleaded

guilty in a criminal action to a charge of unlawful possession of marijuana. On the trial of this proceeding that plea was admitted in evidence against the registered owner and against Phillips. It was excluded as against Bank of America.

A police officer testified that "at a later time after the arrest" he had a conversation with Phillips in the presence of Clothier, DeCordova, and Dean in which Phillips in effect stated he knew prior to and at the time the automobile was seized that marijuana was in the possession of Clothier.[1] The conversation consisted of declarations of Phillips which were narrative in character and a recapitulation of the events which preceded the actual arrest and seizure. The objection of Bank of America to the conversation was sustained. The testimony was admitted against the other defendants.

As ground for reversal the People contend it was prejudicial error to exclude as against Bank of America the testimony of the police officer as to the conversation with Phillips. We have concluded that the evidence was not admissible against Bank of America and that it was properly excluded.

[1, 2] In order that a vehicle be forfeited the People must establish not only that it was used to unlawfully transport a narcotic, or that a narcotic was unlawfully kept, deposited or concealed in the vehicle, or that a narcotic was unlawfully possessed by an occupant; but also that the person in control of the vehicle had knowledge during the time preceding the arrest and seizure that it was used to unlawfully transport a

1. The testimony of the police officer as to the conversation with Phillips was: "I questioned Phillips as to the—in fact, I questioned him generally as to who was the registered owner of the car. Phillips admitted he was.

"I asked him to relate what had occurred in regard to purchasing this marijuana. Phillips stated that he had met Clothier, who was down here on leave from a naval vessel which was moored at San Francisco,—which was moored in San Francisco Bay, and they had picked up the other party Dean, and DeCordova also was from another vessel in the same area, came down here to Long Beach with Clothier and he had agreed to drive them back to San Francisco in time to be on their vessel by 8:00 o'clock Monday morning, and that on the afternoon before the arrest they decided they would purchase some marijuana, they would take it to San Francisco and sell it, and that the four of them had pooled their funds and that he then drove the other three occupants in this car to Tijuana, and there on the street, he and Clothier contacted a Mexican and Clothier left with this Mexican, at which time he returned and had this marijuana.

"It was shown to them there and then Phillips was worried about the Customs officials finding it in his car. Clothier and DeCordova had their sailor uniforms in a parcel or package within the car; that they had decided to change into their clothes later on in the trip. They decided that the two boys would change into their sailor clothes and take the marijana and walk across the border ahead of the car. There would be less suspicion.

"They both agreed to it, and Clothier took the narcotics and he and DeCordova walked across the border.

"After waiting for sometime across the border, Dean came up to them on the United States side and told them not to get restless, that Phillips had sent him ahead to tell them he was in the line. After Phillips crossed the line, he picked up the suspects and proceeded north back to Long Beach.

"At a place outside of San Diego they stopped at a service station and Clothier got out of the car and went to the rest room at which time he came back and Phillips was driving, and after they left this rest room and got about two miles, Clothier broke out a marijuana cigarette which he told them he had rolled in the washroom and lit it and passed it around to all four of them.

"At a place—they weren't certain whether it was in the City limits of Long Beach or on the border, they stopped for a cup of coffee or sandwich. When they got back in the car, Phillips, having driven, Clothier offered to drive, and he permitted Clothier to drive the car back to Long Beach, and Clothier did drive it, and they came back to the area which is north of where they were arrested, and which had been the original point of departure, and none of their other companions were around, and they drove around the block and stopped, at which time the police car came up to them and found them and shook them down as they took them out of the car."

narcotic, or of the presence of a narcotic in the vehicle, or that a narcotic was possessed by an occupant. Health & Safety Code, § 11610; People v. One 1941 Buick Sport Coupe, 28 Cal.2d 692, 695, 171 P.2d 719. The parties are in agreement that Phillips was in control of the vehicle. The evidence established that marijuana was on the person of Clothier, an occupant of the vehicle, prior to and at the time of the arrest and seizure. In order to secure a judgment of forfeiture against Bank of America it was incumbent on the People, therefore, to establish that Phillips had knowledge prior to the arrest and seizure that marijuana was in the possession of Clothier.

The People advance three theories under any one of which they assert the declarations of Phillips to the police officer were admissible against Bank of America: 1. They were not hearsay. 2. They establish the state of mind of Phillips. 3. The proceeding is *in rem* and any evidence admissible against the *res* binds all claimants in the *res*.

[3–8] It is well settled that hearsay evidence is inadmissible in the courts of this state over proper and timely objection unless it falls within one of the well-defined exceptions to the hearsay rule. (19 Cal.Jur. 2d 108, § 378.) Generally a witness may testify only to facts which he knows of his own knowledge or which are derived from his own perceptions. Section 1845 of the Code of Civil Procedure reads:

> "A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own p[er]ceptions, except in those few *express cases* in which his opinions or inferences, or the declarations of others, are admissible." (Italics added.)

Section 1870 provides that evidence may be given on a trial of

> "2. The act, declaration, or omission of a party, as evidence against such party;
>
> "3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto".

A witness' testimony as to statements made by another, not the party to be bound thereby, is hearsay; and if offered to prove the fact asserted, is prima facie within the hearsay rule and inadmissible unless it comes under an exception to the rule. Code Civ.Proc. §§ 1850, 1870(7); In re Estate of Gaines, 15 Cal.2d 255, 256, 100 P.2d 1055. Evidence is hearsay when its probative force depends on the competency and credibility of some person other than the witness. 31 C.J.S., Evidence, § 192, p. 919. The fact that the statement or declaration is that of a co-defendant does not ordinarily alter the rule. Murphy v. Davids, 181 Cal. 706, 719–720, 186 P. 143; Dean v. Ross, 105 Cal. 227, 231, 38 P. 912; People v. Dowell, 204 Cal. 109, 115–116, 266 P. 807; People v. Jollet, 60 Cal.App.2d 245, 250, 140 P.2d 479; People v. Orloff, 65 Cal.App.2d 614, 619–620, 151 P.2d 288; People v. Curtis, 106 Cal.App.2d 321, 325, 235 P.2d 51. No person can be bound by the declarations of another who is not his agent and not expressly or by implication authorized to make them. 19 Cal.Jur.2d 184, § 433; see also Ryan v. Bank of Italy Nat. T. & S. Ass'n, 106 Cal.App. 690, 289 P. 863; Nishi v. Inoguchi, 116 Cal.App. 398, 401, 2 P.2d 864; McDanels v. General Ins. Co., 1 Cal.App.2d 454, 36 P.2d 829; Wills v. Price, 26 Cal.App.2d 338, 344, 79 P.2d 406; Fagan v. Union Pacific R. Co., 85 Cal.App.2d 583, 193 P.2d 776; Burns v. California Milk Transport, 89 Cal.App.2d 70, 200 P.2d 43; Elcox v. Hill, 8 Otto 218, 98 U.S. 218, 25 L.Ed. 103, 104.

[9] A distinction is made between statements the making of which is in controversy and statements relating to the facts in controversy. The hearsay rule does not forbid the introduction of evidence that a statement was made, where the making of the statement is significant irrespective of the truth or falsity of its content. Werner v. State Bar, 24 Cal.2d 611, 621, 150 P.2d 892.

[10, 11] The contention that the statements are not hearsay is based on the untenable premise that they were not offered

to evidence the truth of the matter asserted. The rule sought to be invoked is that where a substantive litigated fact is the speech of a person, one who heard the utterance may testify to it. The rule does not apply in the case at bar. The hearsay rule excludes extrajudicial deliberate utterances in terms affirming a fact. (2 Wigmore on Evidence, 3d ed., 482, § 459.) "Where the declarant's conduct is an assertion such as a witness would make in testifying, whether in words or symbols used as a substitute for words, and the evidence is offered as tending to prove the truth of the matter asserted, all courts classify it as hearsay." (Morgan, Hearsay, XXV Miss.L.J. 1, 7.)

The People appear to concede that the declarations of Phillips were inadmissible hearsay insofar as they tended to give rise to an inference that a narcotic was on the person of an occupant of the vehicle. However, it is urged, illogically, that the declarations were not hearsay since they tended to prove that during the material period of time Phillips had knowledge of the presence of a narcotic, and that they were not offered to prove the truth of the matter asserted. The testimony of the police officer as to his conversation with Phillips was not offered without reference to the truth of the matter asserted. It was not offered merely to prove that a conversation had taken place. See Gursey v. Campus Camera Shop, Inc., 98 Cal.App.2d 257, 219 P.2d 884. The fact in controversy was not whether Phillips spoke the words to the police officer. It was whether, prior to and at the time of the arrest and seizure, Phillips had knowledge that an occupant of the vehicle had marijuana in his possession. The declarations were not spontaneous exclamations. The testimony of the officer was offered to prove a fact—that Phillips knew prior to and at the time of the arrest and seizure that an occupant of the vehicle had marijuana in his possession. The court was asked to believe the fact that Phillips knew, prior to and at the time of the arrest and seizure, that an occupant of the vehicle had marijuana in his possession because he asserted it to be true, precisely as it would have been asked to believe Phillips' similar assertion if made on the stand. Such testimony is inadmissible hearsay. (6 Wigmore on Evidence, 3d ed., 234, § 1788.) The declarations have evidentiary value bearing on the declarant's knowledge during the material period preceding the arrest and seizure only on the hypothesis that the facts stated in the course of the declarations were at least substantially true, since it is only on that hypothesis that there can arise an inference that the declarant possessed knowledge during the period of time preceding the arrest and seizure of the presence of marijuana on the person of Clothier. The testimony of the officer was testimonial, i. e., evidence that the facts asserted were true. Phillips' knowledge at the time he made the declarations, which was some time after his arrest, was immaterial to any issue in the case.

The People cite Phillips v. Glazer, 94 Cal.App.2d 673, 211 P.2d 37, which is one of many cases stating the rule that when the very point in issue is whether a certain declaration was made, evidence of the making of the declaration, being material irrespective of its truth or falsity, is not hearsay and is admissible. Phillips v. Glazer is not in point.

[12, 13] The statements were declarations against the interest of Phillips. A declaration against interest must be against the interest of the party against whom it is offered. Pansini v. Weber, 53 Cal.App.2d 1, 5, 127 P.2d 288; Lewis v. Western Truck Line, 44 Cal.App.2d 455, 465, 112 P.2d 747. Generally a declaration against interest binds the party who made it; it is not admissible against and does not bind co-parties. Section 1848 of the Code of Civil Procedure reads:

> "The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another."

Section 3520 of the Civil Code says:

> "No one should suffer by the act of another."

See People v. One 1950 Mercury Sedan, 116 Cal.App.2d 746, 751, 254 P.2d 666; Dean v. Ross, 105 Cal. 227, 231, 38 P. 912; Griffin

v. Jacobsen, 17 Cal.App.2d 68, 70, 61 P.2d 350; People v. Walden, 75 Cal.App. 565, 568, 243 P. 25; People v. Zammora, 66 Cal. App.2d 166, 211–212, 152 P.2d 180; People v. Curtis, 106 Cal.App.2d 321, 325, 235 P.2d 51; 21 C.J.S., Evidence, § 318b, p. 1097. The fact that the declarations of Phillips, son of the registered owner, may be binding on the registered owner does not place the legal owner in a superior position to that afforded the registered owner, as argued by the attorney general.

[14] We hold that as against Bank of America the declarations of Phillips were hearsay.

[15] The People argue that the declarations fall within the "state of mind" exception to the hearsay rule. The argument appears to be that declarations pertaining to a declarant's state of mind are admissible irrespective of when or under what circumstances they are made. There is nothing in the record to indicate that the declarations of Phillips were offered for the limited purpose of proving his state of mind. The rule the People seek to invoke is stated in Adkins v. Brett, 184 Cal. 252, at page 255, 193 P. 251, at page 252:

> "[W]hen the intention, feelings, or other mental state of a certain person at a particular time, including his bodily feelings, is material to the issues under trial, evidence of such person's declarations *at the time indicative of his then mental state,* even though hearsay, is competent as within an exception to the hearsay rule." (Italics added.)

The rule is stated in substantially the same language in In re Estate of Carson, 184 Cal. 437, at page 445, 194 P. 5, at page 9, 17 A.L.R. 239, to which the court added:

> "Of course, if, as is frequently the case, and was the case here, the declarations include or are in the form of statements as to past events, the declarations are not competent as proof of such events, and if that is their only bearing, they are not admissible."

In re Estate of Anderson, 185 Cal. 700, 198 P. 407, was a will contest on the ground of undue influence. Various declarations of the testatrix were offered in evidence. On review the court discussed them as follows, 185 Cal. at page 718, 198 P. at page 415:

> "As to the declarations of the decedent admitted over the objection of the proponent, the contention that their admission was error must also be sustained as to some. Such declarations were hearsay, pure and simple. The only exception to the rule against hearsay within which they could come is the exception which admits declarations indicative of the declarant's intention, feeling, or other mental state, including his bodily feelings. But such declarations are competent *only when they are indicative of the declarant's mental state at the very time of their utterance, and only for the purpose of showing that mental state.* It follows from this that unless his mental state at that time is material to the issue under investigation, the declarations are not admissible, even though they do show his mental state at that time, not because they are not competent for that purpose, but because that purpose is not germane to the issue. * * * Now the declarations of the testatrix admitted in the present case were admitted on the theory that they were competent only to show her state of mind when uttered, and the jury were so charged. But although admitted for this purpose alone, most of the declarations do not come within the exception to the hearsay rule. As may be seen from the foregoing statement of the exception, in order that a declaration be within it, two things are requisite: (a) *The declaration must be indicative of the mental state of the declarant at the very time of utterance, and* (b) *his or her mental state at that time must be material to an issue in the cause,* i.e., have a reasonable evidentiary bearing upon such issue.
>
> "The declarations in the present case are of three sorts: First, there are the declarations indicative simply of the fact that at the time they were made, some three months after the execution of the will, the testatrix had changed

her mind in regard to the disposition she wished to make of her property, and regretted the will she had made. If that change of mind and regret had been material, evidence of the declarations would have been competent. The point is that the fact that she had changed her mind and regretted what she had done was not material. * * *

"The second sort of declaration is the one contained in the letter by the testatrix to her aunt to the effect that the will had been made at the latter's request. This was not properly admissible for a reason just the converse of that applicable to declarations of the first sort. The fact declared, that the will was made at the request of the aunt, did have a very direct bearing on the issue in the case, and was quite material. But the declaration of this fact was not admissible because it was merely a declaration as to a past event, and was not indicative of the condition of mind of the testatrix at the time she made it. It was therefore not within the exception to the hearsay rule. [In re] Estate of Jones, 166 Cal. 108, 117, 135 P. 288." (Italics added.)

See also People v. Alcalde, 24 Cal.2d 177, 185–188, 148 P.2d 627; Bridge v. Ruggles, 202 Cal. 326, 330, 260 P. 553; In re Estate of Gregory, 133 Cal. 131, 135–138, 65 P. 315; In re Calkins' Estate, 112 Cal. 296, 300–303, 44 P. 577; In re Estate of Higley, 64 Cal. App. 664, 667–668, 222 P. 626; Stromerson v. Averill, 39 Cal.App.2d 118, 125, 102 P.2d 571; Sandoval v. Southern Cal. Enterprises, Inc., 98 Cal.App.2d 240, 244, 219 P.2d 928.

[16, 17] Declarations are admissible to show the *present* state of mind of the declarant, that is, the declarant's state of mind at the time the declarations are made, when state of mind is relevant. (6 Wigmore on Evidence, 3d ed., §§ 1729 et seq.) The cases hold that articulate declarations of pain or suffering *must be as to a present, existing, bodily condition and that declarations as to past pain or suffering are not admissible;* that they are hearsay, and do not fall within any recognizable class of admissible hearsay. In re Estate of James, 124 Cal. 653, 659–661, 57 P. 578, 1008. See cases collected 19 Cal.L.Rev. 234–240.

Shepard v. United States, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196, was a prosecution for murder. The defendant was charged with having poisoned his wife. The defense was that the wife had committed suicide. The government introduced the testimony of a nurse that two days after she became ill the deceased, in the absence of the defendant, had stated her husband had poisoned her. On appeal the government contended the declaration was admissible, not as evidence of the truth of what was said, but as showing a state of mind inconsistent with the presence of suicidal intent. Mr. Justice Cardozo, delivering the opinion of the court and holding the testimony inadmissible for that purpose, declared 290 U.S. 104, 54 S.Ct. 26, 78 L.Ed. 202:

"There are times when a state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent. * * * Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored."

[18] Application of the rule stated in the foregoing cases makes it clear that the declarations of Phillips were not admissible to prove his state of mind prior to the arrest and seizure. The marijuana was discovered on Clothier by the arresting officers at the time of the arrest and in the presence of Phillips and his companions. Since Phillips acquired knowledge at that time that Clothier possessed marijuana in the vehicle, the mere fact that his later declarations may have indicated that at the time he made them he had such knowledge had no probative value on the issue of his knowledge prior to the arrest. The declarations were indicative of Phillips' mental state at the time he made them, some time after the arrest. His state of mind at that time was not relevant to any issue

in the case. The material issue was his knowledge, not at the time the declarations were made, but during the period preceding his arrest. The declarations were not indicative of and had no probative bearing on his mental state at the pertinent time preceding the arrest. Their only bearing was as proof of past events; as such, they were incompetent.

Under People v. One 1941 Buick Sport Coupe, supra, 28 Cal.2d 692, 171 P.2d 719, the People cannot justify a forfeiture of the vehicle as against an innocent legal owner merely by showing that the declarant had knowledge after the arrest that a narcotic had been in the possession of an occupant prior thereto, without proving that he also had such knowledge prior to the arrest and while he was in possession of the vehicle. The declarations were, therefore, not within the state of mind exception to the hearsay rule

Whitlow v. Durst, 20 Cal.2d 523, 127 P.2d 530, 532, relied on by the People, is not in point. The issue there was whether there had been a reconciliation between the deceased declarant and his wife. The declarations were of a person deceased. The court held that the intention of the parties was a material element in determining whether there had been a reconciliation and that declarations of the deceased made before and within "a few days" after the alleged reconciliation were admissible as bearing upon his state of mind that there was no reconciliation. The issue there was whether the deceased intended to resume the marital relation. The decedent's declarations, at the time they were made, were relevant to an issue in the case.

[19–21] The hearsay rule of exclusion is not a technical rule of evidence, as the attorney general argues. It is a sound rule established for the security of life, liberty, and property. It is one of the most basic in the law of evidence. The infirmities of hearsay are many. There is no assurance of reliability. It is not subject to the tests which can ordinarily be applied for the ascertainment of the truth of testimony. The declarant is under no responsibility to answer for the crime of perjury in making a willful falsification. The court and the jury are without opportunity to test the credibility of hearsay statements by observing the demeanor of the person alleged to have made them. Hearsay contains the possibilities of error or mistake caused by bias, failure to understand, or the imperfection of memory. The exclusion of hearsay evidence is based in part on the principle that a litigant in a court of justice has a right to have the witness whose statement is introduced face him in court so that his veracity may be tested by cross-examination under the sanction of an oath, and on the common experience of mankind as to the unreliability of relating by one person of statements made to him by another. "The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination." (5 Wigmore on Evidence, 3d ed., p. 3, § 1362.) The right to cross-examine the witness of the adverse party is vital to the administration of justice. Cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." (5 Wigmore on Evidence, 3d ed., 29, § 1367.) The right is of no avail if declarations of a person not present in court are to be admitted. As stated in section 1845 of the Code of Civil Procedure, the only exceptions to the hearsay rule are in those "express cases" specified in the law—exceptions which time and experience have shown to be trustworthy. If, as the attorney general argues, hearsay evidence should be admitted, why not multiple hearsay?

[22] The case at bar is a perfect illustration of the necessity for the hearsay rule. Two fundamental bases for the admission of extrajudicial declarations as exceptions to the hearsay rule, i. e., necessity and substantial guaranty of trustworthiness, are conspicuously absent with respect to the declarations in question. The statements to the police officer were those of an admitted felon. The circumstances under which they were made were not de-

scribed by the officer. A fair inference is that they were made while Phillips was incarcerated. In a criminal prosecution, the declarations, which amounted to a confession, would not be admissible even against Phillips until an adequate foundation had been laid by proof that they were made freely and voluntarily, without duress, threat, intimidation, inducement, promise of leniency, immunity, or hope of reward. (19 Cal.Jur.2d 168, § 422.) Phillips was served with the Notice of Seizure and Intended Forfeiture Proceedings. There was no question of nonavailability. No explanation was offered below nor is any made here for the failure of the People to call Phillips, or any one of his three companions, as a witness. Nevertheless an attempt is made to get evidence in by the back door against Bank of America, an innocent party, without confrontation and without an opportunity to cross-examine.

[23–25] The statement of the People that this is a proceeding *in rem* is true only in part. "Although the suit by the state is nominally *in rem* against the vehicle itself, in reality it is directed against those who have property interests in the vehicle. The automobile is not itself an offender but has merely been used in the commission of an offense. The statute operates to transfer property rights in the automobile to the state, as a penalty against the owners for this misuse." People v. One 1941 Chevrolet Coupe, 37 Cal.2d 283, 302, 231 P.2d 832, 845. People v. One 1950 Mercury Sedan, 116 Cal.App.2d 746, 254 P.2d 666, is directly adverse to the People's contention that any evidence admissible against the *res* necessarily binds all claimants in that *res*. In that case, a forfeiture proceeding, the court observed, 116 Cal. App.2d at page 751, 254 P.2d at page 669:

> "It is a fundamental rule that a declaration by a litigant contrary to his position in a law suit is admissible and is evidence which tends to prove the matter admitted. Code of Civ.Proc. § 1870, subd. 2; Bonebrake v. McCormick, 35 Cal.2d 16, 215 P.2d 728. But the rule is subject to the qualification that the declaration is not binding upon co-defendants. Nishi v. Inoguchi, 116 Cal.App. 398, 2 P.2d 864."

See also United States v. Packard Sedan, D.C., 23 F.2d 865. It is well settled that the hearsay rule applies in proceedings *in rem*. Probate proceedings: In re Estate of Russell, 189 Cal. 759, 210 P. 249; In re Estate of Scott, 55 Cal.App.2d 780, 131 P.2d 613; divorce proceedings: Turner v. Turner, 187 Cal. 632, 203 P. 109. The question in the case at bar is whether the declarations of Phillips were admissible against Bank of America. It is no answer to say they were admissible against the *res*.

[26] The People argue that we are not bound by precedent to exclude the hearsay statements when offered to show knowledge. As we have seen, we are bound by precedent. Also, as we have seen, the statements were not offered to show knowledge at the time they were made. But even if we were not bound by precedent, to hold that the statements were admissible would not be a step forward but a step backward. The hearsay rule of exclusion is too vital and important a rule of evidence to be thrown overboard merely because the attorney general may think it expedient to do so.[2] In view of the argu-

2. In Englebretson v. Industrial Acc. Comm., 170 Cal. 793, at page 789, 151 P. 421, at page 423, Mr. Justice Lucien Shaw wrote: "The unreliability of a relation by one person of statements made to him by another is so well known that it has become customary and is considered necessary for courts, in cases where oral admissions of a party are proved against him, to instruct the jury that they must view such admissions with caution, because of the tendency of witnesses to make perverted or inaccurate reports. We have many decisions of courts of the highest standing declaring the importance and substantial character of the rule against hearsay testimony. It has been said that the fact 'that this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that hearsay

ment of the attorney general the comments of the court in People v. Dillman, 37 Cal. App. 415, 174 P. 951, 952, are apropos. In that case, a proceeding by the state under the " 'Red Light Abatement Act' " to enjoin the use of property for alleged immoral purposes, the court commented, 37 Cal.App. at page 421, 174 P. at page 953:

"But, however laudable the purposes of the act may be, no more in a case instituted under the provisions thereof than in any other class of cases should the established rules of evidence be relaxed. Indeed, a trial court, it seems to us, should be specially careful in the trial of such a case, for under said act the personal property of the person charged with keeping a place prohibited thereby may be confiscated and sold, and the right of the owner of the premises against which the action is directed (the action being one *in rem* as well as *in personam* to use the same for the period of one year may be foreclosed, thus depriving the owner of the income which may be derived from the property. Hence, while the people should not be unduly hampered in a proper effort to suppress the social evil which the act was designed to eradicate and should be accorded in the trial full legal opportunity to do so, the rules of evidence long established, and the wisdom and efficacy of which for eliciting the truth in forensic controversies involving disputed questions of fact have been well confirmed by the test of long experience, should not be twisted or distorted or departed from merely for the achievement of some special end."

The court correctly found, as against the bank, that the People had failed to establish an unlawful use of the vehicle.

Affirmed.

SHINN, P. J., concurs.

WOOD, J., did not participate.

ARBITRATION Between GRIFFITH COMPANY, a corporation, Plaintiff and Appellant,

and

SAN DIEGO COLLEGE FOR WOMEN, a corporation, Defendant and Respondent.

Civ. 20446.

District Court of Appeal, Second District, Division 3, California.

Feb. 23, 1955.

Opinion Amended and Rehearing Denied March 25, 1955.

Hearing Granted April 20, 1955. *

Arbitration proceeding. The Superior Court, Los Angeles County, William R. McKay, J., entered judgment affirming award, and unsuccessful party appealed. The District Court of Appeal, Ashburn, J. pro tem., held that, where chairman of arbitration board had expressed intention to allow case to be reopened for further testimony if board were not satisfied as to evidence on any particular point, denial of motion to reopen, which was made after rendering of decision but before making of award, but which was not supported by any affidavit or designation of specific evidence to be offered, was not in and of itself improper.

Judgment reversed.

1. Contracts ⇐303(4)

One whose fault prevents performance by another party to a contract cannot take advantage of breach induced by his own misconduct.

2. Appeal and Error ⇐931(1)

Upon review, all conflicts must be resolved in favor of respondent and all permissible inferences drawn in favor of respondent.

3. Arbitration and Award ⇐73

Rule that, upon review, all conflicts must be resolved and all permissible inferences drawn in favor of respondent was applicable, even though evidence, in proceeding upon arbitration award, consisted

evidence is totally inadmissible. * * * The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule, the value of which is felt and acknowledged by all.' [2]

* Opinion vacated 286 P.2d 3.

entirely of affidavits, and though Superior Court had not made formal findings of fact.

4. Arbitration and Award ⇐73

Upon review of Superior Court's judgment confirming arbitration award, the District Court of Appeal would, in absence of formal findings of fact made by Superior Court, assumed such implied findings for respondent as evidence would sustain.

5. Arbitration and Award ⇐31

Where construction contract provided that dispute should be submitted to arbitration in accordance with designated, non statutory provisions pertaining to arbitration procedure, such procedure, thus agreed upon, became jurisdictional by way of limitation upon arbitrators' action.

6. Arbitration and Award ⇐72

In proceeding to obtain affirmation of arbitrators' award, evidence was sufficient to establish that chairman of panel of arbitrators had stated that, if board of arbitrators were not satisfied as to evidence on any particular point, case could be or would be re-opened for testimony.

7. Arbitration and Award ⇐31

Arbitrator, who had told chairman of board of arbitration that he would not sign award, and who had not made specific request to be present at the signing, but who had not stated that he did not wish to discuss form of the award, was not ruled out of participation in preparation of award and did not lose his status as arbitrator but had right to attempt to confine award to disposition of matters in dispute and to see that award did not mistakenly withhold recovery of item which had never been in dispute but which was, in effect, ruled out by award as made. West's Ann.Code Civ.Proc. § 1287.

8. Arbitration and Award ⇐29

Arbitrators are selected to act in quasi judicial capacity, not as parties' agents, and, ordinarily, must be impartial and nonpartisan and render equal and exact justice to parties.

9. Arbitration and Award ⇐54

In arbitration proceeding, failure of majority of arbitrators to provide for simultaneous delivery for mailing of award to parties, with result that prevailing party, who was notified earlier, was able to file petition for confirmation of award prior to filing by losing party of motion to vacate award, was error.

10. Arbitration and Award ⇐51

Arbitrators may have assistance of an attorney in drafting their award provided they do not resort to counsel of either party.

11. Arbitration and Award ⇐31, 34

Regardless of any contractual provision in contract providing for arbitration, all proofs are to be taken in presence of all the arbitrators and like procedure is to be followed with respect to discussions of the law. West's Ann.Code Civ.Proc. § 1286.

12. Arbitration and Award ⇐48

Award, which is made by majority of arbitrators, will be void if all arbitrators do not participate in the entire proceedings.

13. Arbitration and Award ⇐76

Arbitrator, who had been chosen as third arbitrator by remaining two arbitrators, and who had consulted attorney of unrevealed identity regarding law of case, was guilty of misconduct of such gravity that award made by him and concurred in by another arbitrator would be vacated. West's Ann.Civ.Code, §§ 3300, 3301.

14. Arbitration and Award ⇐34

Where chairman of arbitration board had expressed intention to allow case to be reopened for further testimony if board were not satisfied as to evidence on any particular point, denial of motion to reopen, which was made after rendering of decision but before making of award, but which was not supported by any affidavit or designation of specific evidence to be offered, was not in and of itself improper.

15. Arbitration and Award ⇐76

Arbitrators' ruling that contractor was not entitled to recover for delays allegedly caused by owner in construction of building was not so grossly erroneous as to require vacation on basis of manifest mistake of law.

16. Arbitration and Award ⇐48

Unless specifically required to act in conformity with rules of law, arbitrators may base their decision upon broad princi-

ples of justice and equity, and, in doing so, may expressly or impliedly reject claim which on party might have successfully asserted in a judicial action.

17. Arbitration and Award ⇐63

So long as they keep within jurisdictional limitations, arbitrators are clothed with prerogative of error just as is a court of last resort.

18. Damages ⇐163(1)

If defendant is shown, with reasonable certainty, to have caused some damage to plaintiff by tort or breach of contract or to be one of group of joint tort-feasors with whom the wrong originated, defendant has burden of showing that his acts did not contribute at all to the damage or that some other cause for which defendant was not responsible did produce an identified portion of it.

19. Damages ⇐6

One who contributes to a damage cannot escape liability because his proportional contribution to the result may not be accurately measured.

20. Arbitration and Award ⇐73

Where part of amount sought by construction contractor from owner in arbitration proceeding was conceded to be due contractor, award, which denied even recovery of such part of claim, would have required modification had such parts not been paid and accepted after award was attacked in court. West's Ann.Code Civ. Proc. § 1289(a).

21. Arbitration and Award ⇐73

Where chairman of board of arbitrators had stated to attorneys for each party that he had signed arbitration award, fact that he had not made simultaneous delivery of award to both parties and had not acknowledged award until after proceeding to vacate it was under way would not have been prejudicial had not the fictitious acknowledgment been certified and presented as basis for prevailing party's hurried attempt at confirmation of award.

22. Arbitration and Award ⇐27

Arbitration process is essentially judicial in its nature, and no one should act or be permitted to serve as arbitrator if such person cannot be entirely impartial and objective in performance of his duties.

23. Arbitration and Award ⇐71

Where period, plus extension thereof, allowed after closing of the proceedings for making of arbitrators' award had elapsed prior to reversal of judgment confirming award, matter, following the reversal, could not be recommitted to arbitrators. West's Ann.Code Civ.Proc. § 1288.

24. Arbitration and Award ⇐73

In arbitration proceeding, minute order denying unsuccessful party's motion to vacate award and minute order granting successful party's motion to confirm award were not appealable. West's Ann.Code Civ.Proc. § 1292.

Gibson, Dunn & Crutcher; Ira C. Powers, Richard L. Wells, Los Angeles, for appellant.

Bodkin, Breslin & Luddy, Los Angeles, Martin & Mahedy, San Diego, Henry G. Bodkin, Los Angeles, O'Neill P. Martin, William P. Mahedy, San Diego, for respondent.

ASHBURN, Justice pro tem.

Plaintiff Griffith Company has appealed from a judgment affirming an award of arbitrators, which was that it recover nothing from defendant-respondent San Diego College for Women as a result of the arbitration of a controversy between them concerning Griffith's claim for damages for delays caused by respondent in the construction of its building.

[1] By contract of July 28, 1950 Griffith Company undertook to furnish all labor and materials for the construction of a college for women in San Diego, the work to begin on August 1, 1950 and be completed by September 1, 1951. This was to be done upon a cost plus basis, the fee of the contractor fixed at 3 per cent, it being further expressly agreed by it that the maximum cost of the buildings should be $2,995,000. Actual completion of the job occurred in October, 1952, some 14 months after the contract limit had expired. Actual cost of construction exceeded the contract maxi-

mum by $99,355.79. Griffith Company claimed $354,369.95 to be due and payable, including a 3 per cent fee upon the entire cost of the work. A part of this claim was an item of $52,883.79 which had been certified by the architect as payable but nevertheless withheld by the defendant for some 9 months. Appellant's claim of a right to compensation in excess of the contract price was based upon the assertion that the delays and resulting additional costs were due to failure of the architect to furnish detailed drawings promptly as required by the contract.[1]

Pursuant to appropriate contract provision an arbitration was had. Appellant appointed Mr. E. S. McKittrick as arbitrator; respondent named Mr. J. Howard Ziemann, and those two agreed upon Mr. Paul B. Young as third arbitrator and chairman. Messrs. Young and Ziemann ruled, with Mr. McKittrick dissenting, that the contractor take nothing upon its claims and awarded judgment in favor of the owner. This award was upheld by the Los Angeles Superior Court and hence this appeal.

[2–4] The familiar rule of review is that all conflicts must be resolved in favor of respondent and all permissible inferences be drawn in its favor. The rule is applicable here although the evidence consists entirely of affidavits and the court made no formal findings of facts. The reviewing court must assume such implied findings to have been made in respondent's favor as the evidence will sustain. 4 Cal. Jur.2d 495, § 614; Manson v. Wilcox, 140 Cal. 206, 209, 73 P. 1004. With this rule in mind the facts appear to be these:

The contract provided in Article 40 that any dispute thereunder "* * * shall be submitted to arbitration in accordance with the provisions, then obtaining, of the Standard Form of Arbitration Procedure of The American Institute of Architects * * *." That Standard Form of Arbitration Procedure contains these pertinent and controlling procedural restrictions: "11. Conduct of Hearing. The hearing shall be so conducted that the complaining party and its witnesses shall be heard and may be subject to questioning by the other party or by its counsel, and the defending party and its witnesses shall be heard and may be subject to questioning by the other party or by its counsel. Exhibits may be introduced at any time during the hearing. When all pertinent and material evidence has been submitted by the parties, the arbitrators shall formally close the hearing and proceed in private to their deliberations prior to making the award. Adjournments shall be taken for good cause shown. The hearing may be reopened at any time before the award is required to be made at the discretion of the arbitrators or upon the request of a party for good cause shown.

"12. Submission of Proofs. Proofs shall be taken in the presence of the parties and in the presence of all the arbitrators, unless a party has absented itself by its own fault, after due notice that such proofs will be taken, or unless the parties have mutually authorized such proofs to be taken in their absence. Proofs to be submitted to the arbitrators may comprise testimony by the parties and by their witnesses, documents and exhibits, affidavits and such other material and pertinent evidence as the parties offer and as the arbitrators deem admissible. Proofs may be taken by the arbitrators at any time during the proceedings by making inspections of premises or materials or by ordering tests made of materials and by receiving such other evidence as they may require. Proofs shall be received in privacy unless the parties direct to the contrary. The arbitrators may, in their discretion, permit counsel to sum up and submit briefs, and the arbitrators may specify the time within which counsel must file such briefs. Proofs

1. It is elemental that one whose own fault prevents performance by the other party to the contract cannot take advantage of a breach induced by his own misconduct. See Bewick v. Mecham, 26 Cal.2d 92, 99, 156 P.2d 757, 157 A.L.R. 1277; Orton v. Embassy Realty Associates, 91 Cal.App.2d 434, 438, 205 P.2d 427; Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 371, 210 P.2d 757; 9 Am.Jur. § 50, p. 37.

shall be taken under oath if the prevailing law so requires and may be taken under oath if the arbitrators so direct. * * *

"14. Awards. The arbitrators shall decide, by a majority vote, any issue presented to them within the scope of the controversy, including the making of the award. The award shall be made in writing and shall be signed by all or by a majority of the arbitrators, and shall be acknowledged when the prevailing law so requires. The award shall be made within a period of thirty days from the closing of the proceedings and shall be delivered or mailed simultaneously to each party, and a copy thereof to the Architect."

[5] The procedure thus agreed upon became jurisdictional by way of limitation upon the arbitrators' actions. Bierlein v. Johnson, 73 Cal.App.2d 728, 733–735, 166 P.2d 644; Drake v. Stein, 116 Cal.App.2d 779, 785, 254 P.2d 613; Screen Cartoonists Guild v. Walt Disney Prod., 74 Cal.App.2d 414, 418, 168 P.2d 983.

Hearings were held by the arbitrators in Los Angeles and in San Diego on nine different occasions at which evidence and argument of counsel were received; briefs were presented by counsel for both parties. The matter was continued to September 30, 1953 for the purpose of deliberating upon the facts and the law pursuant to rule 11 of the Standard Form of Procedure, which says that after closing the hearing the arbitrators shall "* * * proceed in private to their deliberations prior to making the award." Chairman Young had previously advised his associates that he intended to seek legal confirmation of whatever opinion he might form and no objection was made by either of the other arbitrators. After considering the evidence and the briefs Mr. Young formulated a tentative opinion and then consulted an attorney, asked him to check that opinion to determine that it was not grossly erroneous so far as the law is concerned, and was later advised by said attorney that it was not erroneous. He then dictated that opinion to his secretary and, as he averred, "* * * the language and phraseology thereof were affiant's own except for the citations of legal authority contained therein in which affiant obtained from said attorney * * *." At the beginning of the meeting of September 30th Mr. Young produced this opinion, announced that he had it in a sealed envelope which, though placed on the table before the arbitrators, was never opened until the last few minutes of a four and a half hour meeting. As phrased by Mr. Ziemann in one of his affidavits, Mr. Young stated that this tentative opinion had been prepared by himself "* * * excepting that he had consulted independent legal counsel regarding the statement of the elementary principles of liability ap pearing on pages 5 and 6 of his opinion, the same being quotations from Sections 3300 and 3301 of the Civil Code of the State of California and from the case of Austin v. Roberts, 130 Cal.App. 328, at page 333 [20 P.2d 97]." Mr. Young also stated at the beginning of that meeting that he had not formulated a final, definite and irrevocable opinion, that he wished both the other arbitrators to present their views of the matter, that he had an open mind, that his opinion was subject to change but that he would not disclose it to them until they had had an opportunity fully to present their views. Thereupon Mr. McKittrick presented his views which were favorable to the contractor, using notes which he had brought with him, and when he had finished Mr. Ziemann referred to his own notes and "* * * convincingly refuted various of the statements made by Mr. McKittrick." So far as appears from the record, but subject to an exception later mentioned, Mr. Young, during four hours or more of discussion, had nothing to say between the time that he produced his own opinion contained in the sealed envelope and the time that he announced at the conclusion of Mr. Ziemann's presentation that he had not changed his opinion. It was then presented to the two associates at about 4:30 p. m., each of them read it, Mr. McKittrick dissented, Mr. Ziemann announced concurrence and requested that an award be made immediately. Thereupon Messrs. Young and Ziemann signed the document which is captioned "Opinion of the Chairman, Board of Arbitration"

and bears this addendum: "I concur J. Howard Ziemann" under date of September 30th. As Mr. McKittrick requested an additional meeting so that he could check with "my people" the chairman ruled that an adjournment would be taken until the next day, October 1st, at 1 o'clock.

As above indicated, there is no showing that Mr. Young took any affirmative part in this discussion of September 30th; he did tell the other arbitrators to talk and that he would listen. The name of the attorney whom he had consulted was never disclosed, not then or at any later time, although appellant's counsel have persistently referred to the anonimity of this attorney. No assertion or affirmative suggestion has been made that he was a disinterested adviser and his portion of the written opinion was never disclosed to the other arbitrators until presented at the close of the discussion as a part of the Young decision. Mr. McKittrick during his extended remarks on that occasion could not possibly know what the chairman had in mind, what the unidentified lawyer had advised or what were the points which needed discussion. He avers that the chairman refused to listen to any discussion of the briefs of plaintiff (contractor), stating "That is merely the attorney's opinion." This is not denied.

The gist of the ruling is found in this paragraph: "It is the Chairman of the Boards conclusion that the Contractor may not recover because, First, it did not comply with the provisions in the contract pertaining to the filing of claims, and, Second, he is unable to ascertain what proportion of the costs, over and above the contract price, is attributable to the Owner's neglect, and what proportion is attributable to other factors."

When the arbitrators convened on October 1st both Mr. Young and Mr. McKittrick announced that they had not changed their minds and had nothing further to say, except that Mr. McKittrick did then present on behalf of appellant-contractor a motion to reopen the hearings to afford the contractor an opportunity "* * * to show that the miscellaneous delays referred to by the Chairman of the Board had no substantial effect on the ultimate completion time * * *." This motion was based upon the ground that the chairman had indicated that he was not satisfied with the evidence as to what portion of the overall delay was attributable to the fault of the owner and what portion to other causes and "* * * at the conclusion of the hearings for the taking of testimony herein the Chairman stated that if the Board were not satisfied as to the evidence on any particular point the case could be or would be re-opened for further testimony * * *." The motion was denied upon the grounds that the contractor had had his day in court and had not served the motion upon the owner's attorneys or supported it by affidavit. Mr. McKittrick gave notice that he would file a dissenting opinion, which was done on the next day, October 2nd.

[6] Mr. Powers and Mr. Wells (attorneys for the contractor) joined Mr. McKittrick in swearing affirmatively and specifically that such a promise was made by the chairman. Mr. Wells' affidavit contains persuasive reasons for that matter having been impressed upon the minds of Mr. Powers and himself. In response the Young affidavit merely says "Affiant has no recollection of ever making that statement or any similar statement." Mr. Mahedy, one of the attorneys for the owner, used substantially the same language: "* * * that affiant has no recollection that the chairman of said arbitration panel stated in the presence of affiant, counsel for plaintiff and the other members of the said arbitration panel, the representatives of the parties, or anyone else, that if any member of the panel was not satisfied with the evidence on any one point, the case would be re-opened for the taking of further testimony." Mr. Ziemann's affidavit of November 6, 1953 quotes the pertinent portion of the motion to reopen, adverts to the fact that it had not been served and was not supported by any affidavit, and ignores the subject of the chairman's remark now under discussion. What Mr. Young and Mr. Mahedy said in this regard amounts merely to statements that they had no recollection whether the incident did or did not occur. Such testimony is not sufficient to create

a conflict in the evidence. See Lasby v. Burgess, 88 Mont. 49, 289 P. 1028, 1032; Reid v. Holcomb, 63 Cal.App. 89, 94, 218 P. 76; People v. Dodge, 104 Cal. 487, 489, 38 P. 203; 19 Cal.Jur.2d § 486, p. 253; 32 C.J.S., Evidence, § 1037, pp. 1081, 1084, 1087. True, the Mahedy affidavit further says that he had examined the last volume of the transcript of the hearings and found nothing pertinent to the matter alleged by Messrs. Powers and Wells. But they had not averred that the incident took place in the presence of the stenographic reporter or that it was contained in the transcript and hence this observation of Mahedy adds nothing to his side of the issue. This court must hold, because of the absence of substantial conflict in the evidence, that the statement was made by the chairman as alleged by counsel for appellant. Rule 11, quoted above, provides for a reopening of the hearing at any time before the award is made "* * * at the discretion of the arbitrators or upon the request of a party for good cause shown." Whether appellant had brought itself within this requirement will be discussed later as will the effect of the denial of the motion.

[7] Mr. Ziemann having been requested to prepare an award on the basis of the ruling of September 30th, an appointment was made for signing the same on the 2nd of October and the time set was apparently 2:00 p. m. True, Mr. McKittrick had told the chairman on the 1st that he would not sign the award and he made no specific request to be present at the signing or statement that he wished to discuss the form of the award; but this did not rule him out of participation in its preparation. See McCrary v. Harrison, 36 Ala. 577, 581; Daniels v. Ripley, 10 Mich. 237, 239–240; Moore v. Ewing, 1 N.J.L. 144, 1 Am.Dec. 195. He had not lost his status as arbitrator. He was interested and had a right to attempt to confine the award to disposition of matters which were in dispute, specifically he was interested in seeing that the award did not mistakenly withhold recovery of the item of $52,883.79 which had never been in dispute but which was, in effect, ruled out by the award as made.

Rule 14, here applicable, provides that the award shall be made in writing, signed by all or a majority of the arbitrators and shall be acknowledged "when the prevailing law so requires." That is the requirement of section 1287, Code of Civil Procedure. Also, the rule specifies that the award "* * * shall be delivered or mailed simultaneously to each party, and a copy thereof to the Architect."

Mr. McKittrick arrived at Mr. Ziemann's office at 2:30 p. m. and neither of the other arbitrators was present. He was merely told that Mr. Ziemann had not returned from lunch. He was given no papers and no other information. In a few minutes, while McKittrick was waiting, a messenger from Mr. Young's office called to pick up some papers for him and was given the award, which never came back into Mr. Ziemann's possession, was signed by him, and necessarily this had been done before lunch. Mr. McKittrick, learning that the messenger was taking the award to Mr. Young, contacted the chairman who agreed to send him a copy of the award as soon as the papers arrived. Mr. McKittrick never did know the actual contents of the document until after Mr. Powers had called Mr. Young about 4 p. m. and had had the award read to his secretary over the telephone. In the meantime, at 3 p. m. the contents had been dictated over the telephone to the secretary of Mr. Martin, one of the San Diego attorneys for respondent. Mr. Martin was told that the award had not yet been signed but that he would be advised of the fact when it occurred. After talking to Mr. Powers, Young advised Martin that the award had been signed by Ziemann and himself. And this was then true. But it had not been acknowledged by Mr. Young and the contents furnished to the respective attorneys over the telephone and the copies later mailed to the parties bore a fictitious certification of acknowledgment of the Young signature, which was signed by a notary in the Ziemann office. Before releasing the contents of the document Mr. Young had called Mr. Ziemann's attention to the fact that he had a notary in his own office who could take his acknowledgment

but Ziemann told him that "* * * he had already had the acknowledgment typed for the notary in the office of the said J. Howard Ziemann, and in order to save time he would send it along the way it was and have affiant sign the award as it was." The nature of the rush has not been explained. Respondent had withheld from appellant for some 9 months payment of $52,883.79 concededly owing to it, the arbitrators had decided that appellant was not to get that or any other sum claimed by it, and the record affords no basis for explanation of this hurry on the part of the arbitrators except a desire to win a "race to the courthouse", as Mr. Mahedy (respondent's attorney) described the immediately ensuing events,—an urgent desire to place the impending court controversy in a court deemed to be favorable to respondent, the Superior Court of San Diego County; they did win that race and procured in that county a restraining order forbidding any proceeding to vacate or modify the award; the San Diego court ultimately held that it had no jurisdiction and dismissed the proceeding seeking confirmation of the award upon that jurisdictional ground. Incidentally, a copy of the award which was presented to that court purported to have been acknowledged by Mr. Young, who in that proceeding made an affidavit to the effect that he had done so.

[8] On this afternoon of October 2nd the arbitrators forgot, if they had not previously done so, the role of impartiality and quasi judicial responsibility which they had assumed with the office. "Since arbitrators and umpires are selected, not as agents of the parties but to act in a quasi judicial capacity in the place of a court, in the ordinary case they must, like a court, be impartial and nonpartisan so as to render equal and exact justice to the parties." (3 Am.Jur. § 89, p. 918.) There was no simultaneous delivery or mailing of the award and as above indicated there was never any acknowledgment of the same by Mr. Young, —that is to say, never until after the litigation had been started in both San Diego and Los Angeles Counties. Then someone undertook to cure these defects by having an acknowledgment placed on the award on October 29, 1953 and delivering same to the parties on November 6, 1953.

Mr. Mahedy, respondent's attorney, having been advised at 4:10 p. m. on October 2nd of the fact that the award had been signed by Messrs. Young and Ziemann filed on behalf of respondent a petition for confirmation in the San Diego court at 4:19 p. m. Mr. Powers in Los Angeles succeeded in filing a motion to vacate the award at 5 p. m. of the same day. Appellant necessarily incurred expenses for attorneys, and the like, in resisting the San Diego proceeding which, as above stated, was dismissed for want of jurisdiction. No attempt to review this order was made.

[9, 10] This series of events, violative of the terms of the submission and hence of appellant's rights, cannot be condoned. The primary misconduct was that of the chairman in taking legal advice separately and from an undisclosed source, followed by assistance of that same attorney in the preparation of the opinion which was ultimately adopted by the majority. The Alabama Supreme Court remarked in Black v. Woodruff, 193 Ala. 327, 69 So. 97, 100, that arbitrators may have the assistance of an attorney in drafting their award "* * * provided they do not resort to the counsel of either party. Morse on Arb. 275. But to take advice or assistance of counsel for either party in the absence of the other may even endanger the award." Although given many opportunities to do so respondent has never disclosed the identity of this consulting attorney nor made any suggestion that he was a disinterested adviser. The ruling in Sapp v. Barenfeld, 34 Cal.2d 515, 212 P.2d 233, 238, which sanctions an *ex parte* factual investigation by a Board of Arbitrators (acting together) is limited to consultation with " 'disinterested persons of acknowledged skill' ". That case does not afford any support for separate and secret consultation with outsiders by a single member of the board. Nor does Simons v. Mills, 80 Cal. 118, 22 P. 25, sanction such conduct. It deals only with joint consultation with an outsider.

[11] Section 1286, Code of Civil Procedure, provides: "When more than one arbitrator is agreed to, all the arbitrators shall

sit at the hearing of the case, unless, by consent in writing, all parties shall agree to proceed with the hearing with a less number." Rule 12, which requires all proofs to be taken in the presence of all of the arbitrators, implies the same procedure with respect to discussions of the law. This is the plain import of the requirement "proceed in private to their deliberations prior to making the award." And we hold that to be the established law regardless of any contractual provision to that effect. The cases are not entirely uniform in their holdings but they turn upon the particular facts presented and the better reasoning supports the conclusion just indicated.

[12] The basic principal is thus stated in 6 Williston on Contracts, Revised Edition, § 1929, p. 5394: "Nevertheless, even in those instances where a majority may make an award, it will be void if all of the arbitrators do not participate in the entire proceedings."

S. J. Stewart (Electric) v. Mansura Cotton Oil Mill, La.App.1933, 148 So. 496, holds that an award made by two out of three arbitrators (known as "amicable compounders" in that jurisdiction), without consultation with the third was invalid. The court said, 148 So. at page 500: "And where it appears that in violation of an agreement by the compounders to meet at a certain time, after the taking of testimony by them has been concluded, for the purpose of discussing the case and weighing the evidence introduced, one of the arbitrators and the umpire in concert, during the absence of the other arbitrator, reach a decision in the case, which is opposed, not concurred in, by the absent arbitrator, such decision amounts to fraud against a litigant unfavorably affected thereby, and will be annulled by the court."

In Stefano Berizzi Co. v. Krausz 239 N.Y. 315, 146 N.E. 436, 437, 438, it was held that a factual investigation made by a sole arbitrator in the absence of the parties constituted prejudicial misconduct. That was not a consultation about a minor matter, prevailing costs, as in the Sapp case, supra, but the conduct of an experiment as to the salability of a certain product. "The new policy does not mean that there is to be an inquisition rather than a trial, and that evidence unknown to the parties and gathered without notice may be made the basis of the judgment. * * * There would be little profit in fixing a time and place of hearing, if the arbitrators were at liberty when the hearing was over to gather evidence *ex parte*, and rest their award upon it. * * *

"If misbehavior be assumed, we cannot doubt upon this record that prejudice resulted. The plaintiff, knowing nothing of the evidence, had no opportunity to rebut or even to explain it. * * * We do not mean, of course, that an award will be vitiated by investigations in the absence of the parties if directed toward facts of trifling importance or facts of such a nature as to preclude reasonable contest."

In Fred J. Brotherton, Inc., v. Kreielsheimer, 1951, 8 N.J. 66, 83 A.2d 707, 709, it was held that an investigation made by one arbitrator in violation of the governing agreement requiring joint action constituted misconduct.

Supporting our conclusion, see Citizens' Ins. Co., of Pittsburg v. Hamilton, 48 Ill.App. 593, 597; Saffir v. Wilson, Sup., 100 N.Y.S.2d 263, 264; Seaboard Surety Co. v. Commonwealth, 350 Pa. 87, 38 A.2d 58, 60; E. Millius & Co. v. Regal Shirt Corp., Sup., 113 N.Y.S.2d 385, 386; Hewitt v. Village of Reed City, 124 Mich. 6, 82 N.W. 616, 50 L.R.A. 128; Cleland v. Hedly, 5 R.I. 163, 170; Moshier v. Shear, 102 Ill. 169, 175.

In principle there is no difference between a separate inquiry upon the law and one directed to the facts.

People v. Gilbert, 22 Cal.2d 522, 528, 140 P.2d 9, is not persuasive in respondent's favor. It dealt with the action of a single judge who had drafted a ruling in advance of hearing evidence upon the sole question of degree of the crime of one who had plead guilty to a charge of murder. It was held that this did not establish a claim that he had prejudged the effect of the evidence. But the case did not involve the seeking of private advice by the judge or conduct of one of a group of judges which had a bearing upon his ruling and was kept secret from his associates. The case presents no true analogy to the situation at bar.

The Sapp v. Barenfeld case, 34 Cal.2d at page 523, 212 P.2d at page 239 states that arbitrators "* * * may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action." But we find no such liberal views reflected in the arbitrators' ruling at bar. It is purely legalistic, turning upon the incidence of the burden of proof on damages and upon the question of waiver of the contractor's right to recover through failure to make prompt claims for damages as the work progressed. It is not inferable from this record that the legal advice on which Mr. Young relied was conducive to a determination upon the broad, equitable principles to which the Sapp opinion refers.

[13] We conclude that Mr. Young was guilty of misconduct in consulting this attorney of unrevealed identity, misconduct of such gravity as to require a vacation of the award. Although this misconduct of the chairman would be sufficient to require vacation of the award if it stood alone, it was followed by a series of violations of the agreed arbitration rules which, considered separately, might not be enough to vitiate the award but, viewed in the aggregate, lend emphasis and gravity to the cardinal dereliction of the chairman, and amount to reversible misconduct on the part of the majority arbitrators.

[14] Denial of a reopening after rendering the decision and before making the award was violative of the previously expressed intention of the chairman to do the fair thing in order to act on the real merits in the event of dubiety on the part of the arbitrators as to significance of any of the important evidence. They properly could have treated that prediction or promise of the chairman as good cause within the meaning of the rule. But as the motion was not supported by any affidavit or designation of specific evidence to be offered, we cannot say that the denial was in and of itself improper. Pacific Vegetable Oil Corp. v. C. S. T. Ltd., 29 Cal.2d 228, 241, 174 P.2d 441. Reflected in the light of the manner of previously reaching a decision this denial does take on a dubious character as the connecting link between past and future violations of appellant's rights. Non constat but that appellant's efforts to secure a revision of the ruling would have been successful in point of fact or of law.

[15–17] The merits of the award are not before us. Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 185–186, 260 P. 2d 156.[2] But the fact, if it be so, that the chairman received erroneous advice from the anonymous attorney is of considerable significance. First, as to the burden of proof. The arbitrators' opinion does amount to a holding that the owner's delays were a proximate cause of most, though not all, of the contractor's excess costs. Appellant relies upon this sentence: "The Contractor's evidence indicates that the job was delayed throughout its entire life be-

2. We do not sustain appellant's contention that the arbitrators' ruling was so grossly erroneous as to require vacation on the basis of manifest mistake of law. The cited case of Utah Construction Co. v. Western Pacific Railway Co., 174 Cal. 156, 162 P. 631, 634 was decided upon the expressed assumption that under the terms of the submission agreement the arbitrator "was empowered only to decide correctly as to the law"; the court further said it would "proceed upon that theory without deciding the point." There was no such requirement at bar. And the Utah Construction Co. case is inapplicable. The presently prevailing view is expressed in Sapp v. Barenfeld, supra, 34 Cal.2d 515, 523, 212 P.2d 233, 239: "Arbitrators, *unless specifically required to act in conformity with rules of law*, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action." (Emphasis added.) The matter is made clear in Crofoot v. Blair Holdings Corp., supra, 119 Cal.App.2d at pages 156, 185, 260 P.2d 156. Arbitrators, so long as they keep within jurisdictional limitations, are clothed with the prerogative of error, just like a court of last resort. Muldrow v. Norris, 2 Cal. 74, cannot be accepted as expressive of the rule now prevailing; the contrary expressions of the Sapp and Crofoot decisions forbid.

cause of the Owner's failure to promptly furnish plans and information necessary to the Contractor." Standing alone it does not specifically hold that the job was held up throughout its entire progress by defaults of the owner, and it is to be contrasted with this language: "The Owner has introduced evidence to prove that many other factors, such as labor disputes, material shortages, contractor delays, etc., contributed to the over-all delay of the job. The Chairman of the Board is of the opinion that all of these factors contributed in some degree to delay the job. * * *

"We also conclude that certain labor disputes, material shortages, difficulties with supplies, and contractor delays contributed to some extent in the over-all delay in completing the job." Fairly construed this language amounts to a determination that, in the main, the architect's delays were responsible for the 14 months overtime but that causes for which the owner was not chargeable likewise contributed to some undetermined extent.

Respondent in support of the holding that this precludes any recovery by the contractor relies upon a line of cases which support this statement of Allen v. Gardner, 126 Cal.App.2d 335, at page 340, 272 P.2d 99, at page 102: "Uncertainty as to the fact of damage, that is, as to the nature, existence or cause of the damage, is fatal. But the same certainty as to the amount of the damage is not required." Cases such as Austin v. Roberts, 130 Cal.App. 328, 20 P.2d 97 and Wade v. Thorsen, 5 Cal.App.2d 706, 713, 43 P.2d 592, lend considerable support to the application of that rule at bar and the placing of the burden of proof upon the contractor. This is also true of certain rulings of the Court of Claims, Coath & Goss, Inc. v. United States, 101 Ct.Cl. 702; B-W Construction Co. v. United States, 100 Ct.Cl. 227, and J. J. Kelly Co. v. United States, 107 Ct.Cl. 594, 69 F.Supp. 117. Cases involving attempts to enforce liquidated damage clauses furnish some analogy, and it appears to be the rule that no apportionment will be made when the owner is shown to be partly at fault for the delays. See Gogo v. Los Angeles, etc., Flood Control Dist., 45 Cal.App.2d 334, 344, 114 P.2d 65, and annotation in 152 A.L.R. 1349, 1359.

[18, 19] But respondent's reference to California Orange Co. v. Riverside P. C. Co., 50 Cal.App. 522, 195 P. 694, points to a line of decisions which seem to indicate that in this state the burden rests upon the owner-respondent in circumstances such as those now under discussion to make a segregation of the damage or to pay all of it. This California Orange Co. decision was differentiated in Slater v. Pacific American Oil Co., 212 Cal. 648, 300 P. 31, wherein it was held that one whose property had been damaged by deposits of oil and other hydrocarbon substances originating upon the lands of two or more independent wrongdoers could not recover from any of them without producing evidence of the amount of damage inflicted by the individual defendant's own separate wrong. But the Slater case in turn has been distinguished and disregarded so often that Professor Prosser in Law of Proximate Cause in California, 38 California Law Review 369, at page 388, says: "* * * the California courts and others have said many times that the defendant cannot escape liability because his own wrong has made it impossible to measure the damages. Although this state has the only case [3] the writer has ever found in which the plaintiff was denied recovery for lack of evidence, it is almost certainly out of line and cannot be accepted as the present law. Beginning in 1940, the intermediate courts have taken the bull by the horns and adopted the suggestion of several writers, that where it is clear that a defendant has been at fault and that he has caused some part of the plaintiff's damages, the burden of proof should rest on him to show the extent of his contribution, and that if he cannot sustain it he should be liable for the entire loss." And Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 91 lends considerable support to this conclusion. In that case two hunters had fired in the direction of plaintiff and the shot from one of their guns had struck him. Plaintiff was unable to prove the identity

3. The author here refers by footnote to the Slater case.

of the hunter who had shot him. The Supreme Court held that the burden was upon each defendant to produce evidence which would exonerate him of the charge. In the course of so doing the court quoted, with apparent approval, from Dean Wigmore's Select Cases on the Law of Torts, section 153, as follows: "When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that the one of the two persons, or the one of the same person's two acts, is culpable, then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm. (b) * * * The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all; let them be the ones to apportion it among themselves. Since, then, the difficulty of proof is the reason, the rule should apply whenever the harm has plural causes, and not merely when they acted in conscious concert. * * *" This seems to leave the California rule in this shape: If defendant is shown with reasonable certainty to have caused some damage to plaintiff by tort or breach of contract, or if he is shown prima facie to be one of a group of joint tort-feasors with whom a wrong originated, the burden rests on the defendant to show that his act did not contribute at all to the damage or that some other cause for which the defendant was not responsible did produce an identifiable and identified portion of it. "It is well settled that one who contributes to a damage cannot escape liability because his proportional contribution to the result may not be accurately measured." Reclamation Dist. No. 833 v. American F. Co., 209 Cal. 74, 80, 285 P. 688, 690. "Where parties contribute to damage which has been caused by their acts and the acts of another they cannot escape liability because their proportionate contribution is not accurately measured." Switzer v. Yunt, 5 Cal.App.2d 71, 79, 41 P.2d 974, 978.

Whether these considerations were presented to the arbitrators is not disclosed by the record. Whether they would have changed the result we cannot know. Surely the arbitrators should have permitted appellant's attorneys to present these or similar views to the chairman in an effort to enable him to judge the soundness of the secret advice he had received or to do justice in a broad fashion such as suggested in the Sapp case, supra. The advice upon which Mr. Young acted in this regard was bad advice.

The matter of waiver of damages is involved in some obscurity which a reopened hearing might have dissipated. Article 16 of the contract provides: "Claims for Extra Cost.—If the Contractor claims that any instructions by drawings or otherwise involve extra cost under this contract, he shall give the Architect written notice thereof within a reasonable time after the receipt of such instructions, and in any event before proceeding to execute the work, except in emergency endangering life or property, and the procedure shall then be as provided for changes in the work. No such claim shall be valid unless so made." And Article 31 provides: "Damages.—If either party to this Contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone employed by him, then he shall be reimbursed by the other party for such damage.

"Claims under this clause shall be made in writing to the party liable within a reasonable time at the first observance of such damage and not later than the time of final payment, except as expressly stipulated otherwise in the case of faulty work or materials, and shall be adjusted by agreement or arbitration." Appellant insists that the demands for progress payments which were made from time to time under Article 16 gave the necessary notice. As the architect had the right to withhold certification when costs threatened to exceed the agreed maximum (Article 26(d)), it seems that requests made for payments for the original job in excess of the prescribed maximum of $2,995,000 would be properly considered as notices of damage claimed, for there was

no other basis for claiming costs in excess of that amount. But the matter is complicated by a large amount of extras, something like $500,000 worth, which were included in the architect's certificates actually issued, and the evidence before us is insufficient to afford basis for an inference as to when the requests for payment for the original work began to exceed the prescribed maximum. It may well be that this point, if not already developed at the arbitrators' hearings, would have a material influence toward an award based upon broad equities untrammeled by legal niceties.

[20] After denial of the motion for reopening came the drafting of the award and its execution. Although Mr. McKittrick had called specific attention to the conceded item of $52,883.79, which was included in the $152,239.58 mentioned in the arbitrators' opinion, that award denied any recovery whatever. This alone would have required a modification under Code of Civil Procedure, section 1289(a) had the $52,883.79 not been paid and accepted after the award was under attack in the court.

[21] The award was not acknowledged by Mr. Young at all until after the proceeding to vacate was well under way. The major purpose of an acknowledgment had been served, however, by his statement to the attorneys for each party on October 2nd that he had signed the award. (See 1 Cal.Jur.2d § 3, p. 461.) And the omission would not be important, because not prejudicial, Manson v. Wilcox, 140 Cal. 206, 208, 73 P. 1004; Popcorn Equipment Co. v. Page, 92 Cal.App.2d 448, 451, 207 P.2d 647; Pacific Vegetable Oil Corp. v. C. S. T., Ltd., supra, 29 Cal.2d 228, 240–241, 174 P.2d 441, were it not for the atmosphere in which the fictitious acknowledgment was certified and presented to the court as a basis for respondent's hurried attempt at confirmation of the award. These same considerations apply to the studied lack of simultaneous delivery of the award to the respective parties.

The majority arbitrators were guilty of misbehavior through which the rights of appellant were prejudiced and the award cannot be sustained.

[22] This proceeding exemplifies a condition which has become much too prevalent in this jurisdiction and which strikes at the integrity of the arbitration process. We refer to the appointment, acceptance and service of partisans in the role of arbitrators. The arbitrator named by Griffith Company was its own president.[4] The one named by respondent College had been consulted, he and his associate, by the Bishop of the Church and through him the respondent was induced to arbitrate upon the understanding that Mr. Ziemann should act as one of the arbitrators. The trial judge described him as partisan, and so did counsel for appellant; counsel for respondent opined that "Ziemann selected by the defendant would be inclined to go along with him (Young) and that would be natural." Mr. Ziemann was undoubtedly partisan and his conduct of October 2nd bears no other complexion. The arbitration process is essentially judicial in its nature. 3 Am.Jur. § 89, p. 918, 6 C.J.S., Arbitration and Award, § 1, p. 153. No one should act or be permitted to serve who cannot be entirely impartial and objective in the performance of his duties. The New York Court of Appeals in American Eagle Fire Ins. Co. v. New Jersey Ins. Co., 240 N.Y. 398, 405, 148 N.E. 562, 564, has well stated the matter: "But, first, the practice of arbitrators of conducting themselves as champions of their nominators is to be condemned as contrary to the purpose of arbitrations, and as calculated to bring the system of enforced arbitrations into disrepute. An arbitrator acts in a quasi judicial capacity, and should possess the judicial qualifications of fairness to both parties, so that he may render a faithful, honest, and disinterested opinion. He is not an advocate whose function is to convince the umpire or third arbitrator. He should keep his own counsel, and not run to his nominator for advice when he sees that he may be in the minority. When once he enters into an arbitration he ceases to act as the agent of the party who appoints him. He must lay aside all bias, and approach the case with a mind open to conviction and without regard to his previously formed opinions as to the merits of the party or the cause. He should

4. This case was submitted and decided upon a record which affirmatively showed Mr. McKittrick to be president of appellant Griffith Company. After the opinion was filed counsel stipulated that that showing was incorrect and inadvertent and the court made an order correcting the record to show him to be president of E. S. McKittrick Company, Inc.

sedulously refrain from any conduct which might justify even the inference that either party is the special recipient of his solicitude or favor."

[23] Reversal of the judgment under review cannot carry an instruction to recommit the matter to the arbitrators; their function has ceased. Flannery v. Sahagian, 134 N.Y. 85, 31 N.E. 319, 320; 5 Cal.Jur. § 43, p. 114; 6 C.J.S., Arbitration and Award, § 51, p. 192; 3 Am.Jur. § 913, p. 924. They initially had, under rule 14, thirty days after "closing of the proceedings" for the making of their award. Proceedings were closed on July 16, 1953 but the 30-day period was extended to 90 days after filing of the last brief. That date we do not have but it seems clear that the time could not have expired later than December 13, 1953, for the last brief had been filed before September 14th. Section 1288, Code of Civil Procedure, provides: "Where an award is vacated and the time, within which the agreement required the award to be made, has not expired, the court may, in its discretion, direct a rehearing by the arbitrators." Where the prescribed time for their action has expired the matter cannot be re-submitted to the arbitrators. Hauck v. Rochester Taxicab Co., 127 Misc. 759, 217 N.Y.S. 2; Goerke Kirch Holding Co. v. Goerke Kirch Co., 116 N.J.L. 427, 185 A. 376; 6 Williston on Contracts, Rev.Ed. § 1927A, p. 5390; 6 C.J.S., Arbitration and Award, § 113, p. 263.

[24] The Griffith Company appealed not only from the judgment confirming the award but also from an order denying its motion to vacate the award and from the minute order of December 22, 1953, denying the motion to vacate and granting the motion to confirm. These minute orders are not appealable, Code Civ.Proc. § 1292, and the purported appeal therefrom is dismissed. The judgment confirming award, which was entered on January 4, 1954, is reversed.

PARKER WOOD, Acting P. J., and VALLÉE, J., concur.

131 Cal.App.2d 175

Vincent SQUILLANTE, Plaintiff and Appellant,

v.

E. L. BARR and Merle Barr, Individually and as co-partners doing business under the firm name and style of Barr Packing Company, Albert Allen, Rodney W. Epps and Eddie Weber, Defendants and Respondents.

Civ. 4663.

District Court of Appeal, Fourth District, California.

March 1, 1955.

Rehearing Denied March 22, 1955.

Hearing Denied April 27, 1955.

Action to recover for personal injuries sustained by plaintiff as result of fall from truck loaded with grapes. The Superior Court, Fresno County, Edward L. Kellas, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeals, Mussell, J., held that questions of negligence of owner of packing plant where truck had stopped to unload, and of negligence of driver of truck in loosening rope holding grape crates on truck, which rope slipped when plaintiff used it to assist him in climbing to top of truck, resulting in plaintiff's fall to loading platform, was for jury.

Judgment affirmed.

1. Automobiles ⇐246(54)

In personal injury action, instruction on law pertaining to trespassers, was not error, on ground that plaintiff was invitee on truck as matter of law, where there was substantial evidence to support defendant's theory that plaintiff was trespasser on truck when injury occurred.

2. Automobiles ⇐245(24)

In action to recover for personal injuries sustained by plaintiff as a result of a fall from a truck loaded with grapes, question whether plaintiff was invitee or trespasser upon truck at time of injury was one of fact for jury.

3. Appeal and Error ⇐1001(1)
Negligence ⇐136(14)

Question of negligence is generally one of fact for jury, and its finding thereon, if supported by substantial evidence, is binding upon reviewing court, and it

is only when there is no substantial conflict as to facts, and from facts reasonable persons can draw only inferences that defendant was negligent, that reviewing court will disturb verdict of jury rendered in favor of defendant.

4. Negligence ⇐32(1)

Owner of packing plant was not insurer of safety of invitee, but merely owed him duty to exercise reasonable care in keeping premises safe for such invitee.

5. Negligence ⇐48

To impose liability for injuries suffered by invitee due to defective condition of premises, owner or occupier must have either actual or constructive knowledge of dangerous condition or have been able by exercise of ordinary care to discover condition, which if known to him, he should realize as involving unreasonable risk to invitees on his premises.

6. Negligence ⇐48, 136(16)

Negligence of owner or occupier of premises in regard to invitees is founded upon owner's failure to exercise ordinary care in remedying defect after he has discovered it, and whether, under all circumstances, defective condition had existed long enough so that reasonable man exercising reasonable care would have discovered it, is question of fact for jury.

7. Negligence ⇐52

Owner of premises is under no obligation to give warning of obvious danger or one which should have been perceived by invitee on premises.

8. Appeal and Error ⇐1001(1)
Negligence ⇐136(9)

Where different inferences may reasonably be drawn from evidence, decision on questions of negligence and contributory negligence must be left to trier of fact, and conclusion of jury will not be disturbed on review if some substantial evidence or reasonable inference lends support thereto.

9. Automobiles ⇐245(24)
Negligence ⇐136(14)

In action to recover for personal injuries sustained by plaintiff as result of fall from truck loaded with grapes, questions of negligence of owner of packing plant where truck had stopped to unload, and of negligence of driver of truck in loosening rope holding grape crates on truck, which rope slipped when plaintiff used it to assist him in climbing to top of truck, resulting in plaintiff's fall to loading platform, were for jury.

10. Appeal and Error ⇐996, 1002
Negligence ⇐136(9)

Contributory negligence as matter of law can only be found where reasonable minds cannot but conclude that reasonably careful and prudent person situated as was plaintiff would not have acted as he did, and if circumstances are such that reasonable minds can differ, or, if evidence is in conflict, finding of trier of facts is conclusive.

11. Automobiles ⇐245(87)

In personal injury action, question of plaintiff's contributory negligence in climbing on truck and using rope used for lashing grape crates on truck to assist him in climbing to top of truck, which rope had been loosened by truck driver, resulting in plaintiff's fall to loading platform, was for jury.

12. Automobiles ⇐246(58)

In personal injury action, evidence on issue of plaintiff's voluntary acceptance of risk in climbing to top of truck loaded with grapes, was sufficient to support instruction to jury on issue of assumption of risk.

John D. Chinello and Lawrence E. Viau, Jr., Fresno, for appellant.

Stammer, McKnight & Barnum, Fresno, for respondents Weber and Allen.

Ray W. Hays and James N. Hays, Fresno, for respondents Barr and Epps.

MUSSELL, Justice.

This is an action to recover damages for personal injuries suffered by plaintiff as the result of a fall from a truck loaded with boxed grapes. The truck had been driven up to a loading platform at the packing plant of defendant Barr Packing Company. Plaintiff was a fruit shipper

and buyer and on September 8, 1950, was at the packing plant to inspect grapes which he was buying through the Barr Company. Defendant Rodney Epps, who was the foreman at the plant, was talking with the plaintiff when he saw the truck approaching the loading platform. Epps remarked to plaintiff that these were some of the grapes he would be getting and asked plaintiff if he would like to look at them. Plaintiff stated that he would and they proceeded to the truck which had been stopped so that the bed of the truck was approximately level with and along the side of the loading platform. Defendant Allen, who was driving the truck for the owner (defendant Weber) got out of the cab on the driver's side and proceeded along that side of the truck to the rear, where he loosened the two ropes holding the loaded boxes in place. These boxes were in three tiers and eleven boxes high and the total height from the bed of the truck to the top of the boxes was six and one-half feet. The two ropes were fastened to the front of the bed of the truck, one on each side of the cab, extended up over the outer tiers of the loaded boxes and were secured by devices on the rear of the truck by which they were held taut. Epps did not see Allen go to the rear of the truck and climbed up on a platform back of and on top of the cab where he could see the grapes in the top boxes. This platform was accessible by means of three steps attached to the bulkhead at the rear of the cab and it was not necessary to use the rope to climb up to the platform. When Epps climbed up, he put his feet on the steps and held onto the top of the bulkhead. He testified that when he had been on the platform for approximately one minute, plaintiff attempted to follow him up; that plaintiff put his foot on the steps, took hold of the rope and when he had climbed high enough to reach the top box on the load, he grabbed the box and fell to the loading platform and then to the ground. Plaintiff testified in this connection that Epps went up on the truck first and he, plaintiff, followed; that they were on top of the load for a while inspecting the grapes and after Epps had climbed down, he, plaintiff, started to come down, holding himself on the rope; that when he was about the middle of the second step, "down I went, and it is all I remember".

Plaintiff had been in the grape business for forty years and had been up on a similar truck before. He admitted that he knew that the ropes had to be loosened before the grapes were unloaded and that he made no attempt to see where the driver of the truck was before he attempted to go up on the truck and did not see Allen leave the truck.

There is substantial evidence showing that when defendant Allen drove the truck up to the loading platform, plaintiff and Epps were engaged in conversation inside the packing shed; that as Allen drove up, he saw plaintiff and Epps standing in the doorway; that he did not know plaintiff; that neither plaintiff nor Epps spoke to him and that he did not know that they had climbed up on the truck before the accident happened; that approximately two minutes elapsed from the time that Allen stopped his truck before the plaintiff fell.

[1, 2] A jury trial was had resulting in a verdict for all defendants and plaintiff appeals from the judgment entered in accordance with this verdict. Appellant first contends that the evidence established as a matter of law that at the time of the accident plaintiff was a business visitor or invitee on the Barr premises and on the Weber truck, and he was prejudiced by instructions which permitted the jury to find otherwise. Appellant admits that the jury was correctly instructed on the law of business visitors and business invitees but argues that the court erred in instructing the jury, at the request of Allen and Weber, on the law pertaining to trespassers. It is not contended that these instructions did not correctly state the law but it is argued that they should not have been given because plaintiff was an invitee on the truck as a matter of law. However, it was the contention of defendants Allen and Weber that plaintiff climbed up on the truck without their

permission, consent or knowledge and there was substantial evidence to support that contention. Weber was not at the packing plant when the accident occurred. He did not know the plaintiff and had never seen him or given him permission to go onto the truck involved. While Allen saw plaintiff talking to Epps in the doorway of the packing plant, he did not give plaintiff permission to go onto the truck and did not know that he had done so until after the accident. Defendants Weber and Allen were entitled to have these instructions given based on their theory of the case since there was substantial evidence to support it. Ritchey v. Watson, 204 Cal. 387, 390, 268 P. 345; 10 Cal.Jur. Ten Yr.Supp., p. 699, sec. 92. The question of whether plaintiff was an invitee or trespasser was one of fact for the jury. Boucher v. American Bridge Co., 95 Cal.App.2d 659, 666, 213 P.2d 537.

[3–9] Appellant next asserts that the evidence established as a matter of law that defendants Barr and Epps were guilty of negligence proximately causing or contributing to the accident, and plaintiff was prejudiced by an instruction which submitted an issue of unavoidable accident to the jury. We cannot agree with this contention. "The question of negligence is generally one of fact for the jury, and its finding thereon, if supported by substantial evidence, is binding upon a reviewing court. It is only when there is no substantial conflict as to the facts, and from the facts reasonable persons can draw only the inference that a defendant was negligent, that the reviewing court will disturb the verdict of the jury rendered in favor of a defendant." Ferrell v. Matranga, 92 Cal.App.2d 620, 622, 207 P.2d 654, 655. Defendant Barr as owner of the packing plant was not an insurer of the safety of the plaintiff but owed him the duty to exercise reasonable care in keeping the premises safe for his invitee, and as was said in Girvetz v. Boys' Market, Inc., 91 Cal.App.2d 827, 829, 206 P.2d 6, 8:

> "To impose liability for injuries suffered by an invitee due to the defective condition of the premises, the owner or occupier 'must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it.' (Citing cases.) Whether, under all the circumstances, the defective condition had existed long enough so that a reasonable man exercising reasonable care would have discovered it, is ordinarily a question of fact to be decided by the jury." (Citing cases.)

The evidence here is that Epps did not discover that Allen had loosened the ropes until after the accident happened and where, as here, the danger was as obvious or as well known to plaintiff as to Epps, there was no obligation to give warning of an obvious danger or one which should have been perceived by the plaintiff. Royal Ins. Co. v. Mazzei, 50 Cal.App.2d 549, 552, 123 P.2d 586. There was a conflict created by the evidence as to whether defendants should have had knowledge of the danger and should have warned plaintiff or whether the condition was or should have been obvious to appellant. As was said in Curland v. Los Angeles County Fair Ass'n, 118 Cal.App.2d 691, 695, 258 P.2d 1063, 1065:

> "Where different inferences may reasonably be drawn from the evidence, the decision on the questions of negligence and contributory negligence must be left to the trier of fact. The conclusion of the jury will not be disturbed on review if some substantial evidence or reasonable inference lends support thereto. Nichols v. Mitchell, 32 Cal.2d 598, 606, 197 P.2d 550."

Under the circumstances here shown the question of the negligence of defendants, if any, was one of fact for the jury. The defense of unavoidable accident was set forth in the answer of defendants Barr and Epps and is nothing more than a denial

by them that their negligence, if any, was the proximate cause of plaintiff's injuries and an instruction on this subject was properly given under the circumstances shown by the record. Parker v. Womack, 37 Cal.2d 116, 120–121, 230 P.2d 823.

[10, 11] Appellant further contends that the evidence established as a matter of law that contributory negligence was not a proper issue in the case, and plaintiff was prejudiced by instructions which submitted an issue of contributory negligence to the jury. This argument is without merit. Contributory negligence as a matter of law, can only be found where reasonable minds cannot but conclude that a reasonably careful and prudent person situated as was plaintiff would not have acted as he did. If the circumstances are such that reasonable minds can differ, or, if the evidence is in conflict, the finding of the trier of the facts is conclusive. Dickison v. La Thorpe, 124 Cal.App.2d 190, 193, 268 P.2d 164. In the instant case the jury could reasonably draw an inference of contributory negligence from plaintiff's own testimony as he stated that he had been in the business for forty years; that he had been on similar trucks; that he knew that the truck was to be unloaded and that to do so, the ropes had to be loosened; that he made no attempt to see where the truck driver had gone and did not look to the back of the truck. The evidence further shows that it was not necessary in climbing up onto the platform to use the ropes involved.

[12] Finally it is argued that the trial court erred in instructing the jury on the issue of assumption of risk. This contention is likewise without merit. It is not argued that the law applicable is not correctly stated but it is claimed that the record is devoid of evidence that would support a finding that plaintiff voluntarily accepted a risk with knowledge and appreciation of the risk. Since there was substantial evidence to support a finding upon this issue, there was no reversible error in giving the criticized instruction.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.

131 Cal.App.2d 217

George E. WILLIAMS, Jr., and Myrtle F. Williams, his wife, Plaintiffs, Cross-Defendants and Respondents,

and

Glen Talbot, C. B. Dickey, Curtis Meecham, R. N. Jones, D. B. Hope, Thomas F. Swigert and Agnes Claire Swigert, Rex Olson and Carl Olson, Cross-Defendants and Respondents,

v.

Chris LARAS, also known as Chris Larras, Kenneth Wizner and Albert Herringshaw, Defendants, Cross-Complainants and Appellants.

STATE of California, Plaintiff and Appellant in Intervention, Respondent

v.

Chris LARAS, also known as Chris Larras, Kenneth Wizner, Albert Herringshaw, George E. Williams, Jr., and Myrtle F. Williams, his wife, Glen Talbot, C. B. Dickey, William J. Dickey, Curtis Meecham, R. N. Jones, D. B. Hope, Thomas F. Swigert and Agnes Claire Swigert, Rex Olson and Carl Olson, Defendants and Respondents in Intervention.

Civ. 8526.

Sac. 6496.

District Court of Appeal, Third District, California.

March 2, 1955.

Action to enjoin diversion of water from one of canals of water system by landowner allegedly entitled to divert such water. The Superior Court, Lassen County, Curtiss E. Wetter, J., entered judgment adverse to both parties and they appealed. The District Court of Appeal, Van Dyke, P. J., held that contract and deed between defendant landowner, who held easement for use of water from water system in connection with his ownership of certain realty acreage, and plaintiff landowners in same vicinity, relative to defendant landowner's ownership of certain lands and water rights, showed that parties intended to foreclose any claim that may have previously existed in favor of plaintiff landowner as to water from water system for use on his land.

Judgment affirmed.

1. Waters and Water Courses ⇐151

Landowner, who previously held easement for use of water from water system in connection with his ownership of certain realty acreage and who subsequently contracted with other landowners that their rights to use water from such system had preference and priority over his rights, was estopped to demand or enforce right to any use of water from such system in action commenced by such other landowners to enjoin his diversion of water from system.

2. Waters and Water Courses ⇐158(2)

Contract and deed between defendant landowner, who held easement for use of water from water system in connection with his ownership of certain realty acreage, and plaintiff landowners in same vicinity, relative to defendant landowner's ownership of certain lands and water rights, showed that parties intended to foreclose any claim that may have previously existed in favor of plaintiff landowner as to water from water system for use on his land.

Coyle E. Bybee and George P. Kading, Chico, and Landis & Brody, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Ralph W. Scott, Deputy Atty. Gen., for appellant in intervention.

Hardin Barry, Susanville, for plaintiffs-respondents.

Anderson & Pancera, Susanville, for cross-defendants and respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment decreeing that the individual respondents and the intervening State of California are entitled to the use of all of the waters stored annually in the Tule Lake and Bayley reservoirs and that appellants have no right thereto and no right to use any part thereof on a parcel of land owned by appellant Laras and hereinafter referred to as "Section 16". The intervening State of California has also appealed on the ground that the judgment fails to declare the respective amounts of said waters to which it and the respondents are entitled.

The Tule Lake and Bayley reservoirs, together with a system of canals and ditches, constitute what is commonly known as the Madeline Water System, which the intervening state and the respondents now own as tenants in common and which, since about 1907, has been used to supply waters for the irrigation of certain real property in Lassen County. The land so serviced, now owned by the respondents and the state, does not include the above-mentioned "Section 16". Laras, as the owner of that land, and the other appellants, who were his tenants before the action was brought, claim they likewise had and have a right to receive a proportionate share of the waters so stored annually in Tule Lake reservoir, and claim that this right exists by virtue of a contract executed on July 6, 1912 by the company which then owned said system, contracting with Laras' predecessors in interest in said section 16. By that agreement the water company covenanted with the then owner of said section 16 to furnish so much water as should be required to irrigate 600 acres of said section, but not exceeding one acre foot for each of said 600 acres. Provision was therein made for the apportionment of the total supply with the other landowners who had similar contracts, whenever there was insufficient water for all in any season. The contract purported to grant and sell "the right to the flow and use" of the amount of water agreed to be furnished, and provided that: "* * * the said right to the flow and use of such water shall be and remain, forever, a perpetual servitude upon the reservoirs, ditches, canals and other aqueducts and the waters and water rights constituting the said water supply system, and shall be and remain attached to the Consumer's aforesaid tract of land [Section 16] as a perpetual easement appurtenant thereto."

The consideration for "the grant * * of said right and easement to the flow and use of water" and for "the water" and for "the water to be furnished" was recited to be $21,000 to be paid upon the execution of the agreement, and $600 a year for ten years thereafter, commencing on April 1, 1912. Upon default in any payment the

company had the option to cease delivery of water until payment of all amounts due, together with interest thereon. The contract further provided that the benefit of all the covenants of the water company "shall run with and be transferable with" said section 16. After the execution of this contract the water company acquired title to said section 16 and its appurtenances. But merger was prevented by the fact that it took title to said section subject to an existing mortgage thereof. This mortgage was subsequently foreclosed and on August 3, 1915 there was executed a commissioner's deed of said section 16 and the "water right" attached thereto. This deed, through which appellant Laras deraigns title, recited that the referred to water right had been granted in consideration of $21,000 paid to the water company under the contract of July 6, 1912. There was no evidence that appellant Laras' predecessors in interest made any of the ten annual $600 payments called for under the contract and it stands without dispute that no water has ever been delivered to or used upon said section 16, nor has any demand been made therefor from 1915 until 1951, when Laras demanded of the respondents and of the intervening state that there be delivered to said section for his use thereon the stipulated 600 acre feet for use in that year. In January of 1942 said section 16 had been for some time owned by Stanford University. On January 15, 1942, Laras and the University entered into a written agreement whereunder Laras agreed to purchase said section 16 for the sum of $2,500, payable in installments, and in due course he paid the purchase price and received a deed. Since said January 15, 1942, therefore, he has been either the equitable or the legal owner of said section. At approximately the same time Laras purchased other real property and also purchased the irrigation system, including the Tule Lake and Bayley reservoirs, from the then owners, respondents Williams and Ethel Plasil, who in the meantime through mesne conveyances had succeeded to the former water company's ownership therein. In connection with this latter transaction, the parties thereto entered into an agreement in writing, which agreement is significant in the decision of this case. This agreement, dated January 20, 1942, provided that the sellers, Williams and Plasil, should, for the benefit of 1,280 acres of land owned by them, have the first and prior and preferential right to all the waters of Tule Lake reservoir and all dams, ditches and easements appurtenant thereto. The agreement recited that the waters of the reservoir were primarily impounded and appropriated for furnishing water to said preferred lands and for furnishing water to three other smaller tracts owned by persons not parties to said agreement; that the 1,280 acres should have such preferential rights to the waters of Tule Lake reservoir and the works used in connection therewith and that each of the two ranches making up said total acreage had a right to be supplied with a sufficient quantity of water for the thorough and adequate irrigation of said places without being charged with any costs or expenses for maintenance, operation, improvements or betterments of and to the system; and this was stated to be agreed to because the waters were originally impounded and appropriated for that purpose. Laras agreed to furnish water out of the reservoir and through the irrigation works for such complete and full irrigation of said two ranches each and every year and without imposing any charge or costs for said water services. It was recited that Laras was purchasing a large tract of land, including the said reservoir and irrigation system, and it was agreed that from the system he was so purchasing no water could be furnished to any lands for irrigation or stock watering purposes which lay south of a road referred to as the Brockman Road and this was stated to be for the reason that the reservoir and system were barely sufficient to furnish adequate waters for the lands north of said road, which lands in the past had been irrigated with waters from said source, it being further stated that the history of water service from said system showed plainly that no additional lands, and particularly lands south of said road, ought to be

included as entitled to receive water. As to lands lying north of said road, it was agreed that no lands could be supplied with water, except the lands being sold to Laras by Williams and Plasil, "save and except that the said Chris Laras shall have water for the purpose of irrigating a tract of land purchased by Chris Laras from Stanford University, approximately one section in area, and a further tract of land comprising approximately 960 acres, which the said Chris Laras is negotiating to purchase through the Sacramento Indian Agency." (The proposed purchase from the Indian Agency was not consummated.) It appears that, with the exception of the three small ranches, the parties to this contract among them owned all the lands that for a very long time had received water from the irrigation system and the land for which Laras in this litigation claimed a water right, and that these parties owned the entire water system, together with all water rights to be serviced from the same. This contract, therefore, was one whereby all parties interested in the general subject matter agreed among themselves as to what water service should be rendered from the water supply which is the subject of this action. Laras was then the equitable owner of said section 16, which, at least upon the public records, was shown to have a right of water service from the Madeline system, and he agreed that such right to receive water from the system was to be and was by the agreement subordinated to the overriding rights of the 1,280 acres of land belonging to Williams and Plasil, and to the overriding rights of the three small landowners, to receive water therefrom. At the same time, the parties to said agreement executed a deed of said Madeline system, wherein the system, with all its appurtenances and its appropriative rights to water, were conveyed to Laras. It appears that Laras thereafter operated the system, although he did not use any water on said section 16, until during December of 1944, at which time further arrangements were made between him, on the one hand, and Williams and Plasil, on the other. Difficulties and disputes had been encountered and had arisen and Williams and Plasil undertook to repurchase the system from Laras. The result of negotiations between them was that another agreement and accompanying deed were executed. By the agreement Laras agreed to sell to Williams and Plasil all water rights, reservoirs, storage rights, water structures, diversion works, easements and canals, appurtenant to certain described real property and any and all of his interest in and to the waters of Tule Lake reservoir. The agreement was accompanied by a deed made pursuant thereto, which described the real property involved and declared that there was thereby conveyed "all water rights, and waters, reservoirs, and reservoir rights, water structures and diversion works, easements, aqueducts and canals appurtenant to said lands, and any and all of the first party's interests in and to the Madeline or Tule Lake Water System." But this was not all, for the deed also conveyed "all and every right of diversion, allotment and appropriation appertaining to said Tule Lake or Madeline Water System." Thereafter it appears that Williams and Plasil resumed the operation of the Madeline irrigation system and on June 9, 1945, they entered into a contract with the State of California. This contract recited that Williams and Plasil were selling and transferring to the state approximately 5,000 acres of land situated in Madeline Plains in Lassen County, including the Madeline system, excepting therefrom Bayley reservoir, but permitting the use of that reservoir as a part of the irrigation system. By that agreement they reserved to themselves 3,190 acre feet of water annually from the waters of Tule Lake reservoir for irrigation and stock watering needs on their lands approximating 3,000 acres in extent and on the lands of said three small ranchers whose rights had likewise been protected in the contract with Laras. It was agreed that this 3,190 acre feet of water so reserved to Williams, Plasil and the three small owners should be measured under certain requirements set up in the agreement, that the state should maintain Tule Lake and Bayley reservoirs in a satisfactory manner, make all betterments, improvements, additions and new construction at its own expense and should manage and

operate the system, being obligated to deliver such reservoired water as should flow into Bayley reservoir in any year. Hold-back requirements for the purpose of providing water in a future year were provided for and Williams and Plasil agreed that the state could deliver the reservoired water to them and that they would undertake to service the three small farms and comply with their rights to water. It appears that the purpose of the state in purchasing the system and the right to obtain water therefrom was to carry on a program for the preservation, protection and propagation of migrant water fowl and that from the time the state's contract was entered into between it and Williams and Plasil the parties thereto, including the three small ranch owners and the state, used and consumed all of the waters that had been collected in the reservoirs and so became available for distribution through the irrigation system.

Up to 1946 said section 16 had been uncultivated land covered with sagebrush and other wild growth. During that year Laras commenced to clear the land and in 1948 planted it to grain. However it was not until 1951 that Laras tendered to the parties owning and using the irrigation system the sum of $600 and demanded, pursuant to the terms of the 1912 contract, the delivery of 600 acre feet of water to that land. His request for water was refused and he proceeded to divert water from one of the canals of the system, with the result that Williams and Plasil brought this action to enjoin such diversion. The state intervened, setting up its rights in the premises, and Laras answered and cross-complained. The plaintiffs joined Kenneth Wizner and Albert Herringshaw as defendants with Laras. These men had been tenants of Laras during the year the demand for water service was made and they and Laras cross-complained in the action, Laras setting up his alleged rights to water service for said section 16; Wizner and Herringshaw cross-complained by the assertion of the same rights, with allegations that depending upon those rights of Laras they had planted a grain crop upon the lands in said section 16 which had been lost by reason of the refusal of water service to said lands.

The trial court found that by virtue of the contract and the accompanying deed by which Laras sold the irrigation system to Williams and Plasil he had, as owner of section 16, released and relinquished whatever rights existed for the service of water to said section, whether those rights be considered as arising under the 1912 water rights' contract or under the contract of January, 1942, between himself and Williams and Plasil. The court further found that, as to Williams, Plasil and the State of California, whatever rights existed for the service of water to said section 16 had been extinguished by the adverse user of all of the waters deliverable through said system, or arising by virtue of the appropriative rights appertaining thereto. The court denied all relief to Laras and to his tenants, and from this judgment all three have appealed. The State of California has filed a cross appeal, contending that under its contractual arrangements with Williams and Plasil any water that had to be supplied to said section 16, if Laras finally prevailed, would have to be furnished by Williams and Plasil out of their reserved 3,190 acre feet of water and that the court should have made findings which would have protected the state in that regard.

[1] There is much discussion in the briefs concerning appropriative water rights, the nature thereof, the various relationships which arise in respect thereto, and concerning other matters akin to that general subject. We think it unnecessary to follow the parties in their contentions resting upon such matters. We hold that the decision of the trial court, in so far as it rests upon that court's construction of the contractual relations between the parties hereto, was and is correct and supports the judgment rendered. We have already taken pains to recite with sufficient particularity the pertinent provisions of the contractual undertakings as shown in the executed instruments and it is unnecessary to repeat them. Suffice it to say that, so far as the parties to this action are concerned, the contract of January, 1942 and the accompanying deed between Laras, then the

owner of said section 16, and Williams and Plasil, then the owners of all the other lands involved in this action and of the irrigation system, determined the rights of the parties and of their lands to service of water from the Madeline system. Whatever the preceding rights were, it was there agreed that the lands of Williams and Plasil should have, as against section 16 and the lands then being conveyed to Laras, preference and priority in the use of the waters from the system to the full extent to which those lands needed water for irrigation and stock watering purposes. It was further then settled that as between Laras on the one hand and Williams and Plasil on the other, Laras, with respect to water used upon said section 16 and other lands then being conveyed to him, was to be subrogated to the three small ranch owners mentioned in the documents, and it was further settled that, after these demands had been met, Laras could use irrigation waters from the system upon said section 16 and other lands then being conveyed to him and that his rights to water were thus limited. We hold, therefore, that Laras was in this action estopped by contract and deed to demand or enforce a right to any use of water from the Madeline system otherwise than as so fixed.

These limited rights, however, to water service on section 16 Laras did have after the execution of the contract and deed of January, 1942.

[2] We now proceed to consider the trial court's conclusions as to the effect of the contract and deed of December, 1944, whereby and whereunder Laras, on the one hand, and Williams and Plasil on the other, again negotiated and contracted concerning the same general subject matter dealt with by them in January of 1942. Once again, so far as any rights litigated in this action be concerned, we have dealings with each other, parties competent to contract for and to fix the rights to the use of water from the Madeline system. We see Laras conveying back to Williams and Plasil all of the lands, water rights, canals, ditches, etc., making up the Madeline system, and both the contract and the deed between the parties contained language suitable, and as the trial court found, intended by the parties, to effectuate a complete release and relinquishment by Laras of any right to receive for use on section 16 any water from said system. Said the contract: "The said deed shall also convey all water rights of Seller [Laras], reservoirs, storage rights, water structures, diversion works, easements and canals appurtenant to said lands, and *any and all of Seller's interest in and to the waters of said Tule Lake Reservoir.*" (Italics ours.) Said the deed, after describing the land conveyed: "Also all water rights, and waters, reservoirs, and reservoir rights, water structures and diversion works, easements, aqueducts and canals appurtenant to said lands, and any and all of the first party's interests in and to the Madeline or Tule Lake Water System, *together with all and every right of diversion, allotment and appropriation appertaining to said Tule Lake or Madeline Water System.*" (Italics ours.) It is to be noted that the contract and deed did not specifically describe the water rights and rights of diversion, etc., agreed to be conveyed, and conveyed, by Laras to Williams and Plasil, but used general and all-inclusive language to describe the same. Since Laras contended in the trial court that his rights as owner of section 16 to receive water from the system for use on that land was not included within the general language of the contract and deed, it was proper for the trial court to take testimony concerning the negotiations of the parties leading up to the execution of those documents. This the trial court did and Williams, who conducted the negotiations for himself and Plasil, testified to a conversation with Laras at a meeting attended by the interested parties and their respective counsel, in which he announced to Laras that he was buying back the Madeline system and the lands particularly described in the contract and deed because of the trouble he had been having with Laras concerning his operation of the system and his service of water therefrom to the lands of Williams, Plasil and the three small landowners. It was testified that Williams stated to Laras: "I want this transaction to

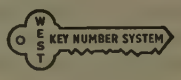
take care of everything, all the rights of any that you claim in the Tule Lake reservoir, and its ditches. * * * During the past two years, you were supposed to have maintained those ditches and those waters under the agreement that I had with you; that you failed to do it. The only reason I had any water at my place was because I went to the headgates and repaired the outlet. * * * I want you out of the picture entirely, I don't want to have anymore trouble with you, we have trouble with this litigation, I have been involved and I want to be out of the picture. I have got to take care to Mr. Ponty and Mr. Bollenbacher. Chris, I want to get you out of this picture; you and I haven't gotten along and I want to take you out entirely. I can't depend on your taking care of the water, and you are making some arrangements of buying some of these other lands, the Stanford property and the Indian lands, and I want to know that you haven't any claim or right and when I pay you this money that you have nothing further whatever to do with these properties." There was testimony that a witness had a conversation with Laras, in which he stated to Laras: "I note that you have cleared the ground here on the Stanford property, you are doing a pretty good job of it. What are you going to do with the land after you haven't any water to go on it? You gave up your rights in that matter to Mr. Williams." To this Laras replied: "Yes, I know, but I can drill a water well. This canal has been running by on the upper side of this property for years and I know there is water down here, and I can drill a well and develop my water that way." There was other testimony supportive of the trial court's construction of the contract and the deed, but enough has been said to show that these parties intended by the contract and deed to finally and forever foreclose any claim that there existed any right for the benefit of said section 16 to receive any water from the Madeline irrigation system.

As we have stated, the trial court further found that Laras had lost through the adverse use of all the water of the system by the respondents and their predecessors in interest any right to demand and receive water for use on said section 16. We think it unnecessary to discuss the contentions of the parties pro and con upon this subject since we have held that Laras, while owner of said section 16, disposed of the right he here claims.

For the same reason we think it unnecessary to discuss the state's contentions that it was entitled to certain findings as to who has the burden of furnishing water to section 16 if eventually it should be determined in this case that such right existed. As we view it, the contingency will not arise.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.



131 Cal.App.2d 141

John CARAS and Olympia Caras, Plaintiffs and Appellants,

v.

James E. PARKER, Leon Goldberg and Fannie Goldberg, Defendants,

Leon Goldberg and Fannie Goldberg, Respondents.

Civ. 20623.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1955.

Action by purchasers against vendor and vendor's grantees for specific performance of contract for sale of realty. The Superior Court, Los Angeles County, H. Burton Noble, J., gave judgment for grantees of vendor. Purchasers appealed. The District Court of Appeals, Drapeau, J., held that purchaser's complaint alleging that vendor's grantees had full knowledge of contract for sale of realty, and that they conspired with vendor to breach contract,

was sufficient to state a cause of action against all defendants.

Judgment reversed.

1. Specific Performance ⇐114(1)

Purchasers' complaint alleging that vendor's grantees had full knowledge of contract for sale of realty, and yet conspired with vendor to breach contract, was sufficient to state a cause of action against vendor and his grantees for specific performance. West's Ann.Civ.Code, § 3395.

2. Pleading ⇐345(1)

Only when there is an entire absence of some essential allegation in pleadings, may motion for judgment on pleadings be granted.

3. Specific Performance ⇐22

Where vendor's grantee has actual or constructive notice of the prior rights of the purchaser, specific performance against such grantee is authorized, for such a grantee is not a purchaser in good faith. West's Ann.Civ.Code, § 3395.

Tanner & Thornton, Los Angeles, for appellants.

Low & Stone, Beverly Hills, for respondents.

DRAPEAU, Justice.

Plaintiffs, husband and wife, contracted with defendant James E. Parker to purchase real property. These three entered into an escrow agreement to carry the contract into effect.

Then defendants Leon and Fannie Goldberg offered plaintiffs $1,000 for their bargain. When this offer was refused, the Goldbergs prevailed upon defendant Parker to breach his contract and convey the property to them.

In their first amended complaint plaintiffs allege that Goldberg's purchase from Parker was with full knowledge of plaintiffs' contract, and that the Goldbergs conspired with Parker to breach the contract and convey the property to them instead of to plaintiffs.

Motion for judgment on the pleadings was denied when the case was called for trial on the merits. Then, before plaintiffs rested their case in chief, apparently the court reconsidered and granted the motion.

Plaintiffs appeal from the judgment which followed, against them and for the Goldbergs. The case against Parker went back on calendar.

[1] The amended complaint states a cause of action against all of the defendants. If the facts alleged can be proved, plaintiffs are entitled to specific performance of their contract as against them all.

[2] It is only when there is an entire absence of some essential allegation in pleadings that a motion for judgment thereon may be granted. Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 157 P.2d 1; Stockton Morris Plan Co. v. Mariposa County, 99 Cal.App.2d 210, 221 P.2d 232; and see 40 C.L.R. 192.

[3] Where a vendor's grantee has actual or constructive notice of the prior rights of a purchaser, specific performance against such grantee is authorized under Section 3395 of the Civil Code. Such a grantee is not a purchaser in good faith. McLane v. Van Eaton, 60 Cal.App.2d 612, 141 P.2d 783. And for an early all-fours case see Hildreth v. Shelton, 46 Cal. 383.

The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

130 Cal.App.2d Supp. 901

SHULZMER WATCH & JEWELRY CO., etc., Plaintiff and Appellant,

v.

Pierre CORTAT et al., Defendants and Respondents.

C. A. 8578.

Appellate Department, Superior Court, Los Angeles County, California.

Proceeding on motion for change of venue in action on a breach of contract. The Municipal Court of Los Angeles Judicial District, Walter C. Allen, J., ordered change of venue and plaintiff appealed. The Appellate Department of Superior Court, County of Los Angeles, Bishop, J., held that where Municipal Court of Los Angeles Judicial District had jurisdiction of subject matter, and where contract had been entered into in Los Angeles County, Municipal Court of Los Angeles Judicial District was a proper court, and therefore, trial court erred in transferring the case.

Order reversed.

1. Courts ⇐472(1)

In Code of Civil Procedure there are instances in which there are several proper courts for trial of action, and no one of them may be properly characterized as "the" proper court. West's Ann.Code Civ. Proc. § 392 et seq.

2. Venue ⇐46

Authority to transfer case is given only if it appears that action for proceeding was not commenced in proper court. West's Ann.Code Civ.Proc. §§ 395, 396b, 397.

3. Courts ⇐189(3)

Where, in action on contract, subject matter was within jurisdiction of municipal court, and where contract having been entered into in Los Angeles County, plaintiff was entitled to bring his action in that county, Municipal Court of Los Angeles Judicial District was proper court and it was error to order change of venue. West's Ann.Code Civ.Proc. §§ 395, 396b, 397.

Benjamin D. Brown, Los Angeles, for appellant.

Ray D. Johnson, Santa Monica, for respondents.

BISHOP, Justice.

We have reached these conclusions: The Municipal Court of the Los Angeles Judicial District was a proper court for the trial of this action, in which recovery of over $1,000 was sought, and as a consequence it was error to transfer the case from that court to the Oceanside Judicial District.

[1] It is unfortunate, but a fact, that the legislature at several places in the title of the Code of Civil Procedure dealing with the place of trial of civil actions, Title IV, Part 2, has used the definite article "the" where the indefinite article "a" should have been used. Beyond all doubt, in many instances there are several proper courts for the trial of an action, and no one of them may properly be characterized as *the* proper court. This is true of this case. These appear to be the facts: (1) the defendants resided in Vista, San Diego County, when the action was filed; (2) the contract sued upon was entered into in Los Angeles city, County of Los Angeles; (3) the contract, according to the complaint's first cause of action, expressly provided that it was to be performed in Oceanside, San Diego County; (4) the second cause of action does not allege that the contract contains any express place of performance, but it does appear that the plaintiff is a corporation, with its principal place of business in Los Angeles County. Looking to these facts we find it said that San Diego County is the proper county for the trial of the action, because the defendants resided there at the commencement of the action. First sentence, sec. 395, C.C.P. San Diego is, again, a proper county, because the contract was to be performed there. Third sentence of sec. 395. But Los Angeles County having been the one "in which the contract in fact was entered into" is also a proper county. Third sentence, sec. 395.

So far we have both Los Angeles and San Diego Counties established as proper counties. Subdivision (2) of section 395, C.C.P. declares that "The proper court for the

trial of any such action in the county hereinabove designated as the proper county, shall be determined as follows." It then identifies, as a proper court, that of the judicial district in which a defendant resides, or "in the cases hereinabove mentioned," that of the judicial district in which the obligation was contracted to be performed. The court of the judicial district in which Vista lies, if a municipal court, is, therefore, a proper court, as is the Municipal Court of Oceanside Judicial District. No defendant resides in Los Angeles County, and, restricting our view to the first cause of action, the contract was to be performed elsewhere, so no particular court in that county is identifiable as a proper court. But, as we have seen, Los Angeles County is a proper county. The consequence is that the last words of section 395 become applicable: "otherwise any court in such county, having jurisdiction of the subject matter of the action, is a proper court for the trial thereof." The Municipal Court of the Los Angeles Judicial District emerges, therefore, as one of the proper courts for the trial of this action.

[2, 3] Two sections of the Code of Civil Procedure advise when cases may be transferred from one court to another. Of the four "cases" authorized by section 397 the first only interests us; the place of trial may be changed "1. When the court designated in the complaint is not the proper court." Section 396b covers the matter in greater detail. Its provisions, however, apply only "if an action or proceeding is commenced in a court having jurisdiction of the subject-matter thereof, other than the court designated as the proper court for the trial thereof, under the provisions of this title" and the authority to transfer is given only "if it appears that the action or proceeding was not commenced in the proper court." See Turner v. Simpson, 1949, 91 Cal.App.2d 590, 591, 205 P.2d 423, and cases cited. As it appears that the trial court had jurisdiction of the subject matter and was a proper court for the trial of the action, the motion to transfer should not have been granted.

The order appealed from is reversed. The appeal from the non-existent judgment is dismissed.

SHAW, P. J., and PATROSSO, J., concur.



130 Cal.App.2d Supp. 903

ART FROST OF GLENDALE, etc.,
Plaintiff and Respondent,
v.
Burton HOOPER, Defendant and Appellant.
C. A. 8423.

Appellate Department. Superior Court, Los Angeles County, California.
Feb. 7, 1955.

Proceeding on motion by defendant for change of venue and on counter motion by plaintiff to retain action for convenience of witnesses. The Municipal Court of Glendale Judicial District, Charles R. Dyer, J., denied defendant's motion and granted plaintiff's motion to retain action. Defendant appealed. The Appellate Department of Superior Court, County of Los Angeles, held that where action for money had and received for use and benefit of plaintiff had been founded on defendant's having cashed check to which plaintiff was entitled, but complaint did not state where check was cashed, upon which event alleged cause of action arose, complaint was insufficient to support contention that obligation was incurred at plaintiff's place of business.

Orders reversed with directions.

1. Venue ⇐68

Where affidavit in support of counter motion to retain action for convenience of witnesses gave neither names nor addresses of witnesses, and made no pretense of stating what their testimony would be, affidavit was insufficient to support order retaining action.

2. Courts ⇐189(3)

Where subject matter of action was within jurisdiction of municipal court, municipal court of county in which defendant resided was a proper court for its trial. West's Ann.Code Civ.Proc. § 395, and (2).

3. Money Received ⇐1

In action for money had and received, wherein it was alleged that defendant had received and cashed check to which plaintiff was entitled, cause of action did not arise until defendant cashed check and obtained money.

4. Payment ⇐21

In absence of agreement that check is to constitute payment, it does not discharge obligation for which it is given.

5. Pleading ⇐45

Where action for money had and received had been founded upon defendant's having cashed check to which plaintiff was entitled, but complaint did not state where check was cashed and money received, upon which event alleged cause of action arose, plaintiff's complaint was insufficient to support contention that defendant's obligation had been incurred at plaintiff's place of business, as respects venue.

6. Venue ⇐68

In action for money had and received for benefit of plaintiff, wherein plaintiff contended place of performance of implied promise to pay was deemed to be at its principal place of business, mere recital of plaintiff's corporate name and business address in affidavit supporting counter-motion to retain venue in place other than defendant's residence was not sufficient to establish place of business as plaintiff's principal place of business.

7. Venue ⇐72

Law requires strict showing by plaintiff who seeks to have action tried in place other than defendant's residence and all ambiguities will be construed against pleader.

William A. Munnell, Los Angeles, for appellant.

Glenn Simpson, Los Angeles, for respondent.

PER CURIAM.

This is an appeal from an order denying defendant's motion for change of venue to the Municipal Court of the East Los Angeles Judicial District, wherein he resides, and from an order granting plaintiff's motion to retain the action, for convenience of witnesses, in the Glendale Judicial District, where it was filed. In a former opinion in this case, this court, in reversing the orders, pointed out that as in neither its complaint nor in its affidavit in opposition to the first motion did plaintiff give facts sufficient to establish that a judicial district other than that of defendant's residence was a proper one for the trial of the case under the provisions of section 395, Code of Civil Procedure, it followed that the Municipal Court of that Judicial District was the proper court for its trial. A rehearing was granted, and upon further consideration we are of the opinion that our original determination was correct.

[1] It is quite clear that the orders denying defendant's motion to transfer the case, and granting plaintiff's motion to retain it in the court where it was brought, may not be affirmed on the ground that such a course served the convenience of witnesses. The affidavit in support of the counter-motion to retain the action gave neither the names nor addresses of the witnesses, and made no pretense of stating what their testimony would be. Such an affidavit is insufficient to support the orders made. Juneau v. Juneau, 1941, 45 Cal. App.2d 14, 113 P.2d 463.

[2] There is no doubt that Los Angeles County is a proper county for the trial of this action, within the terms of section 395, Code of Civil Procedure, and that the subject matter of the action is within the jurisdiction of a municipal court. By virtue of the provisions of the second subdivision of section 395, the Municipal Court of the East Los Angeles Judicial District, wherein the defendant resides, is, without question, a proper court for its trial. The problem narrows down, therefore, to this ques-

tion: does the court in which the action was brought, the Municipal Court of the Glendale Judicial District, appear to be a proper court? If it is, the order denying the motion to transfer should be affirmed. Schulzmer Watch & Jewelry Co. v. Cortat, Cal.Super., 280 P.2d 228.

[3–5] Plaintiff first argues that an obligation is to be deemed performable at the place wherein such obligation was incurred. Thus, it is contended, as the instant obligation was incurred in Glendale, it should be considered that such location is the place of performance, and the plaintiff may properly insist on the Glendale Judicial District as the place of trial. But the plaintiff is in error in its assumption that it has shown that the obligation sued on was in fact incurred in Glendale. The record does not disclose where it arose.

Plaintiff's complaint, as is the case of all common count pleadings, has brevity as its main virtue and its averment that the defendant became indebted to the plaintiff in Glendale, California, in the sum of $828.50 for money had and received for the use and benefit of the plaintiff, furnishes us with no fact to determine venue. The affidavit filed by the plaintiff does give us some few facts to work with. It is there stated that an insurance company issued a check for $828.50 payable to the plaintiff, the defendant and another, for the purpose of covering the repairs made by the plaintiff to an automobile; that the check was delivered to the defendant by the Insurance Company for the purpose of having him endorse it and deliver it to the plaintiff in payment; that the defendant endorsed it and presented it to the plaintiff in Glendale, but through someone's mistake, the check was then returned to the defendant who cashed it, at some unnamed place, and has not paid the money over to the plaintiff.

Plaintiff's theory is that upon receipt of the check with its endorsement, the defendant had received $828.50 for its use and benefit. We have concluded that this was not so, but that plaintiff's cause of action did not arise until the defendant cashed the check and obtained the money. Had the defendant not cashed the check, it could not be said that he had received any money belonging to the plaintiff. See section 4, Money Received, 17 Cal.Jur. 606–607. In the absence of an agreement that a check is to constitute payment, it does not discharge the obligation for which it is given. American Marine Paint Co. v. Tooley, 1942, 53 Cal.App.2d 530, 538, 127 P.2d 960, 964. Until the check involved here was cashed, therefore, the obligation of the drawer remained in existence and any obligation to the plaintiff that the defendant may have incurred, in the transaction, did not arise until he cashed the check and had the money in hand. We do not know the judicial district in which that event took place.

[6, 7] Plaintiff's second point is that the place of performance of the implied promise to pay is to be deemed to be at its principal place of business. In view of the strict showing required by the law of a plaintiff who seeks to have an action tried in a place other than the defendant's residence and the fact that in this situation all ambiguities will be construed against the pleader, Rench v. Harris, 1946, 76 Cal.App. 2d 113, 115–116, 172 P.2d 576, neither the mere recital of the defendant's corporate name nor the Glendale address given as a place of business is sufficient to establish Glendale as the defendant's principal place of business.

No good reason appearing why the defendant should not have this action transferred to the Municipal Court of the Judicial District in which he resided, at the commencement of the action, the orders appealed from are reversed, with directions to the trial court to grant defendant's motion.

131 Cal.App.2d Supp. 866

MUNGER & MUNGER, etc., Plaintiff and Appellant,

v.

Elizabeth McBRATNEY and William Gerald McBratney, as Executors, etc., Defendants and Respondents.

C. A. 8543.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 24, 1955.

Suit to foreclose mechanic's lien for work done by plaintiff under plumbing and heating subcontract. The Municipal Court of the Santa Anita Judicial District, John A. H. Sturgeon, J., entered judgment for defendants and plaintiff appealed. The Appellate Department of the Superior Court, Bishop, Acting P. J., held that even though owner of premises on which plaintiff as subcontractor had installed plumbing and heating equipment, filed notice of completion on December 7, in which date of completion was given as November 28, which was date building inspector of city found job to have been completed, where subcontractor's crew put in 84 hours of work after December 2, 20 hours being put in on December 8, owner was not authorized to file notice of completion on December 2, and subcontractor's claim of lien, filed January 8, was not filed too late.

Judgment reversed.

1. Stipulations ⇐18(7)

Finding of fact may not be made contrary to stipulation as to that fact.

2. Stipulations ⇐18(7)

Where, in suit to foreclose mechanic's lien, trial court made finding of fact contrary to written stipulation as to that fact, such finding failed to furnish support for act of owner of repaired premises in filing notice of completion prior to time when subcontractor actually completed job. West's Ann.Code Civ.Proc. § 1193.1.

3. Mechanics' Liens ⇐132(7)

Even though owner of premises on which plaintiff as subcontractor had installed plumbing and heating equipment, filed notice of completion on December 7, in which date of completion was given as November 28, which was date building inspector of city found job to have been completed, where subcontractor's crew put in 84 hours of work after December 2, 20 hours being put in on December 8, owner was not authorized to file notice of completion on December 2, and subcontractor's claim of lien, filed January 8, was not filed too late. West's Ann.Code Civ.Proc. § 1193.1(a), (c), (d) (1–3), (f); West's Ann. Const. art. 20, § 15.

Hahn & Hahn, Pasadena, for appellant.

Draper & Porter, Monrovia, and Bailey & Poe, Los Angeles, for respondents.

BISHOP, Acting Presiding Judge.

The plaintiff unsuccessfully sought to foreclose a mechanic's lien for work done by it under a plumbing and heating subcontract, recovery being denied on the theory that the plaintiff had filed its claim of lien too late. We have concluded that the theory was ill founded; the judgment should be reversed.

After repeated amendments, section 1187, of the Code of Civil Procedure, has become section 1193.1. Certain of its provisions are material to our problem. A subcontractor is authorized to file a claim of lien "after he has ceased to perform labor or furnish material, or both * * * and before the expiration of the periods of" thirty days after the owner files a notice of completion. "The owner shall within 10 days after the completion of the work of improvement file for record a notice of completion." "In all cases * * * any of the following shall be deemed equivalent to a completion: (1) the occupation or use of a work of improvement by the owner * * * accompanied by cessation from labor thereon; (2) the acceptance by the owner * * * of the work of improvement; or (3) after the commencement of a work of improvement, a cessation of labor thereon for a continuous period of 60 days * * *."

The provisions just quoted are to be read in the light of section 15 of Article XX of our state constitution, which declares that materialmen and artisans "shall have a lien

upon the property upon which they have bestowed labor or furnished material * * * and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens." So read, it seems rather obvious that the three conditions enumerated differ one from the other and each differs from "completion" but that the existence of any one of the conditions, or of completion itself, authorizes the owner to file a notice of completion. Certainly an owner could not limit the time within which liens could be filed by filing a notice of completion at an earlier stage in the making of an improvement than that specified by the section. Subdivision (f) of section 1193.1 contains the proviso: "that the recital of an erroneous date of completion shall not affect the validity of the notice if the true date of completion is within 10 days preceding the date of filing for record such notice." It can hardly be doubted that a notice of completion recorded before the work is completed does have its validity affected.

There is little, if any dispute about the facts in this case. The general contract involved was to build an addition to a store building owned by the person whose estate the defendants represent. The store owner set November 24 as the day of the gala opening of her enlarged building, and all concerned bent their efforts to enable her to reach her goal. A grill over an opening that plaintiff had contracted to provide was unavailable, so a temporary cover was installed. The heating ducts leading from the old building to the new were not covered with insulating material, as required by plaintiff's contract, nor were the air filters installed, but these ducts were out of sight in the attic, and the opening was not delayed because of the deficiencies referred to. Heat was needed, and it was supplied through plaintiff's system. Following the gala opening, a few days were spent by the general contractor in getting minor details ironed out, then, on December 2, the owner filed a notice of completion, in which the date of completion was given as November 28, which was the date the building inspector of the city gave for "Job Completed." The plaintiff completed the work required by its subcontract and on January 8 filed its claim of lien. This was too late, if the notice of completion started the time running for the filing of claims.

[1, 2] Findings of Fact were filed in this case. In them the trial court stated its conclusion "that said work of improvement * * * was completed on the 28th day of November, 1952 * * * and that any work done or materials furnished by plaintiff under said contract had been completed more than thirty days prior to the filing of plaintiff's alleged claim of lien." The latter portion of this finding is entirely lacking in evidentiary support, and the whole finding is in direct conflict with a written stipulation of facts filed in the case and referred to in the judgment. According to this stipulation, on November 28 and December 2, "certain of the ducts in connection with the heating and ventilating system had not been covered and insulated as required by the plans and specifications" and plaintiff's crew put in 84 hours of work after December 2, 20 hours being put in on December 8. The work that was done, between November 28 and December 8, cannot be considered unsubstantial, see Hammond Lumber Co. v. Barth Inv. Co., 1927, 202 Cal. 601, 605, 262 P. 29, 30; Hammond Lumber Co. v. Barth Inv. Co., 1927, 202 Cal. 606, 610, 262 P. 31, 33–34; Nevada County Lumber Co. v. Janiss, 1938, 25 Cal.App.2d 579, 583, 78 P.2d 200, 202. We have, then, a finding contrary to a written stipulation as to the fact found. But a finding of fact may not be made contrary to a stipulation as to the fact, Capital Nat. Bank v. Smith, 1944, 62 Cal.App.2d 328, 343, 144 P.2d 665, 673, and cases cited. The finding made, therefore, fails to furnish support for the owner's act in filing a notice of completion.

If it be argued, as the defendants do, that the owner was authorized to file her notice of completion because she had accepted the work of improvement, two things are to be noted. First, there is no finding that there had been an acceptance. This as we have seen, is a condition given the effect in law of completion, but differing in fact from it. Moreover, the evidence would not have supported a finding that the owner "accepted the work of improvement" as those words

must be understood in the light of what was said in the two passages we are about to quote, and as required, if section 1193.1 is not to defeat, but to provide "for the speedy and efficient enforcement" of the lien given by section 15, Article XX of the Constitution.

In Hammond Lumber Co. v. Barth Inv. Corp., supra, 202 Cal. 606, 611–612, 262 P. 31, 33, the question under consideration was When did the time for filing claims begin to run? Section 1187, Code of Civil Procedure, as it then read, authorized a subcontractor to file a claim of lien at any time after he had ceased to perform "and until thirty days after the completion of such work of improvement." It was also provided that "the acceptance by the owner, or said agent, of said building, improvement or structure" "shall be deemed equivalent to a completion for all the purposes of this chapter." The trial court had found that the owners on June 8 had "notified said contractors that they accepted said building." The Supreme Court there observed: "No finding is made that this acceptance was in anywise communicated to the materialman, or that it had any knowledge of said acceptance, or that the building was accepted as *completed*. Of course a secret acceptance by the owner from the contractor of an uncompleted building could not defeat the lien claimant. If in cases where no notice of completion is filed work should be suspended for a time and later be resumed in execution of the original contract, as in the instant case, the materialman would be entitled to ninety days after the work was finally finished in which to file his lien. But the question of 'acceptance' of the building cannot be regarded as a finding that the building was actually completed on June 8 for the reason that the contractors, as shown by the findings, did in fact *thereafter* complete said building by performing the work and furnishing the materials necessary 'to correct and complete the work in accord with the plans and specifications.' Therefore, from the findings themselves, the building could not have been accepted as *completed* on June 8."

A similar thought is expressed in Orlandi v. Gray, 1899, 125 Cal. 372, 373–374, 58 P. 15, where the owner had moved into the building in October, but the trial court had determined that the work was completed in the following January: "It is now claimed by this appellant that the completion of the building dates from that time, by reason of her occupation. This contention is based upon the following provision of section 1187 of the Code of Civil Procedure: 'And in cases of contracts the occupation or use of a building, improvement or structure by the owner or his representative, or the acceptance by such owner or his agent of said building, improvement or structure, shall be deemed conclusive evidence of completion.'

"The owner now contends that, under this provision of the Code, she and her tenants having taken actual possession of the building, there resulted a 'statutory completion' at that time, and the time for filing liens began to run at once. Under the peculiar facts of this case, such a construction of the statute would result in an absurdity; for here one of these lien claimants substantially did all his work after this occupation by the owner took place, and therefore, by such a construction, his time to file a lien began to run before he had performed any labor upon the building. The framers of the statute never intended any such results to follow. Neither did they intend that such a subcontractor should be cut off absolutely from the right to file a lien upon the building."

[3] We have concluded, therefore, that under the facts as they appear, the owner was not authorized to file a notice of completion, as she did, on December 2. No other notice of completion was ever filed, and the plaintiff had "90 days after the completion of such work of improvement within which to file [his] claims of lien." Subd. (c), section 1193.1, Code of Civil Procedure. As the work of improvement was actually completed December 8, plaintiff's claim of lien, filed January 8, was not filed too late.

The judgment is reversed.

PATROSSO and SWAIN, JJ., concur.

130 Cal.App.2d Supp. 868

L. L. STEINER, Plaintiff and Respondent,

v.

Richard C. JARRETT, also known as Dick Jarrett, and Claude C. Jarrett, et al., Defendants and Appellants.

Superior Court No. 191296.

Municipal Court No. 4341.

Appellate Department, Superior Court, San Diego County, California.

Nov. 22, 1954.

Action by buyer's assignee against seller for breach of warranty in sale of bus. The Municipal Court, San Diego Judicial District, County of San Diego, Philip Smith, J., rendered judgment for plaintiff, and defendants appealed. The Superior Court, Burch, J., held that where seller of bus promised to install new motor block if buyer would pay $100 more and buyer accepted the offer, there was an express warranty that new block would be installed, and seller's installation of a used block was a breach.

Judgment affirmed.

1. Sales ⇐262

Where natural tendency of a promise for consideration is to induce buyer to purchase, and buyer purchases goods relying thereon, there is an express warranty. West's Ann.Civ.Code, § 1732.

2. Sales ⇐261(3)

No particular words are necessary to create a warranty. West's Ann.Civ.Code, § 1732.

3. Sales ⇐260, 284(1)

Where seller of bus promised to install new motor block if buyer would pay $100 more and buyer accepted the offer, there was an express warranty that new block would be installed, and seller's installation of a used block was a breach. West's Ann. Civ.Code, § 1732.

4. Sales ⇐288(2)

For breach of warranty, buyer may hold seller for damages notwithstanding acceptance of goods, provided that he gives notice of breach within a reasonable time. West's Ann.Civ.Code, § 1769.

5. Sales ⇐285(2)

What constitutes the reasonable time within which a buyer must give seller notice of breach of warranty must be determined from particular circumstances in the individual case. West's Ann.Civ.Code, § 1769.

6. Sales ⇐285(2)

Where seller of bus had promised to install new block, but failed to do so, and buyer resold bus to third person with warranty that new block had been installed, and breach of warranty was discovered after resale, buyer's notice to seller of breach within thirty days after delivery was within a reasonable time so as to justify buyer's action for breach of warranty. West's Ann.Civ.Code, § 1769.

7. Sales ⇐442(6, 13)

In an action for breach of warranty of quality, purchaser may recover for money and time spent in reasonable effort to make goods conform to warranty, and where purchaser resells with a similar warranty, without knowledge that goods are unsuitable for purpose for which they were designed, he may recover amount for which he is liable to his sub-purchaser. West's Ann.Civ.Code, § 1769.

8. Sales ⇐442(13)

Where buyer bought bus under seller's warranty that a new block had been installed, and resold to third person under similar warranty, without knowledge that a used block had been installed, buyer could recover from seller the reasonable cost of installing new block. West's Ann.Civ.Code, § 1769.

9. Sales ⇐434, 437(3)

Allegations of fraudulent representation were unnecessary to action for breach of seller's warranty, and proof of these allegations was not required.

Harold P. Lasher, San Diego, for appellants.

Ruel Liggett, Roy M. Cleator and E. C. Davis, San Diego, for respondent.

BURCH, Judge.

The defendants appeal from a judgment in favor of plaintiff for $440 and costs. Plaintiff sues as an assignee to bring action or suit. The assignment was duly executed and received in evidence. The appeal is before us on a settled statement of facts and includes the exhibits received in evidence at the trial.

The settled statement shows these facts which tend to support the judgment. E. R. Walker, plaintiff's assignor for suit, purchased from defendants a secondhand passenger bus for $1,100 cash and transfer of a used Chevrolet automobile. During the negotiations leading up to the sale, the defendants wrote Walker a letter about the bus, from which we quote:

"We sent the Engine down for rebuilding but they sent it back and said it was not rebuildable as three of main bearing supports are cracked. They did say though that the engine could be fixed and rebuilt but they couldn't guarantee how long or how far it would run.

"We therefore feel that the bus should have a new short block, but as this would run about $100.00 more than rebuilding the old block. So if you'll pay the difference that is of what it will cost us over rebuilding the old block $100 then we will put in the new block and you can have the other block in the deal.

"Would appreciate hearing from you concerning the above as soon as possible so as the mechanic can get the engine back to gather as soon as possible.

"Thanking you for your attention to this matter.

"I remain.

"Yours Very Truly
/s/ Dick
R. C. Jarrett

"P.S. Will send you a resale card as soon as we get some more in?"

Walker communicated to defendants by telephone, accepting the offer, and paid the extra $100.

After the sale was consummated and the bus was delivered to Walker, he resold the same, representing to his purchaser that the bus had been equipped with a new short block. Upon being put into use by the new purchaser, the engine collapsed.

The new purchaser returned the bus to Walker who then discovered that the defendants had failed to put in a new block. Instead, they had put in an old one of 40,000 to 50,000 miles wear and tear, in need of reboring, new bearings and new rings. There were soft sleeved cylinder walls and the motor was patched up with babbitt, lead and tin; it was not a new short block. Walker had a new short block installed at a cost of $390, and spent $50 in taking down and reassembling the engine.

We think a judgment for $440 for breach of contract to install a new short block is warranted by the above proof.

Defendants make several contentions on appeal:

(1) That the judgment is not supported by the proof;

(2) That the pleadings do not raise the issue of breach of contract, and that the defendants were misled to their prejudice by certain allegations of fraud in the complaint;

(3) That Walker should have discovered the failure to install a new short block before accepting delivery;

(4) That the damages allowed were special and not general.

The first count of the complaint alleges, in keeping with the facts stated, that Walker bought the bus from defendants and paid therefor $1,500 and "* * * that for the sum of $100.00 additional, the Defendants would remove from the motor of the said bus or coach the old engine block therein and would substitute therefor a new block commonly known in the auto industry as a 'short block'." The letter from which we have quoted was attached as an exhibit and made a part of the complaint. "* * E. R. Walker, did accept the said proposal at San Diego, California, and did pay the $1500.00 plus the said $100.00 to the Defendants."

Walker resold the bus and represented to said purchaser that the "* * * bus had been repaired with a new * * * 'short block' * * * fully believing the same

to be true. * * * That * * * the said auto bus had not been repaired by placing a new * * * 'short block' in the motor * * * and the motor in the said auto bus went to pieces and became utterly unusable right after the said * * Walker * * * had sold and delivered the same to his said purchaser, * * * the amount of damages occasioned by the falling to pieces of the said motor * * * is in the sum of $738.15 in which amount the Plaintiff's Assignors herein were and are damaged * * *."

[1] Both the pleading and proof show a promise for a consideration to install a new short block. Under Section 1732 of the Civil Code this is an express warranty if the natural tendency of such promise is to induce the buyer to purchase and if the buyer purchases the goods relying thereon.

[2] "Under this section no particular words are necessary to create a warranty, and whether the word 'warrant' was used in the parties' dealings is immaterial, Chamberlain Co. v. Allis-Chalmers [Mfg.] Co., 51 Cal.App.2d 520, 522, 125 P.2d 113; El Zarape Tortilla Factory, Inc., v. Plant Food Corp., 90 Cal.App.2d 336, 345, 203 P.2d 13; and such was the rule established long before the adoption of the Uniform Sales Act. Cole v. Weber, 1924, 69 Cal.App. 394, 397, 231 P. 353." Stott v. Johnston, 36 Cal.2d 864, 869, 870, 229 P.2d 348, 351, 28 A.L.R.2d 580.

[3] The letter of the defendants quoted above offered to install a new short block for an additional $100. The record shows a clear and unequivocal acceptance of the offer and payment of the consideration. This evidences the promise of defendants and plaintiff's reliance upon the promise. See Williston on Sales, Rev.Ed., Vol. 1, Sec. 194, p. 498. We conclude that the defendants' attack upon the sufficiency of the evidence is without merit. Defendants breached their obligation to install a new short block. Had they not done so they would have fulfilled their contract.

[4] Defendants contend that the court adopted an incorrect rule of damages. For breach of warranty the buyer may hold the seller for damages notwithstanding acceptance of the goods, provided that he gives notice of such breach within a reasonable time. Section 1769, Civil Code.

[5] There can be no doubt here that the notice was sufficient in form and content and given within a reasonable time. By the particular circumstances of this case there was no opportunity for the plaintiff's assignor to discover the breach until there was occasion to tear down the engine. That occasion obviously would not arise until repairs were needed. As said in Whitfield v. Jessup, 31 Cal.2d 826, 831, 193 P.2d 1, 4:

> "* * * 'It may be taken as axiomatic that what constitutes a reasonable time must be determined from the particular circumstances in the individual case' * * *."

[6] As was here alleged and proved, the buyer sold to a third party with the warranty that a new short block had been installed. Within thirty days after delivery plaintiff's assignor gave notice to defendants of the breach. We cannot say as a matter of law that the notice was not within a reasonable time.

[7, 8] The court employed a proper rule of damages. As stated in Grupe v. Glick, 26 Cal.2d 680, 689, 160 P.2d 832, 838:

> "* * * it is generally held that, in an action against the seller for a breach of warranty of quality, the purchaser may recover damages for money and time spent in reasonable efforts to make the machine conform to the warranty under which it was sold" (citations) "and, in addition, where the purchaser resells the machine with a warranty similar to that made by his seller, without knowledge that the machine is unsuitable for the purpose for which it was designed, he may recover the amount for which he is liable to his subpurchaser * * *.
>
> "As it may be assumed that a buyer will spend time and money in reasonable efforts to make defective goods conform to their warranty, the amounts incurred or paid for that purpose should be considered as being within the contemplation of the parties at the

time of the original contract of sale and, because such damages proximately result from the breach of warranty and can be ascertained with reasonable certainty, they are allowable."

So, in the case at bar, the allowance for the reasonable cost of bringing the bus up to the promise are allowable.

[9] The complaint makes certain allegations of a fraudulent representation. Since the gist of the action was the breach of the promise of the seller, irrespective of any conscious deceit on his part, it probably was not necessary to allege that defendant knew his affirmation was false, and so the proof of those allegations were not necessary. See Williston on Sales, Rev.Ed., Vol. 1, Sec. 197 et seq. The allegations are consistent with the history of an action on the case for breach of warranty though not now required.

We find no error, and the judgment is therefore affirmed.

TURRENTINE, P. J., and GLEN, J., concur.



131 Cal.App.2d Supp. 847

Albina G. MAROT, Plaintiff and Respondent,

v.

CAPITAL BRUSH COMPANY, etc., Defendant and Appellant.

C. A. 8591.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 7, 1955.

Rehearing Denied Feb. 21, 1955.

Manufacturer's assignor brought action against wholesaler to recover purchase price of paint brushes sold by manufacturer to wholesaler, and wholesaler pleaded defense that brushes did not conform to samples and that there had been an accord and satisfaction. The Municipal Court of the Los Angeles Judicial District, Ida May Adams, J., entered judgment adverse to wholesaler, and wholesaler appealed. The Appellate Department of the Superior Court, Patrosso, J., held that Municipal Court erred in permitting manufacturer's assignor to introduce in evidence a letter written by assignor's representative to assignor stating that wholesaler's president had stated to assignor's representative that wholesaler's president could not locate the samples, though wholesaler's president on cross-examination had denied that he had made such statement, and that admission of such letter was reversible error, where Municipal Court, in announcing decision, made it unmistakably clear that the letter weighed heavily in the decision.

Judgment reversed.

1. Evidence ⇐540

In action by manufacturer's assignor against wholesaler to recover purchase price of paint brushes sold by manufacturer to wholesaler, wherein wholesaler pleaded defense that brushes did not conform to samples, wholesaler's president, who had been connected with wholesaler for some seven years, who had purchased some three or four million dollars worth of paint brushes, and who, through his sales force and surveys had kept informed and was familiar with demands of buyers of various types of paint brushes, was competent to testify with respect to retail trade demands, though he did not personally make retail sales of brushes.

2. Witnesses ⇐389

In action by manufacturer's assignor against wholesaler to recover purchase price of paint brushes sold by manufacturer to wholesaler, wherein wholesaler pleaded defense that brushes did not conform to samples, and wherein wholesaler's president denied on cross-examination that he had stated to assignor's representative that president could not locate samples, court erred in admitting in evidence a letter written by assignor's representative to assignor stating that wholesaler's president had stated to assignor's representative that samples could not be located.

3. Appeal and Error ⊂1054(1)

Where trial judge, in announcing her decision, made it unmistakably clear that improperly admitted evidence weighed heavily in her decision, improper admission of such evidence was prejudicial error.

4. Accord and Satisfaction ⊂27

Where buyer of paint brushes refused to pay for first shipment of brushes, on ground that they did not conform to samples, and when buyer received second shipment of brushes, it sent check to seller's assignor for sale price of second shipment less freight charges for first shipment, and check bore notation that freight charges for first shipment were deducted, and seller's assignor cashed check, cashing of check did not compel trial court to conclude, as a matter of law, that there was an accord and satisfaction with respect to demands of seller's assignor with respect to first shipment of brushes, and question of accord and satisfaction was a question of fact.

5. Accord and Satisfaction ⊂9

Where buyer of paint brushes refused to pay for first shipment of brushes, on ground that they did not conform to samples, and when buyer received second shipment of brushes, it sent check to seller's assignor for sale price of second shipment less freight charges for first shipment, and check bore notation that freight charges for first shipment were deducted, and seller's assignor cashed check, cashing of check by seller's assignor was an accord and satisfaction with respect to freight charges for first shipment.

Nessen & Becker, Los Angeles, for appellant.

Greenbaum, Baker & Ancel, Los Angeles, for respondent.

PATROSSO, Judge.

Defendant, a wholesale dealer or jobber of paint brushes, on September 26, 1952 placed an order with plaintiff's assignor, a manufacturer of paint brushes, with its place of business in Brooklyn, New York, for 200 "assortments" of brushes, in accordance with samples previously submitted by plaintiff to defendant, the brushes to bear defendant's label. An "assortment" is a box containing 6 dozen brushes of three different widths. The order was shipped in three installments: the first, for 57 assortments, being received by defendant November 14; the second, for 95 assortments, received November 21; and the third, for 73 assortments plus three odd lots, was received December 12. As the goods were received by defendant, they were placed upon its shelves, but no examination was made of the boxes to determine whether they conformed to sample, and in ordinary course some were shipped out on orders received from its customers. However, on or about December 17, after some customers to whom the brushes had been shipped had returned the same as unsatisfactory, the defendant first discovered, as it claims, that the brushes did not conform to sample. Thereupon, defendant addressed a communication to plaintiff, advising it of the fact that the brushes did not conform to sample. What further correspondence occurred between the parties does not appear, but in January, 1953 defendant shipped the goods back to plaintiff, which refused to accept the same, as a result of which they were returned to Los Angeles, and defendant advised plaintiff that it was not accepting the same but that they were being held subject to plaintiff's order.

Defendant refused to pay for the brushes returned, and plaintiff thereupon instituted this action, and in defense thereof defendant pleaded their nonconformity to the samples, and accord and satisfaction. From an adverse judgment, defendant appeals.

The evidence as to whether the brushes conform to samples was conflicting in this: defendant produced two brushes as being the samples submitted, and introduced testimony to the effect that the brushes received did not conform to such samples in various particulars. While plaintiff did not undertake to contradict this testimony, it adduced proof to the effect that the alleged samples produced by defendant were not the ones submitted by plaintiff. In view of this, we would be constrained to accept the trial court's implied finding adverse to

the defendant upon this issue were it not for the errors in rulings upon evidence now to be mentioned.

[1] Defendant's president in the course of his testimony, wherein he pointed out the various differences between the alleged samples and the brushes delivered, made mention of the difference in their appearance, stating that this was a matter of considerable importance because the brushes were of a type that was not used or purchased by professional painters but by laymen and principally housewives who were influenced in purchasing the same by the appearance of the brush. This testimony was stricken out by the trial judge upon the ground that it was hearsay for the asserted reason that, inasmuch as the defendant was a wholesaler and the witness (its president) did not personally sell to the ultimate consumer, he could not have any personal knowledge of the fact. The witness, however, had testified that he had been connected with the defendant for some seven years and had purchased some three or four million dollars of paint brushes; that through his sales force and surveys he was kept informed and was familiar with the demands of purchasers of the various types of paint brushes. In these circumstances, he was certainly competent to testify with respect to trade demands, and it was not necessary, as the trial judge assumed, that he personally have sold brushes to housewives and other ultimate users. And the testimony stricken was relevant and material to the principal issue in the case, namely, whether the brushes delivered conformed to samples.

[2, 3] As previously noted, the main controversy upon the trial was whether the brushes produced by defendant and stated to be the samples submitted by plaintiff were in fact such. In identifying the same as such samples, the witness for defendant stated that he had kept them in a cabinet in his office. Upon cross-examination, he was asked by counsel for plaintiff whether it was not a fact that after he had notified plaintiff that the brushes did not conform to samples he had stated to Mr. Glazer, plaintiff's Los Angeles representative, that he could not locate the samples in question, and in reply denied making such a statement. Counsel for plaintiff thereupon offered and, over objection of defendant, the trial court admitted in evidence a letter written by Mr. Glazer to the *plaintiff* wherein he stated that Mr. Lerner, the witness, had stated that he would prove to him (Glazer) that the brushes did not conform to samples *when he located the samples.* The letter was plainly hearsay as to the single fact of interest that it was offered to prove, that is, that the witness (Lerner) had made a statement indicating that he did not know where the samples could be located. We might not be inclined to regard the error as prejudicial were it not for the fact that the trial judge, in announcing her decision, made it unmistakably clear that the alleged "inconsistent statement" appearing in Mr. Glazer's letter weighed heavily in her announced conclusion that the brushes produced by defendant and represented as being the samples were not in fact such.

Defendant also complains of the trial court's ruling in admitting evidence, over its objection, as to an alleged custom that where brushes are manufactured for a distributor under his label, the buyer is required to accept any "over-run," i. e., a quantity in excess of that ordered. We do not undertake to consider the question because there is no evidence in the record that defendant rejected the goods because the quantity delivered was in excess of that ordered.

Other rulings upon evidence are assigned as error, and while some of them appear questionable, they are not likely to recur upon a new trial, and those already mentioned are such as to require a reversal.

There remains for consideration the question of the defense of accord and satisfaction. Subsequent to the delivery of the brushes previously discussed and on about February 13, 1953, defendant, presumably pursuant to another order placed by it with plaintiff, the date of which however does not appear, received and accepted a shipment of a different type of brushes from plaintiff. The shipment consisted of 100 assortments and one dozen one inch brushes, for which plaintiff issued its invoice

No. 7189, in the sum of $1,052.80, and in payment of which defendant issued to plaintiff its check in the sum of $868.60, which plaintiff received and cashed. This check bore the following notation: "Capital Brush Co. tenders you the attached check in full payment of invoices enumerated below:

	"No. 7189	1052.80	
less:	2 doz 1" not ordered—	2.80	1050.00
less:	Frt Co chges on mdse retd to you, refused & now at our premises awaiting your disposition	181.40	868.60."

[4, 5] It is contended by defendant that upon these facts the trial court was compelled to conclude, as a matter of law, that this constituted an accord and satisfaction not only as to the charges on invoice No. 7189 but of all demands of the plaintiff by virtue of the delivery of the brushes which defendant had refused to accept and which had been reshipped to plaintiff as stated in earlier portions of this opinion. With this contention, we do not agree. The notation upon the check does not purport to state that it is tendered in payment of any demands of the plaintiff except the charges on invoice No. 7189, which were entirely separate and distinct from those arising from the three previous shipments of brushes. It is true that one of the deductions noted upon the check was for the freight charges incurred by defendant in connection with its attempt to return the previous shipment of brushes to the plaintiff, but this is not tantamount to an unequivocal statement that the check was tendered in payment of any demand which plaintiff might have or assert against defendant for the purchase price of the brushes so sought to be returned. Under the circumstances, a question of fact was presented as to whether the tender and acceptance of the check was intended by defendant and understood by plaintiff as a satisfaction of demands of the plaintiff other than those reflected in the invoice specified. Potter v. Pacific Coast Lumber Co., 1951, 37 Cal.2d 592, 600-602, 234 P.2d 16. However, the amount of the check was not only unequivocally tendered in full payment of invoice No. 7189, but so understood by plaintiff as evidenced by its letter in evidence, and by cashing the check, an accord and satisfaction resulted as to the items covered by that invoice, Potter v. Pacific Coast Lumber Co., supra. The trial court, however, included the sum of $181.40 so deducted in the amount of its judgment, and to this extent it is erroneous.

Nothing herein is intended to control the trial court's determination upon the retrial of the question as to whether or not the brushes conformed to samples, or, if not, whether defendant's conduct constituted an acceptance of the goods and thereby operated as a waiver of its right to complain of the breach of warranty.

The judgment is reversed

BISHOP, Acting P. J., concurs.



131 Cal.App.2d Supp. 877

Margie E. REID, Plaintiff and Appellant,

v.

HERRICK FOUNDATION, a corporation, Defendant and Respondent.

Civ. 120.

Appellate Department, Superior Court, Alameda County, California.

Feb. 25, 1955.

Action by patient against hospital for value of diamond earrings allegedly lost when taken from patient's possession by hospital when she entered hospital in unconscious condition. The Municipal Court, Berkeley-Albany Judicial District, Redmond C. Staats, J., entered judgment for patient in amount of part of loss and denied patient's motion to vacate such judgment and enter another judgment, and patient appealed. The Superior Court, Appellate Division, Hoyt, J., held that hospital would not be entitled to limitation of liability granted voluntary hospitals for loss of or injury to personalty of any one individual, in absence of pleading, proof and finding

that hospital was, at time in question, a voluntary hospital.

Judgment modified and, as modified, affirmed.

1. Hospitals ⇐7

Statute, which limits liability of voluntary hospitals for loss of or injury to personalty of any one individual to $250, refers to hospitals operated for other than valuable consideration, in other words, charitable hospitals. West's Ann.Civ.Code, §§ 1859, 1860.

2. Hospitals ⇐8

In action by patient against hospital for value of diamond earrings allegedly lost by hospital when patient entered in an unconscious condition, hospital would not be entitled to limitation of liability granted voluntary hospitals for loss of or injury to personalty of any one individual, in absence of pleading, proof, and finding that hospital was, at time in question, a voluntary hospital. West's Ann.Civ.Code, §§ 1859, 1860.

Charles O. Bruce, Berkeley, for appellant.

Joseph F. Rankin, Oakland, for respondent.

HOYT, Judge.

The complaint in this action alleges that the defendant is a corporation doing business under the name of Herrick Foundation Memorial Hospital; that within one year last past the defendant became indebted to the plaintiff in the sum of $975, being the sum due plaintiff from defendant for the reasonable value of one pair of diamond earrings had and taken by defendant from the possession of plaintiff without her consent or permission and that neither said sum nor any part thereof has been paid to plaintiff.

The Answer consists of a general denial of all of the allegations of the complaint excepting the allegation that the defendant is a corporation doing business under the name of Herrick Memorial Hospital, together with a separate defense alleging that the loss of the diamond earrings, if any, was solely through the fault and negligence of plaintiff. Nowhere in the pleadings is there any allegation that the defendant was at any time a voluntary hospital.

The trial court found that at all of the times in question the defendant Herrick Foundation owned and operated a hospital known as Herrick Memorial Hospital; that plaintiff was admitted to this hospital in an unconscious condition and remained unconscious continuously for a period of eight days; that at the time of her admission plaintiff was wearing a pair of diamond earrings of the reasonable value of $975; that the earrings were securely fastened to her ears by means of perforations in the ear lobes; that while plaintiff was still unconscious defendant, through its agents, removed plaintiff's earrings to facilitate the taking of x-ray pictures of her head; that the pictures were taken to aid in the diagnosis and treatment of plaintiff's illness; that defendant's agents negligently wrapped plaintiff's earrings in a piece of Kleenex, fastened them to the collar of her bed gown with a paper clip, and negligently returned her to her room without taking any precautions for the safety of her earrings; that as a proximate result of the negligence of defendant, before plaintiff regained consciousness, the earrings became lost and that plaintiff had sustained damage in the sum of $975.

The trial court gave judgment in favor of plaintiff for only $250 because of the provisions of sections 1859 and 1860 of the Civil Code limiting the liability of voluntary hospitals for loss of or injury to personal property of any one individual patient to $250.

Prior to 1943 sections 1859 and 1860 of the Civil Code limited the liability of keepers of inns, hotels, furnished apartment houses, furnished bungalow courts, boarding houses and lodging houses. In 1943 the legislature extended this limitation of liability to the "* * * operator of a voluntary hospital, rest home or sanitarium, * * *."

No evidence was offered or admitted and no finding was made on the question of whether Herrick Memorial Hospital was a voluntary hospital.

The term "voluntary" as it pertains to legal matters usually has one of two meanings: either, an act done of one's own free will, without compulsion or obligation; or, an act done without valuable consideration.

Black's Law Dictionary, page 1746, gives the following definitions:

"Unconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself. * * * Done by design or intention, purpose, intended. * * * Proceeding from the free and unrestrained will of the person. * * * Produced in or by an act of choice. * * * Resulting from choosing. * * *

"Without consideration; without valuable consideration; gratuitous, as a *voluntary* conveyance. * * * Also, having a merely nominal consideration; as, a *voluntary* deed. * * *"

The state legislature and the courts of this state have used the word "voluntary" in various senses, depending upon its application. As concerns property, "A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general; except that a consideration is not necessary to its validity." Civil Code, Sec. 1040; Shelley v. Board of Trade, 87 Cal.App. 344, 349, 262 P. 403, 407. As applied to trusts, it has been held that, "A voluntary trust was defined in section 2216 of the Civil Code as 'an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another.' * * * Webster's New International Dictionary under the heading 'voluntary-law' gives this definition: 'Acting, or done, of one's own free will without valuable consideration, acting, or done, without any present legal obligation to do the thing done.' It was in the latter sense that the word 'voluntary' was used in the amended section, otherwise it would not have been coupled with the word 'revocable' without reservation. * * *" Touli v. Santa Cruz County Title Company, 20 Cal.App.2d 495, 497, 67 P.2d 404, 405. "A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. * * *" Civil Code, Sec. 1814; Ennis-Brown Company v. Richdale Land Company, 47 Cal. App. 508, 511, 190 P. 1064, 1065. "A voluntary payment means one made without compulsion and one made on an illegal claim with knowledge of its illegality or groundlessness." Engelken v. Justice Court, 50 Cal.App. 157, 159, 195 P. 265, 266.

The term "voluntary" as applied to hospitals has been defined by the New York courts under their statutes as meaning charitable hospitals. "Private hospitals, * * * are those maintained by private funds and operated by private individuals or corporations. So-called private hospitals are of two classes: One is known as the voluntary or charitable hospital, the other as the proprietary hospital or sanitorium (Hospital Survey for New York, Vol. II, pp. 112–113). Voluntary hospitals are organized under section 11 of the Membership Corporation Law. Such institutions are tax exempt and are chartered as non-profit making corporations. Both indigent and paying patients are received in charitable hospitals. * * * the fact that a profit is realized on some patients does not change the character of the institution; such payments are regarded as contributions to the income of the hospital, to be devoted like its other funds to the maintenance of the charity." Goldwater, Com'r of Hospitals v. Citizens Casualty Company of New York, Mun.Ct., 7 N.Y.S.2d 242, 247.

Because of existing limitations on the liability of public hospitals, it is obvious that the 1943 amendments of sections 1859 and 1860 of the Civil Code were intended to apply to private hospitals. If the legislature intended these amendments to apply to all private hospitals it would not have used the term "voluntary". From the use of the term "voluntary" it is apparent that the legislature intended that the limitation of liability granted by these amendments should be limited to a certain class or type of private hospitals.

Since the operation of private hospitals is voluntary in the sense that the operators undertake such operation of their own free

will, without compulsion or obligation, it is apparent that the legislature did not use the term in that sense.

[1, 2] For the foregoing reasons we are of the opinion that the term "voluntary", as used with reference to hospitals in sections 1859 and 1860 of the Civil Code, refers to hospitals operated for other than a valuable consideration; in other words, charitable hospitals. Under this view of the law, before defendant was entitled to the benefit of the limitation of liability granted to voluntary hospitals by sections 1859 and 1860 of the Civil Code it was incumbent upon it to plead and prove that at the time in question it was a voluntary hospital. In the absence of such pleading and proof and a finding to that effect, the judgment must be modified to change the amount of the same from $250 to $975 and, as so modified, affirmed.

The order appealed from was an order denying plaintiff's motion to set aside and vacate the judgment and to enter another and different judgment in favor of plaintiff and against defendant for $975 and costs. This motion should have been granted but in view of the decision on the appeal from the judgment no action need be taken on the appeal from the order.

The judgment appealed from is modified by increasing the amount of the same to $975 and, as so modified, affirmed; Appellant to have his costs on appeal.

WAGLER, P. J., and LEDWICH, J., concur.

131 Cal.App.2d 327

Lotus SINGLETON, George David Singleton, a minor, by and through Lotus Singleton, his guardian ad litem; and Darlene Rae Howard, a minor, by and through Lotus Singleton, her guardian ad litem, Plaintiffs and Appellants,

v.

Mary Anne Catherine BONNESEN, Administratrix of the Estate of George Abbott Williams, Mary Anne Catherine Bonnesen, Administratrix of the Estate of Catherine Alice Williams; Frank Stower, Ina Violet May Stower; the County of Glenn, a political subdivision of the State of California; and Lyle Sale, individually, and as an employee of the County of Glenn, Defendants,

County of Glenn, a political subdivision of the State of California, and Lyle Sale, individually, and as an employee of the County of Glenn, Respondents.

Civ. 8502.

District Court of Appeal, Third District, California.

March 7, 1955.

Heirs of sheriff, who was killed in accident involving county owned automobile driven by deputy sheriff while sheriff and deputy sheriff were acting within scope of their employment and employees of county, brought action against deputy sheriff and county for death of sheriff. The Superior Court of Shasta County, Albert F. Ross, J., entered judgment adverse to heirs, and they appealed. The District Court of Appeal, Finley, J. pro tem., held that action could be maintained against deputy sheriff, but that action could not be maintained against county under doctrine of respondeat superior without necessary allegations in complaint to negative application of the Workmen's Compensation Act.

Judgment reversed as to deputy sheriff and affirmed as to county.

1. Sheriffs and Constables ⇐17

Deputy appointed by sheriff is an employee of the county.

2. Workmen's Compensation ⇐2168

Heirs of sheriff, who was killed in accident involving county owned automobile driven by deputy sheriff while sheriff and deputy sheriff were acting within scope of their employment as employees of county, could maintain action against deputy sheriff for death of sheriff, even though county might be protected from suit by the Workmen's Compensation Act. Government Code, § 1981; Labor Code, §§ 3351 (b), 3852.

3. Workmen's Compensation ⇐2168

Fact that sheriff, who was killed in accident involving county owned automobile driven by deputy sheriff while sheriff and deputy sheriff were acting within scope of their employment as employees of county, was the superior officer of the deputy sheriff would not constitute a defense to action by heirs of sheriff against deputy sheriff for death of sheriff. Government Code, § 1981; Labor Code, §§ 3351(b), 3852.

4. Workmen's Compensation ⇐2207

In action against deputy sheriff by heirs of sheriff, who was killed in accident involving county owned automobile driven by deputy sheriff while sheriff and deputy sheriff were acting within scope of their employment as employees of county, negligence, if any, of deputy sheriff could not be imputed to sheriff. Government Code, § 1981; Labor Code, §§ 3351(b), 3852.

5. Workmen's Compensation ⇐2155

Heirs of sheriff, who was killed in accident involving county owned automobile driven by deputy sheriff while sheriff and deputy sheriff were acting within scope of their employment as employees of county, could not maintain an action against the county under the doctrine of respondeat superior for death of sheriff without necessary allegations in the complaint to negative application of the Workmen's Compensation Act. Labor Code, §§ 3601, 3706.

6. Evidence ⇐60

Since it is made a penal offense under the Workmen's Compensation Act not to comply with its requirements, it cannot be inferred, where a complaint is silent on the subject, that one complained against had violated the law, since there is a presumption of innocence. Labor Code, §§ 3601, 3706.

7. States ⇐209

Nothing can be taken by implication against the sovereign.

8. Workmen's Compensation ⇐2125, 2155

Generally, an employee or his surviving dependents cannot maintain a tort action against his employer for death or injury occurring within course and scope of his employment without pleading facts to negative application of the Workmen's Compensation Act. Labor Code, §§ 3601, 3706.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Chico, for appellants.

Clyde H. Larimer, Dist. Atty., Willows, and Rich, Carlin & Fuidge, Marysville, for respondents.

FINLEY, Justice pro tem.

This is an appeal by plaintiffs from a judgment in favor of defendants County of Glenn, a political subdivision of the State of California, and Lyle Sale, individually and as an employee of the County of Glenn. Judgment was entered by the trial court after the demurrer by these defendants to plaintiffs' second amended complaint had been sustained and plaintiffs failed to amend.

Plaintiffs are the surviving heirs and dependents of Hal A. Singleton, deceased, who was sheriff of Glenn County and who met his death in an automobile collision while riding in a county owned automobile driven at the time by defendant Lyle Sale, a deputy sheriff under Singleton.

The first amended complaint contains three causes of action, one on behalf of each plaintiff. In each cause of action it is alleged that Hal A. Singleton was the sheriff of Glenn County and that he was riding as a passenger in an automobile owned by Glenn County which was being negligently driven and operated by Lyle Sale, undersheriff of Glenn County; that as a result of said negligence there was a collision causing the death of Hal A. Singleton, and that at the time thereof, "Hal Singleton and Lyle Sale were both acting within the scope of their employment as employees, servants, agents, and representatives of the county of Glenn, state of California." There is no mention made in the complaint of Workmen's Compensation insurance or the State Employees' Retirement System.

Respondents' demurrer so far as we are concerned with it here is on the general ground that the complaint does not state facts sufficient to constitute a cause of action against the demurring defendants Lyle Sale and Glenn County.

The trial court sustained this demurrer on the ground that an action based upon the negligence of the decedent's co-employee, the respondent Sale, would not lie against either him or their common employer, respondent Glenn County, since appellants' exclusive remedy, if any, was under the Workmen's Compensation Act.

[1, 2] Under the provisions of section 3351(b) of the Labor Code Hal Singleton as sheriff of Glenn County was an "employee" of said county. Also a deputy appointed by a sheriff is an employee of the county. County of Monterey v. Industrial Accident Comm., 199 Cal. 221, 248 P. 912, 47 A.L.R. 359. Since Singleton and Sale were both employees of Glenn County, a common employer, it necessarily follows that they were co-employees. As co-employees we know of no rule prohibiting a suit by one against the other for damages on account of negligence, even though their common employer may be protected from such a suit by provisions of the Workmen's Compensation Act. Section 1981 of the Government Code does not exclude such actions and in Ward v. Jones, 39 Cal.2d 756, 249 P.2d 246, wherein the dependents of a deceased employee of the City of Los Angeles brought an action against their decedent's co-employees alleging that their negligence was the cause of his death, a judgment of dismissal by the trial court was affirmed upon the sole ground that claims had not been filed pursuant to the provisions of Government Code section 1981. No suggestion was made that the action was not otherwise proper. See also Wallace v. Pacific Electric Railway Co., 105 Cal.App. 664, 288 P. 834; Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633, 152

A.L.R. 1043; and Thompson v. Lacey, 42 Cal.2d 443, 267 P.2d 1.

[3] Going further, the relationship of respondent Sale to the decedent Hal A. Singleton was that of a "person other than" his employer, within the purview of section 3852 of the Labor Code which sanctions an action for damages for injury or death against "any person other than the employer." See note on page 445 of Thompson v. Lacey, supra, 42 Cal.2d 443, 267 P.2d 1, 2. The fact that Singleton was Sale's superior officer would not constitute a defense. In Baugh v. Rogers, supra, 24 Cal.2d 200, at page 214, 148 P.2d 633, at page 641, we find this language: "The employee's right to recover against a third person is not affected by the fact that the 'person other than the employer' is not a stranger but has entered into a consensual legal relationship with the employer. Wallace v. Pacific Electric Ry. Co. (1930), 105 Cal.App. 664, 668, 288 P. 834; Merino v. Pacific Coast Borax Co. (1932), 124 Cal. App. 336, 338, 341, 12 P.2d 458."

[4] Here appellants' right to recovery would only be barred by proof of actual personal negligence upon the part of decedent. The personal negligence, if any, of respondent Sale would not be imputed to Hal Singleton. As the rule is stated in Ledgerwood v. Ledgerwood, 114 Cal.App. 538, at pages 542–543, 300 P. 144, at page 146: "'To do so would be to permit one guilty of negligence to take refuge behind his own wrong. The situation when the action is brought by one member of the enterprise against the other is entirely different from that when recovery is sought against a third person.' * * * 'The controlling principle is simply that, be it a case of * * * co-servants * * * or participants of any character in a common or joint enterprise, no person may negligently injure another without being responsible for damages.'" See also Roberts v. Craig, 124 Cal.App.2d 202, 268 P.2d 500.

[5] It must be held, therefore, that the trial court erred in holding that an action would not lie against respondent Sale. However, that court correctly ruled that this action could not be maintained against respondent Glenn County under the doctrine of respondeat superior without the necessary allegations in its complaint to negative application of the Workmen's Compensation Act. In Butler v. Wyman, 128 Cal.App. 736, 739, 18 P.2d 354, 355, the rule applicable to pleading the act is stated as follows: "It is a general rule that a plaintiff need not negative the fact that he is within the act, this being an affirmative defense. [Citing cases.] Nevertheless the allegation that Wyman directed appellant to get upon the truck for the purpose stated inferentially supports the conclusion that the latter was an employee, and if so the allegations of what subsequently occurred were reasonably sufficient to bring him within the provisions of the act; and it has been held that if the complaint shows the case to be one covered by the act, then the pleading must show facts bringing the plaintiff within the exceptions thereto. Michel v. American Cinema Corp., (Sup.) 182 N.Y.S. 588." See also Jackson v. Pacific Gas & Electric Co., 95 Cal.App.2d 204, 207, 212 P.2d 591, and Wessell v. Barrett, 62 Cal.App.2d 374, 144 P.2d 656.

[6, 7] In their complaint herein appellants affirmatively allege that the deceased was fatally injured while acting within the course and scope of his employment with respondent Glenn County. This allegation indicates a situation falling squarely within the field designed to be encompassed by the Workmen's Compensation Act. Since under the provisions of the act and within the field of its application it is made a penal offense not to comply with its requirements, it cannot be inferred, where a complaint is silent on the subject, that one complained against has violated the law. The presumption of innocence is elementary. Wessell v. Barrett, supra. Furthermore, nothing can be taken by implication against the sovereign. Patton v. City of Los Angeles, 169 Cal. 521, 532, 147 P. 141. Therefore, since the complaint herein contains no allegation which would negative application of the statute, appellants have failed to state a cause of action against Glenn County.

[8] Under such alleged facts, the recovery of said compensation was the exclusive remedy available to appellants, Labor Code, sec. 3601, unless the respondent county had failed to secure the payment of such compensation. Labor Code, sec. 3706. If such were the fact and appellants intended to rely upon any such statutory exception it should have been pleaded in the complaint. Having failed to do so they cannot complain that the trial court applied the general rule that an employee or his surviving dependents cannot maintain a tort action against his employer for death or injury occurring within the course and scope of his employment without pleading facts to negative application of the act. Wessell v. Barrett, supra, 62 Cal.App.2d 374, 377, 144 P.2d 656.

The judgment is reversed as to respondent Sale, and affirmed as to respondent Glenn County.

VAN DYKE, P. J., and PEEK, J., concur.



John H. EDGAR, Plaintiff, Cross-Defendant and Respondent,

v.

Dan S. HITCH, Defendant, Cross-Complainant and Appellant,

and

E. Braden, Defendant.

Civ. 4907.

District Court of Appeal, Fourth District, California.

March 10, 1955.

Rehearing Denied April 4, 1955.

Hearing Granted May 4, 1955.*

Action was brought by seller of hay against buyer to recover balance allegedly due for hay sold, and buyer filed a cross complaint seeking damages for alleged breach of contract by seller. The Superior Court of Kern County, W. L. Bradshaw, J., entered judgment adverse to buyer, and buyer appealed. The District Court of Appeal, Mussell, J., held that where seller of hay was contending that agreed price for hay was $42.50 a ton, and buyer was contending that it was $32.50 a ton, and buyer gave seller check for hay at price of $32.50 a ton, and check bore a notation that it was payment in full for all hay bought from seller for $32.50 a ton, and seller cashed check, there was an accord and satisfaction which prevented seller from recovering balance allegedly due on ground that agreed price was $42.50 a ton.

Judgment reversed.

Accord and Satisfaction ⇐11(2)

Compromise and Settlement ⇐5(2)

Where seller of hay was contending that agreed price for hay was $42.50 a ton, and buyer was contending that it was $32.50 a ton, and buyer gave seller check for hay at price of $32.50 a ton, and check bore a notation that it was payment in full for all hay bought from seller for $32.50 a ton, and seller cashed check, there was an accord and satisfaction which prevented seller from recovering balance allegedly due on ground that agreed price was $42.50 a ton.

Donald D. Roff, Ventura, for appellant.

Conron, Heard & James, Bakersfield, for respondent.

MUSSELL, Justice.

It is alleged in the complaint herein that between March 20 and March 22, 1952, defendants purchased from plaintiff 66 tons of alfalfa hay at the agreed and reasonable value of $42.50 per ton, no part of which has been paid except the sum of $2,150.04, leaving a balance due and owing in the sum of $660. In his answer Dan S. Hitch denied that he had purchased said hay or any hay at $42.50 per ton, and alleged that he purchased approximately 500 tons of hay from plaintiff at the agreed price of $32.50 per ton; that he took delivery of approximately 66 tons of hay and paid $2,150.04 therefor; that this sum was the agreed price for the hay received by him at $32.50 per ton. He denied there was a balance due plaintiff and filed a cross-complaint in

* Opinion vacated 294 P.2d 3.

which he sought damages for plaintiff's alleged breach of the contract.

Trial was had on July 2, 1953, and the matter was submitted for decision. On September 10, 1953, defendant Hitch filed a notice of motion for leave to file an amendment to his answer to conform to proof. On September 18, 1953, plaintiff's attorney stipulated that the amended answer be filed and in it defendant Hitch set forth as a separate defense that on or about March 22, 1952, he delivered to plaintiff a check in the amount of $952.41 and informed plaintiff at the time of the delivery thereof that he intended the check as full payment of the claim alleged in plaintiff's complaint; that on the upper left hand corner of the check there appeared the following words and figures: "Pd. in full for all Hay Bought From John Edgar @ $32.-50 Ton"; that in due time plaintiff cashed said check; that plaintiff by acceptance and cashing said check agreed to the settlement intended by defendant and that at the time of said payment defendant in good faith disputed and denied liability to plaintiff for the amount claimed by him. The trial court found for plaintiff and awarded judgment in his favor for the sum of $660.-00 and costs.

Defendant Hitch here contends that the findings rejecting the defense of accord and satisfaction are not supported by the evidence and that under the facts shown, the acceptance and cashing of the checks offered by defendant amounted to an accord and satisfaction.

On March 19, 1952, defendant Hitch, a hay dealer, and one E. Braden went to plaintiff's farm near Bakersfield where they met plaintiff and proceeded to a stack of baled hay which contained approximately 600 tons and had been offered for sale by plaintiff. Plaintiff testified that Hitch asked him how much he would have to get for the hay and he replied that he would have to get "$42.50"; that Hitch said he would not take all of the stack until he had a trial load; that it was then agreed that Hitch should take a load; that Hitch stated that if his customer did not object to the hay, he might take the whole stack; that Hitch agreed to pay for the first load at the scales. Defendant Hitch testified in this connection that when he looked at the hay with plaintiff he asked plaintiff what he wanted for it and plaintiff said "He was holding the hay for $32.50 straight through as it is"; that plaintiff estimated there were about 500 tons of hay in the stack; that he told plaintiff he would go home and contact his dairyman and let him know; that he called plaintiff on the telephone that night and that the price was not mentioned in this telephone conversation; that he told plaintiff he was coming up the next day to start hauling the hay and plaintiff said "O. K., come ahead." On March 20, 1952, Hitch arrived at plaintiff's ranch with three trucks. He loaded them with the hay and had them weighed at the Chevron station at Greenfield. Hitch then left a check payable to plaintiff at the station for $1,197.63, which sum paid for the hay then received by Hitch at the rate of $32.50 per ton. Hitch delivered this hay to his dairyman and on the evening of March 21, 1952, called plaintiff on the telephone and told him they were coming back for three more loads of hay. The next day, March 22, 1952, Hitch weighed in his equipment at the Chevron station and learned that plaintiff had not received the check for $1,197.63. Hitch got the check to deliver it to plaintiff and proceeded to the ranch where he commenced loading his trucks. Plaintiff appeared and a dispute arose between the parties over the signing of a contract for the purchase of the balance of the hay and also the price charged and to be charged for it. Hitch refused to sign a contract and delivered the check to plaintiff. In this connection plaintiff testified that he looked at the check and knew that "It was short"; that he asked Hitch how he figured it and Hitch said "$32.50"; that he then told Hitch he could not take any more hay at that price; that an argument then took place in which plaintiff stated to Hitch "You can load the trucks but you are not loading it for $32.50"; that he followed the trucks to the scales and there took a check from defendant's agent as part payment. This check was payable to plaintiff, dated March 22, 1952, and on the face thereof the notation "Pd. in full for all Hay Bought

from John Edgar @ $32.50 per ton." Plaintiff retained the two checks received from Hitch and on April 15, 1952, his attorney wrote to Hitch stating that notwithstanding the notation on the check of March 22, 1952, there was an additional sum of $661.55 due plaintiff on the transaction and that legal action would be taken if this sum was not paid within five days.

The complaint herein was filed on April 26, 1952, and on May 24, 1952, upon advice of his attorney, plaintiff cashed the two checks received from Hitch.

The record here, as in Potter v. Pacific Coast Lumber Co., 37 Cal.2d 592, 234 P.2d 16, does not justify the trial court's finding that no accord and satisfaction was effected by the parties in settlement of plaintiff's claim and we are of the opinion that the court erred as a matter of law in adjudicating this issue contrary to defendant's position. The rules applicable are stated in the Potter case, supra, 37 Cal.2d at page 597, 234 P.2d 16, and are approved in Grayhill Drilling Co. v. Superior Oil Co., 39 Cal.2d 751, 753–754, 249 P.2d 21, 22, in the following language:

"The defense of accord and satisfaction was recently considered in Potter v. Pacific Coast Lumber Co., 37 Cal.2d 592, 234 P.2d 16, in a case factually similar to the present one. This court said, 'The great weight of authority undoubtedly supports the rule that where a claim is disputed or unliquidated and the tender of a check or draft in settlement thereof is of such character as to give the creditor notice that it must be accepted "in full discharge of his claim" or not at all, the retention and use of such check or draft constitutes an accord and satisfaction (1 C.J.S., Accord and Satisfaction, § 34, p. 528); and it is immaterial that the "creditor protests against accepting the tender in full payment" (1 Am.Jur. § 26, p. 228), for in such case "the law permits but two alternatives, either reject or accept in accordance with the condition" (Williston on Contracts, Rev. Ed., Vol. VI, § 1856, p. 5220 * * *). Of course, for the principle of accord and satisfaction to apply in disposition of an unliquidated claim, there must be a "bona fide dispute" between the parties (Stub v. Belmont, 20 Cal.2d 208, 218, 124 P.2d 826), but "it matters not that there was no solid foundation for the dispute" as the test is whether "the dispute was honest or fraudulent". B. & W. Engineering Co. v. Beam, 23 Cal.App. 164, 171, 137 P. 624 * * *. Also, the debtor must make it clear that acceptance of what he tenders is subject to the condition that it shall be in full satisfaction. (Citations.)' 37 Cal.2d at [page] 597, 234 P.2d at page 18."

In the instant case plaintiff had two alternatives, either to reject or accept the checks in accordance with the notation on the face of the second check. The condition was known to plaintiff and his attorney. There was a " 'bona fide dispute' " between the parties and it was immaterial whether plaintiff protested against accepting the tender in full payment.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



131 Cal.App.2d 411

Ruel G. WILLIAMS and E. R. Dickerson, Plaintiffs and Respondents,

v.

Irene A. KRUMSIEK, Defendant and Appellant.

Civ. 4911.

District Court of Appeal, Fourth District, California.

March 10, 1955.

Action by realty brokers against vendor for commissions which would have been payable by purchasers to brokers had not vendor refused to perform agreement with purchasers. The Superior Court, Kern County, Warren Stockton, J., entered judgment for brokers, and vendor appealed.

The District Court of Appeal, Mussell, J., held that action was barred by judgment, which had been maintained in former action by brokers against vendors and purchasers for commissions allegedly due because of same transaction, since brokers could have asserted vendor's alleged liability to broker for loss of commission from purchasers in the former action.

Judgment reversed.

1. Judgment ⇐540

Doctrine of res judicata rests upon ground that party to be affected, or some other with whom he is in privity, has litigated, or had opportunity to litigate, the same matter in former action in court of competent jurisdiction and should not be permitted to litigate it again to harassment and vexation of his opponent.

2. Judgment ⇐713(2)

Prior judgment is res judicata on all matters which have been or could have been raised in controversy in which such judgment was entered.

3. Judgment ⇐713(2)

Action, which was by realty brokers against vendor for damages for loss of commissions which would have been payable by purchasers to broker had not vendor refused to perform exchange agreement with purchasers, was barred by judgment, which had been obtained in former action by brokers against vendor and purchasers for commissions allegedly due because of same transaction, since brokers could have asserted vendor's alleged liability to broker for loss of commission from purchasers in the former action.

Frederick E. Hoar, Bakersfield, for appellant.

Vizzard, Baker & Sullivan, James Vizzard, Bakersfield, for respondents.

MUSSELL, Justice.

This is an action for the recovery of damages alleged to have been suffered by plaintiffs as a result of defendant's refusal to perform a contract for the exchange of real properties. It is alleged in the amended complaint that on or about July 9, 1948, defendant Irene Krumsiek entered into an agreement in writing with O. A. and Lola B. Sanders for the exchange of real properties in Kern and Los Angeles counties; that the exchange agreement was secured through the efforts of plaintiffs as real estate brokers, who fully performed their part of the agreement; that the exchange agreement provided, among other things, that the defendant should pay to plaintiffs the sum of $1,500, and that said O. A. and Lola B. Sanders should pay plaintiffs a like sum as commissions for securing the sale and exchange of the said properties of the respective parties; that on or about July 13, 1948, an independent agreement in writing was executed by plaintiffs and Sanders and his wife wherein it was provided that Mr. and Mrs. Sanders would pay their share of the commission from the first crops of 1949 from the Kern county ranch property being acquired by them and that said payment, if made from proceeds of crops before June 1, 1949, would be from crops on said property; that defendant refused to perform the exchange agreement; that as a direct and proximate result of her failure of performance, Sanders and his wife were never placed in possession of the Kern county property and were unable to produce crops therefrom and that they, therefore, did not become obligated to pay their share of the commission, to the damage of plaintiffs in the sum of $1,500. The trial court sustained a demurrer to the complaint without leave to amend and entered judgment for defendant. Plaintiffs appealed and the judgment was reversed by this court in Williams v. Krumsiek, 109 Cal.App.2d 456, 241 P.2d 40. Defendant then filed her answer to the complaint, denying generally the allegations thereof and setting up as an affirmative defense that plaintiffs had recovered a judgment against the defendant on the same cause of action in a former action, numbered 49950, filed in the superior court of Kern county, and that said judgment had been paid.

When the instant action came on for trial it was stipulated that the cause be submitted on the plea of res judicata and on the transcript of the testimony in said for-

mer action No. 49950. The trial court found that the allegations of plaintiffs' complaint were true and that the allegations in defendant's affirmative defense were untrue. Judgment was entered for plaintiffs against the defendant for the sum of $1,500, with interest and costs. Defendant appeals from this judgment and contends that the finding of fact that the instant action was not barred by the former action between the same parties on the same cause of action was not supported by and was contrary to the evidence. We are in accord with this contention.

The former action, No. 49950, to which reference is made, was filed by plaintiffs in the superior court of Kern county on November 1, 1948. That action was brought by plaintiffs herein against Irene Krumsiek and O. A. Sanders and Lola B. Sanders. Plaintiffs sought therein to recover $1,500 from Irene Krumsiek and a like amount from Mr. and Mrs. Sanders alleged to be due plaintiffs under the terms of the exchange agreement executed by the defendants on July 9, 1948. Sanders and his wife filed an answer and cross-complaint therein in which they alleged, among other things, that performance by them of the agreement had been prevented by plaintiffs' failure to effect completion of the transfer of the properties; that the commission to be paid by them was to be paid from crops produced on the property which was to be conveyed to them by Irene Krumsiek; that they had never secured possession of the property; that defendant Irene Krumsiek did not secure the consent of the co-owner of the Krumsiek property to a transfer thereof and that said Irene Krumsiek had stopped payment on a check given to plaintiffs as a part payment of the expenses of the transfer of the properties; that by reason of the wilful refusal of Irene Krumsiek to complete said transfer, cross-complainants had lost the opportunity to sell their property and were thereby damaged. The trial court gave judgment for plaintiffs against Mrs. Krumsiek for the sum of $1,500 and denied plaintiffs a judgment against Sanders and his wife. They, as cross-complainants, obtained a judgment against Mrs. Krumsiek for attorneys' fees. The judgment against Mrs. Krumsiek in favor of plaintiffs was affirmed on appeal and the judgment for attorneys' fees was reversed. Williams v. Krumsiek, 102 Cal.App.2d 541, 227 P.2d 889.

[1, 2] The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation. Panos v. Great Western Packing Co., 21 Cal.2d 636, 637, 134 P.2d 242. A prior judgment is res judicata on all matters which have been or could have been raised in the controversy in which such judgment was entered. Watkins v. Watkins, 117 Cal.App.2d 610, 611, 256 P.2d 339. In Krier v. Krier, 28 Cal.2d 841, 843, 172 P.2d 681, 682, it is said: "It is settled, however, that a judgment in a prior action between the same parties on the identical cause of action is res judicata, and a bar to a second suit thereon, not only as to issues actually determined therein but also as to issues necessarily involved. (Citing cases.) And even though the causes of action be different, the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat its determination." The cause of action is defined in Panos v. Great Western Packing Co., supra, 21 Cal.2d at page 638, 134 P.2d 242, as simply the obligation sought to be enforced. And as is said in Ideal Hardware Etc. Co. v. Dept. of Emp., 114 Cal. App.2d 443, 448, 250 P.2d 353, 356: "It is the title, right or obligation sought to be established or enforced, not the remedy or the relief sought, which determines the nature and substance of the cause of action. When this has once been adjudicated it cannot be re-litigated upon any grounds that were or that could have been determined in the former action." In McCaffrey v. Wiley, 103 Cal.App.2d 621, 623, 230 P.2d 152, 154, this court held that "It is well

settled in this state that a party may not split a single cause of action, using the same obligation as the basis of separate suits, and that where this is done the judgment in the first action may be pleaded as a bar to a subsequent suit based on the same fundamental claim which could have been presented in the first action."

[3] The application of the rules announced in the foregoing decisions to the situation presented by the record here impels us to conclude that the judgment obtained by plaintiffs in the first action, No. 49950, operates as a bar to the instant action. In that case plaintiffs sought to recover the $3,000 in commissions alleged to be due under the terms of the exchange agreement. By the terms of this agreement the obligation of Sanders and his wife to pay their share of the commission was from the crops raised on the ranch which was to be conveyed to them by Mrs. Krumsiek. A few days after the agreement had been signed plaintiffs knew that Mrs. Krumsiek's daughter was part owner of the ranch and that Mrs. Krumsiek stopped payment on the check for $500 given by her on July 9, 1948, to pay on the expenses of the transfer of the property. These facts were known to plaintiffs when they filed the first action on November 1, 1948. In her answer, filed November 10, 1948, Mrs. Krumsiek alleged that her daughter refused to sign the exchange agreement. In their cross-complaint Sanders and his wife alleged that Mrs. Krumsiek had stopped payment on the $500 check and had refused to go ahead with the agreement or convey the ranch to them. Under these circumstances it is apparent that the issue of defendant's liability under the terms of the contract could have been fully determined in the first action.

In Coffman v. Crookshank, 140 Cal.App. 192, 34 P.2d 1067, plaintiff secured the acceptance of an agreement wherein defendant and his wife offered to exchange their property for property owned by W. L. Rohrer and his wife. Defendant agreed to pay plaintiff the sum of $1,500 "upon 'acceptance of the proposition'" to exchange the properties and Rohrer in his acceptance agreed to pay plaintiff the sum of $1,000 for his services as agent. Defendant refused to perform his part of the contract and plaintiff sued to recover the commission due from the defendant and also for damages caused by the loss of the Rohrer commission by reason of defendant's refusal to perform his part of the exchange agreement. The court there held that the sum of $1,000 damages caused by the loss of the commission was properly included in the judgment for plaintiff. In the instant case as in the Coffman case, plaintiffs could have sued for the commission defendant agreed to pay and also for damages caused by her refusal to perform the exchange agreement. Under the circumstances shown by the record herein the judgment in the prior action, No. 49950, was properly pleaded and was a bar to the instant action.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



131 Cal.App.2d 301

William L. PENZNER, Plaintiff and Respondent,

v.

Adolphe WENLAND, Defendant and Appellant.

Civ. 20286.

District Court of Appeal, Second District, Division 1, California.

March 7, 1955.

Lessor's action against lessee for declaratory relief and damages. The lessee alleged in answer that lessor had failed to have premises available for occupancy on possession date. The Superior Court, Los Angeles County, H. S. Farrell, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence sustained award for rent.

Affirmed.

1. Declaratory Judgment ⇐324

In lessor's action for declaratory relief and damages against lessee, it was not error to permit lessor to file complaint amendment which included merely rent due to date of trial.

2. Appeal and Error ⇐1041(3)

In lessor's action against lessee for declaratory relief and damages, denial of permission to file amended answer was not prejudicial where so-called amendment actually added nothing to controversial issues.

3. Appeal and Error ⇐1011(1)

Where evidence is conflicting and only question is one of fact, judgment must be sustained if there is substantial evidence to support trial judge.

4. Declaratory Judgment ⇐347

In lessor's action against lessee for declaratory relief and damages, wherein lessor filed amendment seeking rent and lessee alleged that lessor had failed to have premises available for occupancy on possession date, evidence sustained findings upon which lessor was awarded rent.

Thomas D. Mercola, Beverly Hills, for appellant.

Guy E. Ward, Beverly Hills, for respondent.

DORAN, Justice.

The appeal is from the judgment in an action for declaratory relief which also sought damages.

Plaintiff was the lessor and the defendant the lessee. The lease dated December, 1951, which was for the second floor of a building, covered a period of five years at the rate of $700 per month. Lessee was to have possession April 1, 1952. Defendant's answer alleges that, "Plaintiff failed, refused, and neglected on April 1, 1952 to have the premises altered and available for occupancy of the defendant, and failed, refused and neglected to put defendant in possession thereof, and by reason thereof defendant has no liability in the premises."

The trial judge found for plaintiff.

In effect, appellant contends that the evidence is insufficient to support the findings and judgment.

It is argued that, "The evidence of the plaintiff's witnesses is inherently improbable and was impeached by the photographic evidence showing the actual physical condition of the property. Therefore, the evidence does not support the findings and the findings do not support the judgment. In face of this, to hold that there was compliance with the terms of the lease, does violence to reason. The lease, as amended provides in part as follows:

"2. The term of the lease shall commence as of April 1, 1952, and shall end on March 31, 1953.

"3. Lessor agrees at his expense to maintain the grounds and plants.

"4. Lessee shall have the right to use the auto park in the rear of the building and lessor agrees to maintain said auto park."

and that, "The failure of the plaintiff to put the defendant in possession was a breach of the implied covenant of quiet possession, and defendant was entitled under the lease to the possession and quiet enjoyment of the premises during the term of the lease. Any disturbance of the defendant's possession or where the premises are rendered unfit or unsuitable for occupancy for the purposes for which they were leased, and the effect of which is to preclude the defendant from his quiet enjoyment and possession, constitutes a constructive eviction."

Although plaintiff sought damages in the sum of $13,206.48 "by way of compensatory damages for alterations and repairs done at the request of defendant", the judgment in the sum of $11,900 pursuant to the finding, was for rent only.

[1, 2] The action of the trial court in permitting plaintiff to file the amended complaint was not error. The amendment merely included the rent due to the date of trial. Also the court's denial of permission to file an amended answer was not prejudicial. The so-called amendments actually added nothing to the controversial issues.

As noted above, appellant refers to "Photographic evidence showing the actual physical condition of the property". In this

connection it is important to note that the trial judge visited and viewed the premises.

[3, 4] The evidence was conflicting as it is in most cases and the only question is one of fact. In such circumstances the law is well settled that if there is substantial evidence to support the trial judge in this respect the judgment must be sustained and a review of the evidence shows it to be sufficient.

There are no prejudicial errors and the judgment is therefore affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



131 Cal.App.2d 208

Ernest PIERSON and Louise Pierson, his wife, Plaintiffs and Respondents,

v.

Harvey L. FISCHER et al., Defendants, Harvey L. Fischer, Appellant.

Harvey L. FISCHER, Plaintiff and Appellant,

v.

CORPORATION OF AMERICA, a corporation, Merchants National Realty Corporation, a corporation, Ernest Pierson and Louise Pierson, his wife, Bank of America National Trust & Savings Association, Defendants and Respondents.

Civ. 8462, 8463.

District Court of Appeal, Third District, California.

March 2, 1955.

Special proceeding by vendee under trustee's deed sounding in unlawful detainer and action by debtor to set aside and declare void trustee's sale and deed issued to vendee thereunder. From judgments of Superior Court, Humboldt County, Delos A. Mace, J., denying debtor's motions to set aside default judgment entered against him and sustaining demurrer to his action to set aside and declare the trustee's sale and deed void, the debtor appealed. The two appeals were presented upon a single record. The District Court of Appeal, Van Dyke, P. J., held that order for service of summons and complaint upon debtor by publication was valid and that trustee's sale and deed were valid.

Motions to dismiss denied and judgment affirmed.

1. Judgment ⇐138(2)

Where defendant was not at home when summons and complaint were left at his residence but he was advised 29 days before entry of default judgment that such documents had been received at his residence, court did not abuse its discretion in denying application, made within one year, to set aside default judgment. West's Ann.Code Civ.Proc. §§ 473, 473a.

2. Forcible Entry and Detainer ⇐19(2), 38(4)

In unlawful detainer action, order for service of summons and process by publication for one day in newspaper in city in which property was located was valid and denial of motion to set aside default judgment based on such service of process was not an abuse of discretion, notwithstanding fact that owner was not living in city where property was located and newspaper was published. West's Ann.Code Civ.Proc. §§ 473, 473a.

3. Appeal and Error ⇐920(1)

All presumptions must be indulged in by reviewing court in support of orders made by trial court.

4. Judgment ⇐143(10)

Where defendant in unlawful detainer action was advised 29 days before entry of default judgment that copies of summons and complaint had been left at his residence and defendant's affidavit to vacate default judgment stated that when he received documents he mailed them to his attorney who erroneously believed that default had already been taken, court properly denied defendant's motion to vacate default judgment on ground of mistake, inadvertence, surprise and excusable neglect. West's Ann.Code Civ.Proc. § 1161a; West's Ann. Code Civ.Proc. §§ 473, 473a.

5. Mortgages ⇐333, 349

Power of sale under deed of trust will be strictly construed and trustee must act in good faith in exercising power and must follow requirements of deed with respect to manner of sale.

6. Pleading ⇐225(1)

Trial court should not sustain demurrer without leave to amend where pleading is merely defective for uncertainty.

7. Mortgages ⇐369(3)

Fraudulent nonperformance of a trustee's duties under deed of trust participated in or known by a buyer at sale may afford grounds in equity for setting aside transaction so procured.

8. Pleading ⇐225(1)

Where deed of trust provided recital in any deed conveying property should be conclusive proof of truthfulness thereof, and trustee's deed stated that trustee complied with law in giving notice of time and place of sale and in mailing copies of notices of default, etc., complaint, which alleged that trustee's sale and deed given pursuant thereto were not made according to law nor according to provisions of deed of trust could not be amended to state a cause of action, and court did not err in sustaining a demurrer to complaint without leave to amend. West's Ann.Civ.Code, § 2953.

9. Mortgages ⇐374

Deed of trust providing that recital in trustee's deed of any matters or facts shall be conclusive proof of the truthfulness thereof did not result in waiver of rights or privileges conferred upon debtor by statutes establishing procedures in exercise of powers of sale conferred by deeds of trust and did not render trustee's deed invalid. West's Ann.Civ.Code, § 2953.

10. Evidence ⇐383(7)

By execution of deed of trust declaring that recital in trustee's deed of any fact or matter should be conclusive proof of truthfulness thereof, debtor made trustee his agent with such powers that trustee could bind him, notwithstanding he had not carried out provisions of trust, and as against purchaser, who did not participate in or know of failure of trustee to perform his duties, recital that trustee had been true to his trust was binding upon debtor. West's Ann.Civ.Code, § 2953.

Sefton & Gartland, San Francisco, for appellant.

Erskine, Erskine & Tulley, San Francisco, for respondent Pierson.

Samuel B. Stewart, Jr., and Christopher M. Jenks, San Francisco, for respondent Corp. of America, Bank of America, etc.

VAN DYKE, Presiding Justice.

Herein two appeals are presented upon a single record. In the case of Pierson v. Fischer, the plaintiffs and respondents brought a special proceeding against the defendants and appellant Fischer sounding in unlawful detainer under the provisions of Section 1161a of the Code of Civil Procedure. Respondents claimed to be the owners of the real property involved in the action, which is located in Eureka, California, by virtue of having purchased the same at a trustee's sale under a deed of trust executed to secure a loan. They made the statutory demand for possession and upon possession being refused brought suit. Personal service was not made upon appellant Fischer nor upon several other defendants. Respondents caused an affidavit to be filed, charging that Fischer and other defendants were concealing themselves to avoid the service of summons, and respondents upon that ground asked for an order for the publication of summons. This order was given and there is no claim made in this appeal that a proper foundation had not been laid for the issuance of an order for such constructive service. It is claimed, however, that the order made was invalid because not ordering publication to be made in a newspaper most likely to give notice to those being so served and because the trial court unduly limited the time of publication. A default judgment was obtained and appellant Fischer twice moved to set the same aside. Both motions were denied and he herein appeals from both denial orders.

In Fischer v. Corporation of America and others appellant Fischer filed an action asking for a judgment setting aside and declaring void the same trustee's sale and the deed issued to the Piersons thereunder. Therein Fischer alleged that he had purchased the property involved in the unlawful detainer action from Merchants National Realty Corporation and had given a deed of trust to secure a part of the purchase price; that the trustee had sold the property to the Piersons and that this sale had not been made according to law nor according to the provisions of the deed of trust. The trial court sustained a general demurrer without leave to amend and from the ensuing judgment Fischer appeals.

[1] We shall treat, first, of the appeal in Pierson v. Fischer. The pertinent facts therein, appearing in the record of proceedings to vacate the default judgment, in addition to those given above, are these: Fischer defaulted in meeting the obligations of his note and deed of trust, and notice of such default was recorded. Three months thereafter demand was made upon the trustee to sell the property. Notice of sale was published, posted and mailed, the sale date being first set for October 9, 1951. The sale was postponed seven times at Fischer's request and during this period the building inspector at Eureka was threatening to condemn the buildings on the property by reason of their condition. February 13, 1952 the property was sold to the Piersons for $72,300 and they were given the trustee's deed. Six days thereafter Fischer filed for record an affidavit charging invalidity in the sale for want of proper notice to him, stating therein that he intended to bring an action to set aside the sale and was recording the document to prevent resale to bona fide purchasers. About one month after the sale, the Piersons served Fischer with a three-day notice to quit and five days thereafter filed a complaint in unlawful detainer. This complaint named Fischer's former wife as a defendant, she having been a party to the deed of trust, and in addition joined a Mr. and Mrs. Strong, who were related to Fischer and to whom he had once conveyed the property. Efforts to serve Fischer and the Strongs were successfully evaded. The former Mrs. Fischer resided in Oregon. The trial court ordered the summons and complaint constructively served upon each defendant "by publication in the Humboldt Standard, a newspaper printed and published in Eureka, the publication to run for one day." No complaint is made, save as noted above, that, procedurally, the requirements of constructive service were not complied with. Fischer received a copy of the complaint and of the summons which required his appearance in three days. Although when the documents were received at his residence he was not there, yet he received notice of their arrival on April 20, 1952. On April 23rd he consulted an attorney, and on April 25th delivered to him copies of summons and complaint. On April 22d the attorney for the Piersons wrote the court clerk, returning the original process with proof of service and requesting the entry of default. April 28th Fischer's attorney contacted the Piersons' attorney and was told that the entry of default had been requested, that no stipulation extending time would be made because of the many indulgences already given to Fischer and that during the following week application would be made for judgment. On April 30th Fischer received a letter from his attorney stating he would not proceed without a retainer. No appearance was made. Fischer employed other counsel. Judgment was entered May 19th, twenty-nine days after Fischer was first advised that summons and complaint had been received at his residence.

Fischer contends that his first motion to set aside the default judgment should have been granted, asserting that it was based upon Section 473a of the Code of Civil Procedure, which provides that if from any cause a summons in an action has not been personally served upon a defendant the court, upon terms that are just, may allow such defendant to answer on the merits if application be made within one year. He says that when the application is made under that section the court is without discretion to refuse relief. The contention is untenable. Neither Section 473 nor Section 473a of the Code of Civil

Procedure was designed to afford relief from judgments validly entered upon constructive notice to those "who with full knowledge of such service upon them, by reason of receipt of a copy of the summons and complaint through the mail, remain inactive." Palmer v. Lantz, 215 Cal. 320, 324, 9 P.2d 821, 823; Gardner v. Gardner, 72 Cal.App.2d 270, 274, 164 P.2d 500; Boland v. All Persons, 160 Cal. 486, 490, 117 P. 547. The application for relief addressed itself to the judicial discretion of the trial court and upon the facts recited we hold that the court did not abuse its discretion in denying Fischer's request.

[2, 3] Appellant contends further that his motion should have been granted upon the ground that the order for publication was void, so that no service whatever had been made upon him. In support of this contention he points out that he was not residing in Eureka where the property was located and where the publication was made and that more than one publication should have been made. But the statutes have clearly recognized the necessity of prompt judicial action in cases such as these. They give a defendant only three days in which to appear. They give the action precedence over other civil actions. And they commit to the trial court broad discretionary powers in selecting the medium of publication and fixing the number of publications to be made. Of course all presumptions must here be indulged in support of the orders made by the trial court and we hold that the record here discloses no abuse of discretion and must be upheld against the attacks here made.

[4] After the denial of his first motion for relief appellant filed a second motion therefor. This motion was made on the ground that the entry of default and of the default judgment constituted proceedings taken against appellant through mistake, inadvertence, surprise and excusable neglect. The supporting affidavit sets forth that the property involved was of such worth that appellant's equity therein was of the value of $75,000 and that he alone of all the defendants was interested therein; that the mailed copy of summons and complaint arrived at his house in Los Gatos on April 20, 1952, when he was at Lakeport, that he thereafter mailed the documents to his attorney and was by him on April 30th told that he already was in default and that proceedings would have to be taken to set that default aside; that he then procured another attorney who, on June 24th, made such application. He further avers, in effect, that his attorney had been misinformed by the Piersons' attorney and led to believe a default had already been entered, which was not true (we note here that this conflicts with the opposing affidavit of the Piersons' attorney); that because of this misinformation, he, appellant, was mistaken as to the status of the case, believing that the default had already been entered when, in fact, it was not entered until May 5th; that he believed he had thirty days to answer, in which he was further mistaken, but therein he relied upon his previous experience in lawsuits which led him to believe that he did have such thirty days' time. Here again the second motion was addressed to the sound discretion of the trial court. The showing, robbed of the claim of misinformation, presented a factual issue which the trial court determined. The memorandum opinion of that court, addressed to this second motion, shows that the court carefully considered the entire situation and arrived at the conclusion that justice required the judgment be permitted to stand. We hold upon the facts presented that the trial court's ruling must be upheld upon appeal.

Turning, now, to the second appeal in the action brought by Fischer against the Piersons and others to set aside the trustee's sale and declare void the trustee's deed, the following situation is presented: It was alleged in the complaint that plaintiff had purchased the subject property and had given a note secured by a deed of trust for a part of the purchase price. A copy of that deed of trust was attached to the complaint and made a part thereof by reference. It was alleged that the trustee had sold the property to the Piersons and a copy of the trustee's deed was likewise attached to the complaint and made a part thereof by reference. It was then alleged

that said sale was not made according to law nor according to the provisions of said deed of trust in this, that "no notice of said sale was either posted or published, nor was said sale postponed to said date by public announcement from any previous time fixed for sale; that the omission of said trustee to post or publish the notice of sale or to publicly announce any postponement thereof was calculated to and did prevent competitive bidding at the sale of said property, and by reason of no competitive bids, the sum for which said property was sold was far below the real and true value thereof." To this complaint respondents demurred generally. Their claim that the pleading did not state a cause of action against them rests upon certain provisions in the deed of trust and in the trustee's deed.

The deed of trust contains the following: "Trustee shall deliver to the purchaser its deed conveying the property so sold, * * * The recital in any such deed of any matters or facts, stated either specifically or in general terms, or as conclusions of law or fact, shall be conclusive proof of the truthfulness thereof." The trustee's deed contains the following language: "Said Trustee gave notice of the time and place of the sale of said property in accordance with the laws of the State of California and the terms of said Deed of Trust. Said Trustee complied with all of the provisions of law regarding the mailing of copies of notices of default and of sale and with all applicable provisions of law regarding the service and publication of the notices of default. Said property was sold by said Trustee at public auction on February 13, 1952, in the City of Eureka, County of Humboldt, in full accordance with the laws of the State of California, and the terms of said Deed of Trust. Said Grantees, being the highest bidders at such sale, became the purchasers of said property and paid therefor to said Trustee the amount bid, being Seventy Two Thousand Three Hundred and No/100 Dollars in lawful money of the United States."

[5] It is obvious that the complaint, without reference to the provisions of the deed of trust and of the trustee's deed above recited, stated a cause of action or at least could have been amended to so state. Generally, the rule is that:

> "The power of sale under a deed of trust will be strictly construed, and in its execution the trustee must act in good faith and strictly follow the requirements of the deed with respect to the manner of sale. The sale will be scrutinized by courts with great care and will not be sustained unless conducted with all fairness, regularity and scrupulous integrity. * * *" (25 Cal.Jur., sec. 67, page 83.)

[6, 7] As to sustaining demurrers without leave to amend, the rule has been broadly stated as follows: "As a matter of sound public policy litigation should be disposed of upon substantial rather than upon technical grounds, and that the trial judge should not sustain a demurrer without leave to amend where it is merely defective for uncertainty." Davis v. Wood, 61 Cal.App.2d 788, 789, 143 P.2d 740, 745; see, also, Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 718, 720, 128 P.2d 522, 141 A.L.R. 1358. However, if the recitals in the trustee's deed are in fact conclusive as between the parties to the deed of trust, then the complaint cannot be amended to state a cause of action based upon any claimed failure of the trustee to properly couduct the sale proceedings and the court did not err in sustaining the demurrer without leave to amend. We are not unmindful of the fact that fraudulent nonperformance of a trustee's duties participated in or known of by a buyer at the sale may afford grounds in equity for setting aside a transaction so procured. But in this whole record there is no suggestion that any fraud was practiced, nor, if fraud existed, that the Piersons had any knowledge thereof. The case, therefore, turns upon the conclusive character of these recitals. Such recitals have often received the attention of appellate courts. In Bank of America, Nat. Trust & Savings Ass'n v. McLaughlin etc. Co., 40 Cal.App.2d 620, 633, 105 P.2d 607, 614, recitals which were to all intents and purposes identical with those we have here, and which were based upon provisions

in a deed of trust that likewise, for all practical purposes, was identical with the deed of trust here, the appellate court upheld the ruling of the trial court directing a verdict for the plaintiff therein after refusing to permit the defendant to offer evidence tending to refute the recitals. The court said:

"The appellant assigns error in the refusal of the trial court to receive evidence tending to refute the recitals in the trustees' deed on the ground that appellant was concluded by those recitals. The deed of trust provided: 'The recitals contained in any deed or deeds made pursuant to any sale of the property hereunder setting forth matters or facts with reference to the regularity or validity of said sale shall be conclusive proof of the truthfulness thereof, and such deed or deeds shall be conclusive against the Trustor and all other persons. The said matters or facts need not be stated specifically but may be stated in general terms and in conclusions.' The trustees' deed contained a recital that the property was sold to the grantee at the time, place, terms and conditions provided in the deed of trust 'and in all respects as provided by the law of the State of California'. The appellant argues that though the deed of trust makes the recitals of everything leading up to the sale conclusive, it does not make the recital that a sale was actually held conclusive. For this reason the appellant offered to prove that no sale was had. The language of the deed of trust is not ambiguous. A matter or fact with reference to the regularity or validity of the sale would clearly embrace the fact of sale, and the recital in the trustees' deed that the property was 'sold' at the time and place noticed will estop the claim that no sale was in fact made."

In Central National Bank of Oakland v. Bell, 5 Cal.2d 324, 327, 54 P.2d 1107, 1109, the Supreme Court said:

"The defendants on the trial endeavored to show that the notices required by section 692, subd. 3, Code Civ.Proc., did not remain posted for twenty days prior to the date of sale. The evidence was held inadmissible and excluded by the court. The court did not err in its ruling. It is sufficient in this respect to note that the trust deeds provided that, in event of sale thereunder, the recitals in the trustees' deeds, of default, request to sell, publication, and posting of notice, postponements of sale, etc., should be conclusive evidence of all such facts recited. In this action and on the record before us the defendants were concluded by the recitals in the trustees deeds."

[8] The same ruling was made in Cobb v. California Bank, 6 Cal.2d 389, 57 P.2d 924. We hold that the trial court did not err in sustaining respondents' demurrer without leave to amend.

Appellant contends that to hold the recitals in the trustee's deed to be conclusive against him is to violate the provisions of Section 2953 of the Civil Code which declares:

"Any express agreement made or entered into by a borrower at the time of or in connection with the making of or renewing of any loan secured by a deed of trust, mortgage or other instrument creating a lien on real property, whereby the borrower agrees to waive the rights, or privileges conferred upon him by Sections 2924, 2924b, 2924c of the Civil Code or by Sections 580a or 726 of the Code of Civil Procedure, shall be void and of no effect."

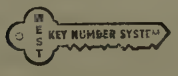
[9, 10] The argument is not sound, for the reason that the provisions in the deed of trust here in question do not result in a waiver of the rights or privileges conferred by the Civil Code sections referred to. Those sections, speaking generally, establish certain procedures in the exercise of powers of sale conferred by deeds of trust and in the remedies of the beneficiary. And concerning all of them, appellant, by the instrument he executed, declared that the recitals in a deed made by his trustee that all of the duties of the trust respecting the sale had been complied with should bind him. In short, he thereby made the

trustee his agent with such powers that the trustee could bind him, notwithstanding he had not carried out the provisions of his trust. As the Supreme Court said in Mersfelder v. Spring, 139 Cal. 593, 595, 73 P. 452, 453: Such stipulations "in express terms to give the trustee the authority to bind his principal by the mere execution of a deed containing the prescribed recitals." As against a purchaser who does not participate in or know of the failure of the trustee to perform his duties, the recital that he has been true to his trust binds the trustee's principal and such purchaser may rely upon those provisions in purchasing at the sale.

We think it unnecessary to rule upon the legal issues presented by the motions to dismiss these appeals. We prefer to dispose of the motions by denial but in conjunction with our disposition of the appeals on the merits.

The motions to dismiss are denied; the judgments appealed from are affirmed.

SCHOTTKY and PEEK, JJ., concur.



131 Cal.App.2d 324

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Arthur Frederick SMALLFIELD, Defendant and Appellant.

Cr. 5225.

District Court of Appeal, Second District, Division 1, California.

March 7, 1955.

Hearing Denied April 6, 1955.

Prosecution for grand theft. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., rendered judgment of conviction. Defendant appealed from judgment and order denying new trial. The District Court of Appeal, Drapeau, J., held that the evidence was sufficient to sustain conviction.

Affirmed.

1. Larceny ⇐58

Evidence identifying fur scarf and diamond found in defendant's room as stolen scarf and diamond was sufficient to sustain conviction for grand theft.

2. Criminal Law ⇐1137(5)

When a defendant stipulates that evidence upon a preliminary examination may be considered by a trial court, defendant must advise court of any objections to evidence or rulings on preliminary examination otherwise he cannot complain of error on appeal.

Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant, Arthur Frederick Smallfield, was a professional appraiser of the contents of dwelling houses, generally for insurance purposes. His employer sent him to appraise the furnishings of the home of the complaining witnesses in this case, Mr. and Mrs. Norman B. Herman. Mr. Herman had made arrangements with defendant's employer to do this work.

Defendant was admitted to the Herman home in Beverly Hills, and given free run of the house, with no one to watch him. After he had been working there for three or four days, Mrs. Herman missed a sable scarf, valued at $4,500, a 5.6 carat, Marquise-cut diamond, some bird-of-paradise feathers, and a ladies handbag.

Complaint was made to the police department of Beverly Hills, and defendant was arrested as he left the Herman house at the end of his day's work. He was searched at the police station, and the officers found on his person an electric razor. At the preliminary examination Mr. Herman positively identified this razor as one he bought in Germany.

The police officers accused defendant of stealing the fur, the diamond, and the other articles. He denied the accusation, gave the officers the keys to his room, and told them they could look there but they wouldn't find any of the stolen property.

The officers went to defendant's room, and found the fur, the diamond, the feathers, and the handbag. When confronted with them, defendant told the officers he had taken the fur and the diamond from the Herman home.

After an extensive trial defendant was convicted by the trial judge of two counts of grand theft—the fur and the diamond. As to one count the court suspended proceedings, and put defendant on probation. As to the other count the court pronounced judgment, and put the defendant on probation. Terms of probation were the same as to each count: five years, concurrently, with the first six months in the county jail.

Defendant appeals from the judgments, and from the order denying his motion for a new trial.

Defendant's argument that the evidence is insufficient to sustain the judgment is without merit. He labors the point that the diamond was an heirloom in his family, that the fur belonged to his mother, and that the identification of them as property of the Hermans was not good enough.

Perhaps some trier of fact might so find, but the great weight of the evidence is to the contrary.

Defendant admitted he took the fur and the diamond from the Herman house, and they were found in his room. A fur merchant identified the scarf found in defendant's room and introduced in evidence as one he sold to the Hermans. Mrs. Herman said that to the best of her knowledge and belief it was her scarf.

[1] The evidence as to identity of the diamond was not so strong as the evidence as to the identity of the fur. But to suggest that there were two Marquise-cut diamonds, weighing approximately 5.6 carats each, one belonging to defendant's family the other to the complaining witnesses, taxes coincidence to too great an extent. In any event it was for the trial judge to settle the conflict. The verdict on both counts is supported by substantial evidence, and that is all there is to it. People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911; People v. Wissenfeld, 36 Cal.2d 758, 227 P.2d 833; People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

Indeed it would be hard to find a criminal case in which the evidence for the People supports more satisfactorily a verdict of guilt of a defendant. His insistence that the fur and the diamond belonged to him lacks the focus of truth, and is out of perspective with the whole case. Moreover, the electric razor found on his person when he was arrested just as he left the Herman house, and positively identified by Mr. Herman, is a circumstance which counts heavily against him. His testimony that he bought the razor in Los Angeles, when it was equipped with electric connections that would not fit any electric plug in California but that would fit such plugs in Germany is palpably untrue.

Defendant's specifications of error as to the admission of, and the exclusion of, evidence have been examined, and are likewise without merit.

[2] The alleged errors occurred at the preliminary examination, the record of which by stipulation was submitted to the trial judge. But the judge's attention was not called to any of them. When a defendant stipulates that the evidence upon a preliminary examination may be considered by a trial court, such defendant must advise the court of any objections to evidence or rulings on the preliminary examination.

The judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

131 Cal.App.2d 303

In the Matter of the ESTATE of Isaac Jacob WEINREICH, Deceased.

Marie W. THOMPSON, Petitioner and Appellant,

v.

Frank E. GRAY, as Guardian ad Litem for Wendy Lee Thompson and for any other possible descendants of Isaac Jacob Weinreich, Leo J. Weinreich, and/or Frances J. Wardwell, minors, Contestant and Respondent, and Security First National Bank of Los Angeles, Trustee and Respondent.

Civ. 20388.

District Court of Appeal, California Second District, Division 1.

March 7, 1955.

Proceeding on petition of testator's daughter, beneficiary of testamentary trust, for instructions requiring trustee to increase monthly payments to daughter. The Superior Court of Los Angeles County, John Gee Clark, J., rendered order denying petition, and daughter appealed. The District Court of Appeal, White, P. J., held that provision of decree of partial distribution that neither principal nor income of testamentary trust for testator's wife could be invaded for purpose of making payments under separate testamentary trust for testator's daughter and grand-daughter until after decease of wife, when read in context, did not render decree ambiguous or limit application to wife's lifetime, and after death of wife, courts were not authorized to look outside decree to alter its terms.

Order affirmed.

1. Executors and Administrators ⚖315(6)

Decree of partial distribution, setting out terms and conditions under which corpus of testator's estate was distributed to trustee of his testamentary trusts, superseded will of testator.

2. Executors and Administrators ⚖315(5)

If there is some ambiguity in order of distribution, will itself may be used to establish true meaning and intent of decree, and court may also determine to whom property shall pass under circumstances not provided for by decree of distribution. Probate Code, § 1120.

3. Executors and Administrators ⚖315(5)

Provision of decree of partial distribution that neither principal nor income of testamentary trust for testator's wife could be invaded for purpose of making payments under separate testamentary trust for testator's daughter and granddaughter until after decease of wife, when read in context, did not render decree ambiguous or limit application to wife's lifetime, and after death of wife, courts were not authorized to look outside decree to alter its terms. Probate Code, § 1120.

Henry C. Rohr, Los Angeles, for appellant.

Frank E. Gray, in pro. per.

Wendell P. Hubbard, Los Angeles, for trustee and respondent.

WHITE, Presiding Justice.

Marie Weinreich Thompson, the only child of the testator and one of the beneficiaries under his testamentary trust, petitioned the court for instructions to require the trustee to pay to her the sum of $450, instead of "the residue of the income" or a minimum of $150 monthly from and after her mother's demise in 1950, said amount to be made up from corpus when the income is insufficient. This appeal is from the order denying her petition.

The trustee appeared by answer as an impartial party. Upon its representation to the court that the interests of petitioner and her minor daughter, Wendy Lee Thompson, were adverse and that any afterborn children of petitioner would have the same rights as Wendy Lee, Frank E. Gray was appointed their guardian ad litem and appeared by filing an answer.

Upon the hearing, petitioner testified that she was 48 years old and her daughter Wendy 10; that each had received from the trust $150 per month ever since testator's death in 1945; that her grandmother, mother and uncle who were life-beneficiaries of the trust are now deceased; that her aunt and cousin are now aged 76 and

54, respectively, and each is to receive a stated amount monthly or annually from the trust until her death; and that when the will was made in 1936 petitioner was divorced, living at home, and had no income of her own.

Guardian ad litem of petitioner's daughter, appearing in pro. per., then objected to "this line of questioning" on the ground that "such testimony would be incompetent, irrelevant and immaterial to the issues in this case, the decree of distribution being full and complete, and there being no ambiguity existing therein * * *"

Petitioner's attorney then stated in effect that the purpose of this testimony by Mrs. Thompson is to explain the circumstances surrounding the making of the will, and not to relate any oral statements made by her father. Ruling on the objection was reserved and offer of proof was made that petitioner would have testified that in 1936 she was completely dependent upon her father; that relations with her father were extremely friendly and he supported her in accord with their high standard of living; that he gave her automobiles and trips to Europe; that he spent in excess of $500 monthly for her support; that before making the will he told her that he was going to erect two multiple units on lots owned by him and she was to receive the income; that the units were never built and the lots were sold before he made his will.

Hubert A. Ward, Robert A. Chamberlain and Charles Schonlaw, testator's business associates and witnesses to his will, were called as witnesses and, according to offers of proof made after rulings reserved on similar objections, would have related conversations in 1936 and at the time of making the will, wherein testator said to them separately that after the death of his wife "the minimum income belonged to" petitioner and that she was to get "all of it"; and that she would then get "her mother's share plus what he had provided for her".

After a continuance, the court sustained the objections to the testimony offered; and thereupon made its order instructing as follows:

"1. That the Will of said decedent and the Decree of Partial Distribution bearing date February 19, 1947, were and are not ambiguous; that said Decree of Partial Distribution superseded the Will of said decedent and is res adjudicata and binding upon all parties to the proceeding.

"2. That the minimum payment of $300.00 per month for Alice Marie Weinreich provided under Paragraph Eighth subdivision (E)(2) of the Will, and under provisions of Trust A of said Decree of Partial Distribution was personal to her, and ceased upon her death, and did not pass to Marie W. Thompson, petitioner herein.

"3. That petitioner Marie W. Thompson is not entitled to have paid to her the minimum payment of $300.00 per month provided to be paid to said Alice Marie Weinreich in addition to the $150.00 per month minimum payment provided to be paid to said petitioner under the provisions of Trust B of the Decree of Partial Distribution."

[1] The Decree of Partial Distribution, setting out the terms and conditions under which the corpus of the estate was distributed to the trustee, supersedes the will of decedent. In re Estate of Loring, 29 Cal.2d 423, 432, 175 P.2d 524. It has become final.

[2] If there is some ambiguity in such order of distribution, "the will itself may be used to establish the true meaning and intent of the decree." In re Estate of Goldberg, 10 Cal.2d 709, 713, 76 P.2d 508, 511. The court may also determine to whom the property shall pass under circumstances not provided for by the decree of distribution. Probate Code, section 1120; In re Estate of Loring, supra, 29 Cal.2d at page 433, 175 P.2d at pages 526, 527.

[3] Appellant first urges as ground for reversal that the trial court erred in sustaining the objections on the ground that the issues raised by the petition were res judicata because the Order of Partial Dis-

tribution setting out the terms of the trust does not "fully instruct the Trustee as to the rights or benefits of petitioner under the testament except during the life of" her mother.

From the record it appears that the decree was drawn up not in the exact terms of the will but so as to provide for the situation created by an holographic codicil, made without the consent of testator's wife about ten years after the will was made. The decree was worked out with the agreement of all of the parties.

The material provisions of the Order for Partial Distribution are "* * * that the entire residue of the estate available for distribution * * * shall be distributed at this time * * * in trust, to be held, managed and distributed as hereinafter provided * * * The Trustee shall pay the remaining net income (of Trust A) to the use of Alice Marie Weinreich. Should said remaining net income from Trust 'A' be insufficient to pay her the sum of $300.00 monthly the Trustee shall make up and pay the deficiency out of the principal of Trust 'A' * * * In case Trust 'A' shall be exhausted the Trustee is authorized to invade the income of Trust 'B' for the payment of the sums to (the beneficiaries of Trust 'A' other than petitioner's mother) * * * Upon the death of Alice Marie Weinreich, if she shall decease prior to the termination of the trust, the corpus and undistributed income of Trust 'A' shall go to augment Trust 'B' * * * Out of the remaining net income (of Trust 'B') the trustee shall pay to Wendy Lee Thompson the sum of $150.00 monthly and the remaining net income of said Trust 'B' to Marie Julia Thompson. In case the net income from Trust 'B' shall be insufficient to pay to Wendy Lee Thompson the sum of $150.00 monthly and to pay the minimum of $150.00 monthly to Marie Julia Thompson the Trustee shall make up and pay the deficiency monthly out of the principal of Trust 'B'. Upon the exhaustion of the principal of Trust 'B' the Trustee is authorized to invade the income of Trust 'A' to pay the sums to (the beneficiaries of Trust 'B' other than petitioner and her daughter) * * * *but neither the income nor the principal of Trust 'A' may be invaded for the purpose of making any further payments to Wendy Lee Thompson, and, Marie Julia Thompson until after the decease of Alice Marie Weinreich*". (Emphasis added.)

Appellant claims that the language emphasized above expressly limits the application of the decree of partial distribution to her mother's lifetime. Reading it in context, however, the purpose of the clause appears to be only to prevent the distribution of any part of Trust "A" to petitioner or her daughter prior to her mother's death, when the entire remainder of Trust "A" becomes a part of Trust "B" and augments the income thereof, to be distributed as therein provided. There is no ambiguity. As before her mother's death, petitioner is to receive the remainder of the income from Trust "B", or, if the remainder of the income is less than $150, she is to receive that amount monthly from income and principal of said Trust "B".

Appellant, in her brief, states that "the doctrine of res judicata should be cautiously applied in the case of a trust where, for all practical considerations, the Petitioner is the sole person concerned". In the instant proceeding, petitioner is not the only person concerned. She may not survive the distribution at the end of the trust term of 25 years. In that case Wendy Lee Thompson may be the sole distributee of the trust property.

Much of appellant's brief is devoted to a discussion of testator's intention as shown by his will; but where, as in this proceeding, the decree of distribution sets forth the terms of the trust without ambiguity and covers fully the conditions now existing, neither the probate court, nor this court on appeal, is authorized to look outside the decree.

The order is affirmed.

DORAN and DRAPEAU, JJ., concur.

131 Cal.App.2d 399

PACIFIC FINANCE CORPORATION OF CALIFORNIA, a Corporation, Plaintiff and Respondent,

v.

R. M. CRANE et al., Defendants and Appellants.

Civ. 4699.

District Court of Appeal, Fourth District, California.

March 10, 1955.

Rehearing Denied April 4, 1955.

Hearing Denied May 4, 1955.

Action to foreclose trust deed, chattel mortgage, and pledge agreement. The Superior Court, Tulare County, Frederick E. Stone, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that where allegedly excessive interest charged and collected was brought about and resulted from borrowers' default, their voluntary action in that regard could not make transaction usurious.

Judgment affirmed.

1. Usury ⇐137

Where parties to loan intended to provide for a bonus within legal limit, and error which rendered return excessive was corrected within a few days and before any interest was due or paid, no penalty for usury attached on account of the error.

2. Usury ⇐42

Amount which was added to face value of note above amount loaned and upon which interest was to be charged was interest, but did not constitute usury unless it resulted in exacting more than 10 per cent interest from borrowers. West's Ann. Const. art. 20, § 22.

3. Usury ⇐42

Where, if all payments had been made on note as they became due, legal limit of 10 per cent interest would not have been exceeded, the contract did not on its face call for usurious interest.

4. Usury ⇐42

Where allegedly excessive interest charged and collected was brought about and resulted from borrowers' default, their voluntary action in that regard could not make transaction usurious.

5. Usury ⇐89

Each usury case must be decided on its own facts.

6. Bills and Notes ⇐137(1)
Chattel Mortgages ⇐271

That payee of secured note, who was not a party to makers' liquidation agreement, was willing to wait a reasonable time to see if liquidation program would succeed, did not extend maturity date of note or waive existing default, and notice requiring strict compliance with terms of note was not a prerequisite to foreclosure.

7. Chattel Mortgages ⇐278
Mortgages ⇐463
Pledges ⇐57

In action to foreclose a trust deed, chattel mortgage and pledge agreement, evidence whether plaintiff had delayed the harvesting of lemon crop on mortgaged land did not support defendants' contention that plaintiff had been guilty of waste or business compulsion.

8. Novation ⇐12

In action to foreclose trust deed, chattel mortgage and pledge agreement, evidence whether individual defendants had executed note as agents of proposed corporation and whether plaintiff had agreed to substitution of corporation as principal debtor supported finding that no substitution had been effected to relieve individual defendants from liability.

9. Trial ⇐395(1)

Findings in action to foreclose trust deed, chattel mortgage, and pledge agreement sufficiently covered material issues.

Harold A. McCabe, Fullerton, G. V. Weikert, Ernest R. Utley, Los Angeles, for appellants.

Crowe, Mitchell & Hurlbutt, Visalia, Hugh M. Foster, Jr., Ivan C. Tagert, Mansfield A. Mills, Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action to foreclose a trust deed, a chattel mortgage, and a pledge agreement given to secure a note executed by the individual defendants.

On June 13, 1946, the plaintiff loaned $195,000 to the nine individual defendants for the purpose of enabling them to purchase 1950 arces of land. Two checks totalling that amount were dated and delivered on that day, both being payable to and endorsed by all of the individual defendants. On the same day, these individual defendants executed a note jointly and severally promising to pay to plaintiff $201,000 "with interest from date hereof on the unpaid principal at the rate of seven per cent (7%) per annum, payable monthly; if the principal payments run past maturity the interest on such delinquent amounts of principal shall be at the rate of ten per cent (10%) per annum; principal payable in installments as follows:

"$75,000.00 or more on January 15, 1947,

"50,000.00 or more on May 1, 1947, and a final installment on January 15, 1948 in the amount of the then remaining unpaid principal balance and interest." Other provisions of the note are not in controversy, and it is admitted that the $201,000 included a bonus or discount agreed upon by the parties, which bonus must be considered as interest.

On June 13, 1946, these individual defendants also signed and delivered to the plaintiff a letter reciting their understanding of this transaction. This letter states that "The following constitutes our understanding and agreement in respect to the $195,000.00 loan made by your corporation to us this day for the purpose of purchasing from Capital Corporation 1950 acres known as Sentinel Butte Ranch together with equipment located thereon." This is followed by three numbered paragraphs. The first states "We have executed our note in your favor in the sum of $201,000.00 which represents the principal amount of the loan of $195,000.00, plus your discount." The second states "It is understood that our note is to be secured by a deed of trust and chattel mortgage * * * covering the aforementioned property, excepting the crops thereon, and subject only to a first lien on the real estate and equipment securing an obligation in favor of the seller in the amount of $300,000.00 * * *". The third paragraph states that "It is our intention to form a corporation to be known as Sentinel Butte Corporation, for the purpose of taking over and operating said property." After a further provision, not material here, the third paragraph concludes: "It is understood that the transfer of said property to the proposed corporation shall in no manner relieve us from our liability to you under said note." Immediately following the signatures of the individual defendants the plaintiff signed a confirming statement which reads: "We confirm the above as setting forth our understanding as to the matters herein set forth."

Title to this ranch was conveyed from the Capital Company to two of the individual defendants, L. A. Evans and his wife, by a deed dated June 18, 1946, which was recorded on July 5, 1946. A trust deed and a chattel mortgage covering this ranch and certain equipment and securing this note, were executed by Evans and his wife and delivered to the plaintiff. They were both dated June 13, 1946, and were also recorded on July 5, 1946. L. A. Evans and his wife then conveyed this land to Sentinel Butte Corporation, which had been organized by the individual defendants, by a deed dated August 9, 1946 and recorded August 17, 1946.

On July 2, 1946, the plaintiff wrote a letter addressed to Sentinel Butte Corporation, "Attention: R. M. Crane", who was one of the individual defendants, which reads:

"Gentlemen:

"This will confirm our conversation of several days ago relative to the adjustment of your indebtedness to this corporation.

"You will recall that during the negotiations leading up to the consummation of the subject loan you were advised that the note would be written to provide for a yield to maturity not to exceed 10% per annum. Inadvertently the note was so drawn as to exceed this limitation. Accordingly, in order to correct this mistake and to bring the rate under 10% per annum, we have by endorsement as of June 13, 1946, reduced the amount of the indebtedness by $625, applicable to the final installment of $76,000, which

is due, pursuant to the terms of the note, on January 15, 1948.

"We shall appreciate the signers of the note indicating their understanding and agreement to the adjustment that has been made, as above mentioned, and their acceptance of the method employed by signing as indicated on the carbon copy of this letter. Please return the copy when properly signed."

A copy of this letter marked "Approved" was signed by each of the individual defendants and returned to the plaintiff. This reduction of $625 was credited by the plaintiff and treated by it as reducing by that amount the final installment called for by the note. The first installment of $75,000 due on January 15, 1947, was partly paid on January 16, 1947, and the remainder on February 14, 1947. The second installment of $50,000 was not paid on May 1, 1947, when due, and no part thereof was paid for more than two years after said due date. The final installment, as corrected, of $75,375 was not paid on January 15, 1948, when due, and no part thereof had been paid when this action went to trial.

A quarrel developed among the individual defendants as a result of the failure to meet the payments required by the various liens on this ranch, and one of them brought a suit which was dismissed when the directors of Sentinel Butte Corporation agreed to sell the assets of said corporation in order to satisfy these obligations. In April, 1948, a program of liquidation contemplating the sale of the Sentinel Butte Ranch properties in small parcels was undertaken for the purpose of applying the proceeds on these various obligations. A real estate agent was given authority to sell certain parcels, as listed in the agreement, at designated prices. In order to facilitate such sales a mutual water company was formed in order to furnish water to the purchasers. The plaintiff was given certain shares in this mutual water company to hold as a pledge, in lieu of its original lien on these water facilities, this being the pledge involved in this action. This was not an additional security but merely a substitution of securities. While the plaintiff was not a party to the program of liquidation or agreement therefor, it consented thereto. A number of parcels were sold at their market value, and the plaintiff executed partial releases of its liens to enable such sales to be made. From the sales so made the indebtedness of $300,000 to the Capital Company was fully paid, and certain amounts were paid to the plaintiff at various times to apply on the indebtedness here in question.

This action was filed on November 7, 1949, naming the signers of the note and the Sentinel Butte Corporation as defendants. The appointment of a receiver was also sought. On November 22, 1949, pursuant to its voluntary petition, the Sentinel Butte Corporation was adjudicated a bankrupt. By order of the federal court the plaintiff was precluded from procuring the appointment of a receiver. The trustee in bankruptcy took possession of the assets, and was authorized by the federal court to represent the bankrupt estate in this action. The trial of the action began on March 13, 1951. The court's opinion and order for judgment was not filed until May 12, 1952. Findings of fact and conclusions of law were later filed, and judgment was not entered until September 21, 1953. On August 13, 1952, before judgment was entered, the trustee in bankruptcy sold the remaining assets for $33,490.20, which amount was paid to the plaintiff and applied partly to the payment of accrued interest and partly to the principal of this debt.

The complaint in this action alleged the general facts above stated, set forth the instruments and letters above referred to, and alleged that no part of the principal sum of this note, as adjusted by the agreement of July 2, 1946, had been paid except for certain amounts paid on various dates between January 16, 1947 and July 28, 1949; that there was now due on said note the principal sum of $92,195.40; that all interest on the note had been paid to July 28, 1949; and that nothing had been paid upon principal or interest since July 28, 1949. It was also alleged that certain sums had been paid by the plaintiff, covered by the trust deed, for taxes and expenses. The prayer was for judgment as against the individual

defendants for $92,195.40, with interest at 10% from July 28, 1949; for the expenses incurred and for attorneys' fees; for a foreclosure and sale of the remaining assets as against all defendants; and for judgment as against the individual defendants for any deficiency. Briefly stated, the answers admitted the making of the loan and the execution of the various instruments in connection therewith and alleged, by way of defense and counterclaims, (1) that the loan was usurious and required the defendants to pay interest in excess of 10% per annum, and they were entitled to have all interest payments applied on the principal of the debt; (2) that the original maturity date provided in the note had been extended and strict performance thereof waived by the plaintiff so that "the note was not in legal default"; (3) that the individual defendants were the promoters of Sentinel Butte Corporation and upon its incorporation Sentinel Butte became the sole debtor; and (4) that between April 28, 1948 and July 28, 1949, the plaintiff controlled and supervised the liquidation program; that plaintiff thus became a mortgagee in possession with the duty of not committing waste; and that while thus in possession plaintiff committed waste which resulted in the freezing of the 1948 lemon crop, to the defendants' damage in the sum of not less than $50,000.

The court made long findings, which were in all material respects in favor of the plaintiff, and which specifically found against the defenses and counterclaims of the defendants. Among other things, it was found that certain sums had been paid on this note on various dates; that there was an unpaid balance on the principal sum of the note as of July 28, 1949 in the sum of $92,195.40; that all interest accruing before that date had been paid; and that two amounts were paid in 1952, including $33,490.20 on August 13, 1952, which amounts reduced the unpaid principal of said note to $86,743.34 as of August 13, 1952, and paid all interest accrued up to that date. As conclusions of law, it was found that the plaintiff was entitled to judgment against the individual defendants for this balance of $86,743.34, for the amounts of the expenses paid by the plaintiff, and for interest thereon as provided in the note and trust deed. Judgment was entered accordingly as against the individual defendants for $119,394.07, including $5,000 attorneys' fees allowed by the court, and for costs of suit. From this judgment the individual defendants and the trustees of the bankrupt estate of Sentinel Butte Corporation have appealed.

In outlining the issues raised on this appeal the appellants state: "The record poses only legal questions, the operative facts not being in dispute." It is first contended that the written instruments set forth in or attached to the complaint conclusively establish that this was a contract calling for usury, and that the evidence established that the respondent charged and collected usurious interest. It is argued that by the terms of the contract the appellants were required to pay interest in excess of 10% in that they were required to pay 10% on the principal actually due "upped by a bonus of about $6000 and plus additional interest of 10% on said bonus"; that the agreed reduction of $625 was to be credited only on the final installment of $76,000 and then only if that installment was paid on January 5, 1948; that the appellants being required to pay 10% on the past due principal represented by the face of the note were thus required to pay an extra 10% on the $625 until the final payment of $76,000 had been fully paid; and that since the $625 reduction was not mentioned in the trust deed or the chattel mortgage, which set forth the original note, those documents called for the payment of the full sum of $201,000 without regard to the agreed reduction. It is further argued that the respondent charged and collected usurious interest; that on January 15, 1948 (the maturity date of the note) the unpaid principal amounted to $125,375, being the unpaid amount of the actual loan in the sum of $120,000 "upped by the amount of the corrected bonus of $5375.00"; that in crediting payments made in 1949 interest was collected on the full amount of that principal, including the corrected bonus of $5,375; and that the evidence shows that the appellants were charged with 7% in-

terest on the adjusted principal of $200,-375 up to maturity, and were charged with 10% interest on the adjusted bonus of $5,-375 after January 15, 1948, the maturity date.

[1–3] It clearly appears that it was the intent of the parties to this loan to provide for a bonus that was within the legal limit, and that an error was made in drawing the note which was contrary to the true intent of the parties. The correction of $625 was made within a few days, before the trust deed was recorded, and before any interest was due or paid. It follows that no penalty attaches because of the error itself. Strauss v. Bruce, 139 Cal.App. 62, 33 P.2d 71. This reduction of $625 was immediately effective as of the date of the note, was in no way conditional, and was not contingent upon the payment of the final installment on the precise date of January 15, 1948. The borrowers were not required to pay 10% interest on this $625 after maturity and until the final installment should be paid. There is no question that the bonus of $5,375 constituted interest but under Article XX, Section 22 of the Constitution such a bonus is not illegal unless it results in exacting more than 10% interest from the borrower. A simple mathematical computation demonstrates that if all payments had been made on this note as corrected, as they became due, the legal limit of 10% interest would not have been exceeded. This contract did not on its face call for usurious interest. Sharp v. Mortgage Security Corp., 215 Cal. 287, 9 P.2d 819.

[4, 5] It clearly appears from the evidence that no usury was charged or collected up to the maturity of the note on January 15, 1948, with the corrected bonus of $5,375 figured as interest. It also appears that, in fact, no interest of any kind was ever charged on the reduction of $625 either before or after maturity, and that no interest of any kind or at any rate was ever charged on the $5,375, the corrected discount, after January 15, 1948. While 7% was charged on this $5,375 up to January 15, 1948, that interest was accounted for in computing all interest paid, including the discount, up to that date, and the total interest thus paid did not exceed the permissible amount. No usury was shown in law or in fact up to the final maturity of this note on January 15, 1948. The fact that interest was thereafter charged and collected on the unpaid balance of the principal of the note, as agreed to by the parties, was brought about and resulted from the default of the borrowers, and their voluntary action in that regard could not make the transaction usurious. Similar principles to those applied in French v. Mortgage Guarantee Co., 16 Cal.2d 26, 104 P.2d 655, 130 A.L.R. 67, are applicable here. The appellants rely on Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A.L.R. 725; Penziner v. West American Finance Co., 10 Cal.2d 160, 74 P. 2d 252; Rice v. Dunlap, 205 Cal. 133, 270 P. 196; Middlekauf v. Vinson, 106 Cal.App. 2d 204, 234 P.2d 742; Anderson v. Lee, 103 Cal.App.2d 24, 228 P.2d 613; and similar cases. Each case must be decided on its own facts and there is nothing in any of those cases which would compel a holding, under the evidence here, that usury appears in connection with the interest charged or collected after the final maturity date of this note. While interest at the agreed rate was charged and collected on the balance of the principal, after the maturity date, the collection of such ilnterest, resulting from the default of the borrowers, does not under the decisions of this state bring the creditor under the penalty of the usury law, where no violation of that law is present in the inception of the contract or is called for by the terms thereof. The court's findings to the effect that this transaction was not usurious are sustained by the evidence and, as the appellants state, the operative facts are not in dispute.

[6] It is next contended that the original maturity date of the note was extended, and strict compliance with its terms waived, by the liquidation agreement; that the plaintiff failed to serve a notice requiring the defendants to strictly comply with the terms of the note and giving them a reasonable time within which to comply; and that it follows that there was no legal default upon which this action could be based.

The facts given as supporting this contention are that the appellants' financial plight was well known to the respondent; that in order to solve this problem Sentinel Butte Corporation adopted a resolution providing for the sale of portions of its ranch and the application of the proceeds in payment of this note; that the respondent consented to these sales, and accepted shares in the mutual water company as additional security; and that upon the receipt of its share of the proceeds from these sales the respondent released the sold acreage from its trust deed lien. In support of this contention the appellants cite Panno v. Russo, 82 Cal.App.2d 408, 186 P.2d 452; Hunt v. Mahoney, 82 Cal.App.2d 540, 187 P.2d 43; Atkinson v. Pacific Fire Extinguisher Co., 40 Cal.2d 192, 253 P.2d 18; Eddleman v. Deavel, 107 Cal.App.2d 351, 237 P.2d 38; and Katemis v. Westerlind, 120 Cal.App.2d 537, 261 P.2d 553. These cases pertain to specific performance and related questions with respect to the right of forfeiture under contracts of sale or lease. No question of forfeiture was here involved, and no agreement by the respondent that the original maturity date of the note would be extended for any period whatever was proved. The respondent was not a party to the liquidation agreement and the fact that it was willing to wait a reasonable time to see if appellants' liquidation program would succeed in no way extended the maturity date of the note, or waived the existing default, and no such notice requiring strict compliance with the terms of the note was required.

[7] It is next contended that the respondent controlled and dictated the liquidation operations, that while so doing it committed waste and acts of business compulsion, that these acts resulted in the freezing of the lemon crop for 1948 on a portion of the ranch, and that this resulted in a loss to the appellants of not less than $50,000, which should be charged to the respondent. It is argued that the liquidation operations were supervised and controlled by the respondent; that the respondent was in effect a mortgagee in possession of the portion of the ranch involved in the liquidation; that as such it was bound to protect the property and not commit waste; that in the fall of 1948 a valuable lemon crop was growing on the part of the ranch that was being sold under the liquidation program; that Sentinel Butte was ready to pick and market this crop; that although warned that a severe cold and freeze were on their way the respondent refused to permit Sentinel Butte to harvest the crop; and that by reason of this conduct the appellants were damaged. There was no evidence that the respondent supervised or controlled this liquidation program, and none which would support the conclusion that it was in the position of a mortgagee in possession of the ranch property or of this crop of lemons. The respondent did not have a crop mortgage on these lemons, and Sentinel Butte was in possession and control. The uncontradicted evidence is that the respondent did not threaten to foreclose its trust deed in the event this crop of lemons were picked, or at all, during this period. There was evidence that an agent of the respondent advised R. M. Crane, one of the appellants, that it would not look with favor upon the harvesting of these lemons because it would interfere with the sale of the land at that time. Crane testified that he wrote a letter to the respondent calling its attention to the fact that "this cold weather" was coming up; that he called respondent's agent to get his permission to pick the lemons; that this agent said to go ahead and pick them but that he would consider it a breach of the liquidation program and looked with disfavor on that procedure; and that while there was no threat of foreclosure they refrained from picking the lemons mostly because of fear of foreclosure and because of the pressure thus brought to bear. There was nothing to show waste committed by the respondent, or business compulsion within the established rules, and the evidence supports the findings to the effect that the facts relied on by the appellants in this connection were not true.

[8] It is next contended that this loan transaction was adopted and ratified by Sentinel Butte and that this corporation was substituted as the principal debtor in place of the individual defendants, thus relieving the individual appellants from any liability on this obligation. It is argued that

the instruments evidencing this loan agreement provided for the formation of a corporation for the purpose of taking over and operating this ranch property; that pending the formation of the corporation title to the ranch was placed in the names of Evans and his wife who executed the trust deed and chattel mortgage, which instruments did not name the other individual appellants as parties; that after its incorporation Sentinel Butte ratified and confirmed the acquisition of the property by Evans and his wife as agents for and on behalf of that corporation while it was in process of organization; that after the incorporation of Sentinel Butte it operated the ranch as a distinct corporate entity and respondent's dealings were then all had with Sentinel Butte; that statements and invoices were submitted by the respondent to Sentinel Butte and were not directed to the individual appellants; that payments on the note were all made by Sentinel Butte and not by the individual appellants; that the respondent wrote various letters to Sentinel Butte acknowledging payments "in accordance with the terms of your note"; that Sentinel Butte ratified the loan agreement and accepted its benefits and the respondent had knowledge thereof; and that this constituted a novation. The evidence does not sustain the contention that the individual appellants were acting as sureties or guarantors for Sentinel Butte Corporation when they signed this note, and there is no evidence to sustain the contention that the liquidation agreement with respondent's subsequent acts, constituted a novation which relieved the individual appellants from liability as makers of this note. In the letter of June 13, 1946, setting forth the understanding of the loan agreement, it was stated that the individual defendants intended to form a corporation to take over and operate this property. Not only does this indicate that this corporation was to be organized to act as the agent for these individuals, but it was clearly stated that it was understood that the transfer of this property to the proposed corporation should in no manner relieve the individual appellants from their liability under this note. It clearly appears that there was no agreement between the respondent and Sentinel Butte Corporation whereby the terms of the promissory note were altered, that the respondent never agreed to any substitution of Sentinel Butte Corporation as the principal debtor, and that in sending statements to and accepting payments from Sentinel Butte the respondent was dealing with that corporation merely as the agent of the individual appellants. As the trial court pointed out, there was no evidence indicating that the respondent misled any of the appellants in this regard at any time, there was no evidence that any of the defendants notified the respondent that he or she was signing in any capacity other than that indicated by the note and letter, and the defendants failed to meet the burden resting upon them in connection with this issue. The evidence supports the court's findings in this connection and refutes the contentions here made.

[9] Finally, it is contended that the findings are deficient in that specific findings were not made as to whether certain testimony made the loan usurious, as to whether the indebtedness was in legal default, as to whether the individual defendants were sureties or guarantors, as to whether their secondary liability was extinguished by novation, and as to whether the plaintiff was guilty of waste and business compulsion in connection with the freezing of the lemon crop. The court specifically found that each and all of the allegations with respect to usury, and with respect to these other matters of affirmative defense, as pleaded by the defendants, were untrue. These were all pleaded as offsets to the claim of the plaintiff and the allegations with respect to each were found to be untrue. The findings were sufficient to cover the material issues and, in view of the findings made, no further findings were necessary.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Sarah BOLLOTIN, Petitioner,

v.

CALIFORNIA STATE PERSONNEL BOARD et al., Respondents.

Sarah BOLLOTIN, Plaintiff and Appellant,

v.

James W. HARVEY et al., Defendants.

James W. Harvey, Elmer C. Mewer, Dorothy E. Handy, Bruce A. Werlhof, Ralph Wertheimer, James H. Phillips, Nicholas Alaga, Jerold E. Weil, Jack A. Hayes and The State Bar of California, a corporation, Defendants and Respondents.

No. 15987.

District Court of Appeal, First District, Division 1, California.

March 2, 1955.

Rehearing Denied April 1, 1955.

Hearing Denied April 27, 1955.

Separate actions were brought by the same plaintiff against the State Personnel Board to review a decision which affirmed action of a Civil Service Examining Board, and against certain attorneys and the State Bar and two of its officers. The Superior Court, City and County of San Francisco, Preston Devine, and Mervin C. Lernhart, J., entered orders and judgments adverse to plaintiff, and she appealed. The District Court of Appeal, Fred B. Wood, J., held that failure, if any, of State Bar officials to perform alleged duty in initiation and conduct of disciplinary proceeding against a client's former attorneys would not create a cause of action for damages in favor of client against State Bar officials.

Appeals from certain orders dismissed, and judgments affirmed.

1. Appeal and Error ⇐113(1)

Minute order vacating previous order for taking of depositions was not appealable.

2. Appeal and Error ⇐102

Orders sustaining demurrers of defendants with leave to amend were not appealable.

3. Appeal and Error ⇐102

Orders sustaining general demurrers of defendants to complaint without leave to amend were not appealable.

4. Pleading ⇐225(2)

Where third amended complaint proved equally as defective as second amended complaint in respect to certain defendant, trial court did not abuse its discretion in sustaining that defendant's general demurrer to third amended complaint without further leave to amend.

5. Pleading ⇐225(1)

Where trial court sustained general demurrer of certain defendants to second amended complaint with leave to amend, and third amended complaint made allegations somewhat more specific but still showed no basis for a cause of action for damages, general demurrer to third amended complaint was properly sustained without leave to amend.

6. Attorney and Client ⇐31

Failure, if any, of State Bar officials to perform alleged duty in initiation and conduct of disciplinary proceeding against a client's former attorneys would not create a cause of action for damages in favor of client against State Bar officials.

7. Attorney and Client ⇐51

Client has right to invoke disciplinary action against an attorney in the Supreme Court, on proper showing that State Bar has arbitrarily failed or refused to grant a hearing on specific charges, or has arbitrarily failed or refused, after a hearing, to take appropriate action.

8. Pleading ⇐225(2)

Where defects of complaint in respect to certain defendant appeared in each form of the complaint, from the complaint first filed to and including third amended complaint, court did not abuse its discretion in denying plaintiff privilege of further amending after demurrer sustained as to that defendant.

9. Pleading ⇐225(2)

Where first amended complaint, second amended complaint, and third amended complaint all failed to disclose whether alleged contractual undertakings of certain defendants were expressed orally or in writing, and special demurrers were interposed each time by defendants on ground that it could not be ascertained whether or

not alleged contract was written or oral, court did not abuse its discretion in denying plaintiff privilege of further amending the complaint. West's Ann.Code Civ.Proc. § 430, subd. 10.

10. Limitation of Actions ⇐189

Where original verified complaint was defective because it alleged that alleged promise on which plaintiff was relying was "oral", and therefore showed that two-year limitation for bringing an action on an oral contract had run, omission of word "oral" in amended complaint without explanation did not cure defeat. West's Ann. Code Civ.Proc. § 339, subd. 1.

11. Limitation of Actions ⇐95(1)

Where complaint was not filed until June 12, 1952, though alleged negligence and alleged deceit of certain defendants was discovered by February 10, 1949, alleged cause of action was barred by one-year and three-year statutes of limitation. West's Ann.Code Civ.Proc. § 338, subd. 4; § 340, subd. 3.

12. Limitation of Actions ⇐30

Where complaint was not filed until several years after alleged tort, second cause of action sounding in tort was barred by one-year and three-year statutes of limitation. West's Ann.Code Civ.Proc. § 338, subd. 4; § 340, subd. 3.

13. Appeal and Error ⇐106

Order of one judge holding that another judge was not disqualified to sit in actions was not appealable.

14. Appeal and Error ⇐870(2)

Nonappealable order of one judge holding that another judge was not disqualified to sit in actions was reviewable on appeals from judgments later rendered.

15. Judges ⇐51(4)

Evidence supported order of one judge holding that another judge was not disqualified to sit in actions.

Sarah Bollotin in pro. per.

Harry P. Glassman, San Francisco, for respondent Nicholas Alaga.

Frank S. McGorty, San Francisco, for respondents James W. Harvey, Elmer C. Mower and Dorothy E. Handy.

James H. Phillips, Sacramento, in pro. per.

Lillick, Geary, Olson, Adams & Charles, Joseph J. Geary, Gary J. Torre, San Francisco, for respondents State Bar of California, Jerold E. Weil and Jack A. Hayes.

No appearance on behalf of respondents Bruce A. Werlhof and Ralph Wertheimer.

FRED B. WOOD, Justice.

Plaintiff Sarah Bollotin appealed "from all Orders, Rulings, Decisions and Judgments made by the Honorable Preston Devine, * * * San Francisco County Superior Court and entered in the Minute Book of Department 10 of said Court between June 25, 1953 and June 30, 1953 inclusive." That embraced orders made in two separate actions: (1) An action against the state personnel board to review a decision which had affirmed the action of a civil service examining board; (2) an action against a number of attorneys whom plaintiff had successively retained to represent her, also against the State Bar and two of its officers.

[1, 2] The appeal in the first action was dismissed April 26, 1954, because taken from a nonappealable order, a minute order vacating a previous order for the taking of depositions. (124 A.C.A. No. 4, Minutes, p. 2.) In the second action, appeals from orders affecting defendants Howard I. Paulson, Vincent Hallinan, James Martin MacInnis and Archer Zamlock were dismissed June 28, 1954, because taken from nonappealable orders, orders which sustained demurrers with leave to amend. (126 A.C.A., No. 1, Minutes, p. 2.)

[3] For similar reasons, appeals in the second action should be dismissed as to defendants Bruce A. Werlhof (general demurrer to complaint sustained with leave to amend), Ralph Wertheimer (general demurrer sustained without leave to amend), and James H. Phillips (general and special demurrers sustained without leave to amend). There is no appeal pend-

ing as to George D. Higgins or Stanley Fleishman; the record discloses no order affecting either of them.

This leaves for consideration the appeals which affect defendants Nicholas Alaga, the State Bar, Jerold E. Weil, Jack A. Hayes, Dorothy E. Handy, James Warren Harvey, and Elmer C. Mower.

[4] The judgment in favor of Alaga was predicated upon an order which sustained his general demurrer to the third amended complaint without leave to amend. His name first appeared in the second amended complaint and then only as the person who had been sued as Fifth Doe, with no allegation connecting him in any way with any of the transactions alleged in the complaint. His general demurrer to the second amended complaint was sustained with leave to amend. The third amended complaint made no change in respect to Alaga. It is a mere repetition of the second amended complaint in so far as he is concerned. Plaintiff argues that he was a member of one of the law firms mentioned in the complaint and responsible for the acts of members of that firm, but the complaint is wholly silent. It says nothing about Alaga in that connection or at all. Each form of the complaint was fatally defective as to Alaga and we find in the record no basis for holding it an abuse of discretion for the trial court to deny leave further to amend when the third proved equally as defective as the second amended complaint.

[5–7] The State Bar of California and Jerold E. Weil and Jack A. Hayes, officers of the State Bar, were made parties defendant by the second amended complaint. Plaintiff therein alleged she had complained to the Grievance Committee of the State Bar concerning the conduct of certain of her former attorneys. She sought damages for alleged denial of her demands and failure to accord her an opportunity to appear before the Grievance Committee of the State Bar. The general demurrer of these three defendants was sustained with leave to amend. The third amended complaint made the allegations somewhat more specific but still showed no basis for a cause of action for damages. This time the demurrer was sustained without leave to amend and the action as to these defendants was dismissed without prejudice. We find no error and no abuse of discretion in that ruling. A failure, if any, of the State Bar officials to perform their duty in the initiation and conduct of a disciplinary proceeding would not create a cause of action for damages in plaintiff's favor. The law does not provide in that manner for the enforcement of the performance of duty by public officers. It does accord to the individual the right to invoke disciplinary action against an attorney in the Supreme Court, upon a proper showing that "The State Bar * * * has arbitrarily failed or refused to grant a hearing on such specific charges or has arbitrarily failed or refused, after a hearing, to take appropriate action." In re Walker, 32 Cal.2d 488, 491, 196 P.2d 882, 883. Plaintiff chose not to pursue that remedy. She has not the alternative remedy of an action against the State Bar for damages of asserted dereliction of duty. This disposition of this issue does not, of course, carry an inference that the State Bar officials have been negligent in their duty. Indeed, plaintiff's allegations tend to indicate a lack of understanding by her of the nature of a disciplinary proceeding and a failure upon her part to cooperate in the preliminary investigation which the State Bar rules prescribe.

[8] As to defendant Dorothy E. Handy, no cause of action was stated. No contract or breach of contract nor any tort, was pleaded. It was alleged that Miss Handy was employed "as a secretary and law clerk by defendants Harvey and Mower" despite an alleged promise by Harvey and Mower to employ plaintiff in that capacity. Acceptance of such employment by Handy was not in violation of any alleged duty toward the plaintiff. The complaint also alleges that Miss Handy owed a duty to plaintiff to investigate the facts concerning the alleged professional negligence of Miss Handy's principals and to reveal those facts to plaintiff, but no legal basis for such a duty is pleaded. Moreover, those events allegedly took place during October

to December, 1948, more than three and a half years prior to the filing of the complaint, a longer period than that of any conceivably applicable statute of limitations. These defects in respect to defendant Handy appeared in each form of the complaint, from the complaint first filed to and including the third amended complaint. There was no abuse of discretion in denying plaintiff the privilege of further amending as to defendant Handy.

As to defendants James W. Harvey and Elmer C. Mower, plaintiff's first cause of action sounds in contract. One contract, evidenced in writing in the form of a receipt for a retainer fee paid by plaintiff, was an undertaking to institute "a mandamus action or other appropriate proceeding to determine [plaintiff's] eligibility for junior state librarian, based upon written examination taken on May 16, 1946." The complaint alleges that such a petition was filed September 17, 1948, to review the action of the state personnel board, effective September 27, 1946, which held adversely to plaintiff's claim that she was eligible for the position of junior state librarian. The complaint herein also alleges that in that mandamus action judgment was rendered not later than February 2, 1949, against the plaintiff upon the ground that said action was barred by the statute of limitations. That judgment, doubtless, was based upon section 19630 of the Government Code which limits to one year the time within which an action may be brought for wrongs or grievances based on or related to any civil service law or the administration thereof. The complaint herein alleges nothing, and we are aware of nothing, that plaintiff's counsel could have done to avoid the bar of that statute and obtain a different result in that mandamus action.

[9, 10] Plaintiff also alleges in her first cause of action that she had been rejected as a candidate for library positions in the Oakland Public Library, the San Francisco Public Library, U. S. Veterans' Administration, the Department of the Army, and various other organizations, upon the ground that although she was a graduate of a library school she was not a graduate of an "accredited" library school. She then states that she informed defendants Harvey and Mower of this situation and that they "promised to secure employment for plaintiff by abolishing said arbitrary and discriminatory system of library school 'accreditation'" and assured her they would "put an end to said unreasonable, arbitrary system of basing Civil Service Eligibility for Library Positions upon graduation from an *'accredited'* library school," but that they refused to undertake any litigation other than the mandamus action above mentioned, and never did anything to end the practice of basing eligibility for library positions upon library school accreditation. She also alleges that the defendants, knowing that plaintiff was unemployed and unable to obtain any kind of employment, "promised to give plaintiff such employment as they could, including their legal research and brief-typing," but failed to do so. The third amended complaint does not state whether these contractual undertakings were expressed orally or in writing. The same was true of like allegations in the second amended complaint and in the first amended complaint, despite special demurrers interposed each time by these defendants upon the ground that it could not be ascertained from the complaint whether or not the contract was written or oral. See Code Civ.Proc., § 430, subd. 10. Under such circumstances, after so many refusals on the part of the plaintiff, a reviewing court could not very well hold it was an abuse of discretion upon the part of the trial court to deny plaintiff the privilege of further amending her complaint. Billesbach v. Larkey, 161 Cal. 649, 653, 120 P. 31; Jackson v. Lacy, 37 Cal.App.2d 551, 560, 100 P.2d 313. Furthermore, in her original complaint, plaintiff alleged that these "defendants *orally* promised to give plaintiff such employment as they could including their legal research" but they wholly failed to perform "any of the *oral* promises made to plaintiff." (Emphasis added.) The omission of the words "oral" and "orally" from all later forms of the complaint did not render them invulnerable to challenge upon the ground that the statute of limita-

tions had run. "If any verified pleading contains an allegation which renders a complaint vulnerable, the defect cannot be cured simply by omitting the allegation, without explanation, in a later pleading." Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 716, 128 P.2d 522, 524, 141 A.L.R. 1358. See also Zakaessian v. Zakaessian, 70 Cal.App.2d 721, 724, 161 P.2d 677; Neal v. Bank of America, 93 Cal.App.2d 678, 682, 209 P.2d 825; Slavin v. City of Glendale, 97 Cal.App.2d 407, 410–411, 217 P.2d 984. "Facts once alleged cannot be withdrawn from consideration by merely filing an amended pleading omitting them without explanation." Lee v. Hensley, 103 Cal.App.2d 697, 709, 230 P.2d 159, 166; the facts omitted from the amended pleading showed that the statute of limitations had run. The two-year limitation for the bringing of an action upon an *oral* contract, Code Civ.Proc., § 339, subd. 1, commenced as to defendants Harvey and Mower at least as early as February 10, 1949, when plaintiff allegedly discharged them and employed new counsel. It had run its course by June 12, 1952, when she filed her original complaint herein.

[11] We observe that the first cause of action contains a few allegations suggestive of a theory that plaintiff is suing in part for negligence or deceit predicated upon these defendants having allegedly misled her by nondisclosure concerning the potential applicability of the statute of limitations to the mandamus action which they instituted on her behalf. Any such theory would likewise be vulnerable to the bar of the statute of limitations: one year in the case of negligence, Code Civ.Proc., § 340, subd. 3; three years after discovery (in this case three years after February 10, 1949) if for fraud or deceit, Code Civ. Proc., § 338, subd. 4.

[12] The second cause of action sounds in tort and, as concerns defendants Harvey and Mower, is barred by the statute of limitations, Code Civ.Proc., § 338, subd. 4, and § 340, subd. 3.

For the above stated reasons we conclude that the trial court properly sustained the demurrers of defendants Harvey and Mower to the third amended complaint and committed no abuse of discretion in denying plaintiff leave to further amend the complaint. In view of this conclusion it is unnecessary to consider the other points urged by these defendants in support of the judgments in their favor.

[13–15] Plaintiff has also appealed from an order by Judge Lernhart holding Judge Devine not disqualified to sit in either of the actions here involved. That appeal should be dismissed because taken from a nonappealable order, Briggs v. Superior Court, 215 Cal. 336, 342, 10 P.2d 1003, but the order is reviewable upon the appeals from the judgments later rendered. We have examined the record, including plaintiff's affidavit, Judge Devine's affidavit in reply, and the transcript of the hearing thereon, and find Judge Lernhart's order amply supported. Plaintiff's charge was two-fold: (1) that on January 5, 1953, Judge Devine refused a request for a two weeks' continuance of certain matters, exhibited marked hostility and ill will toward her, and, upon her assertion that she was disqualifying him, said, "Please leave the courtroom," and ordered his bailiff to usher her out of the courtroom; (2) Judge Devine spoke before the Lawyers' Club of San Francisco on January 21, 1953, and was introduced as guest of honor by an attorney who was chairman of the day and a law partner of defendant Mower; that plaintiff had gone to many members of the Lawyers' Club in an effort to obtain legal counsel without avail and that that group had refused steadfastly to help her in her efforts to obtain legal aid and justice. The judge in his affidavit denied bias and prejudice; stated that the only substantial ruling theretofore made by him, other than the denial of certain continuances, was an order denying a motion to dismiss the action, a ruling which was in favor of plaintiff; that he had no reason for retaining the case in his department except that, not deeming himself in any way disqualified, he believed it was his duty to dispose of the matters herein pending before him; that it was true that he ordered his bailiff to usher plaintiff from the courtroom but this was done because she had raised her voice and

was proceeding to argue after a ruling setting a date had been made by the court; and he believed he did not know defendant Mower, although it was possible he had a courtroom acquaintance with him. We have also examined the transcript of several hearings held by Judge Devine between January 2 and February 11, 1953, at which plaintiff appeared before him. We are convinced from this record that he exhibited great patience toward plaintiff and bore neither bias nor prejudice toward anyone.

The appeals from the orders sustaining the demurrers of defendants Bruce A. Werlhof, Ralph Wertheimer and James H. Phillips, and from the order holding Judge Devine not disqualified, are dismissed. The judgments in favor of Nicholas Alaga, the State Bar, Jerold E. Weil, Jack A. Hayes, Dorothy E. Handy, James Warren Harvey, and Elmer C. Mower are affirmed.

PETERS, P. J., and BRAY, J., concur.



131 Cal.App.2d 267

Eva C. TAYLOR, Plaintiff and Appellant,

v.

CONTINENTAL SOUTHERN CORPORATION, a corporation, and City of Long Beach, Defendants,

Continental Southern Corporation, a corporation, Respondent.

Civ. 20474.

District Court of Appeal, Second District, Division 3, California.

March 3, 1955.

Hearing Denied April 27, 1955.

Action by lessor, whose interest in property leased consisted only of that remaining in grantor after dedication of property to city for park purposes, against lessee for accounting and payment of royalties allegedly due under community oil and gas lease, under which lessor was entitled to royalties only if she had cognizable interest in property leased. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., rendered judgment for lessee, and lessor appealed. The District Court of Appeal, Ashburn, J. pro tem., held that public agency, such as municipality, which takes grant of land for park purposes, acquires title to minerals therein, being in case of oil and gas the exclusive right of capture, and mere possibility of forfeiture of title for breach of condition subsequent does not affect that vested interest unless or until owner of reversionary right has invoked condition by re-entering or suing in some form for declaration of termination of grantee's title.

Judgment affirmed.

1. Courts ⇐90(1), 99(1)

Decisions in prior actions that lessee could attack title of its lessor were not technically law of the case in subsequent action between same parties involving same lease because the prior actions were different, but such decisions would stand as authoritative declaration of legal effect of the lease and were sufficient authority to warrant holding that in the subsequent action lessee was free to question title of lessor.

2. Judgment ⇐948(1)

Decisions in prior actions that lessee could attack title of its lessor did not operate as res judicata in subsequent action between same parties involving same lease, because the prior actions were not alleged or proved as such.

3. Evidence ⇐43(3)

Courts will not take judicial notice of former judgment as basis for applying rule of res judicata.

4. Deeds ⇐155, 156

Deed conveying property for exclusive use as public park upon condition that it be so used was conveyance upon condition subsequent, re-entry clause being unnecessary, and conveyance left possibility of reverter in grantor.

5. Deeds ⇐156

Possibility of reverter remaining in grantor after conveyance upon condition subsequent is transferrable by statute, and is recognized as contingent estate, not

mere naked possibility of future right. West's Ann.Civ.Code, § 1046.

6. Dedication ⇐53, 57

Dedication for park purposes generally passes fee simple to grantee, and such conveyance not only carries all oil and minerals, but also right to develop same in any manner not inconsistent with use of surface of land for park purposes. Public Resources Code, § 7051.

7. Mines and Minerals ⇐54(2)

Public agency, such as municipality, which takes grant of land for park purposes, acquires title to minerals therein, being in case of oil and gas the exclusive right of capture, and mere possibility of forfeiture of title for breach of condition subsequent does not affect that vested interest unless or until owner of reversionary right has invoked condition by re-entering or suing in some form for declaration of termination of grantee's title. Public Resources Code, § 7051.

8. Mines and Minerals ⇐54(2)

As between grantor and grantee of conditional fee, mineral rights reside in latter until forfeiture of his title has been effected.

9. Appeal and Error ⇐173(9)

Where prior judgments were not pleaded or proved in trial court, claim that they were res judicata could not be raised on appeal.

10. Trial ⇐67

In action by lessor against lessee for accounting and payment of royalties allegedly due under community oil and gas lease, fact that affidavit in support of lessor's motion to reopen her case after she had rested, to permit introduction of additional evidence of contemplation and intent of parties at time of execution of lease, did not set forth what evidence lessor wished to introduce as to contemplation and intent or what that contemplation and intent was, and did not contain sufficient showing of diligence on part of lessor, was itself sufficient ground for denial of the motion.

11. Evidence ⇐397(1)

Implications of written contract are as impervious to parol evidence as are express terms.

12. Evidence ⇐461(1)

In action by lessor against lessee for accounting and payment of royalties allegedly due under community oil and gas lease, which required lessor to be owner of right or interest in property leased in order to be entitled to participate in royalties from oil and gas produced therefrom by lessee, and under which it was contemplated that lessee could question lessor's title, evidence as to contemplation and intent of parties at time of execution of lease on question whether lessee could question lessor's title was properly excluded.

William M. Taylor, Claremont, for appellant.

George H. Emerson, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Plaintiff Eva C. Taylor appeals from an adverse judgment in an action brought to obtain an accounting and payment of royalties alleged to be due her under a community oil and gas lease. Defendant Continental Southern Corporation successfully challenged her right to any relief. And the ruling seems to have been based upon a failure of proof of any cognizable interest in plaintiff with respect to the property described in the lease.

Plaintiff and defendant, about August 28, 1946 signed as lessor and lessee, respectively, one of the counterparts of a community lease which was dated December 18, 1944. The property covered by that counterpart was therein described as: "As to any and all right, title, and/or interest which Lessor may now have, and/or may hereafter acquire by whatsoever means, in and to all or any part of the lands hereinafter described, towit: Lot C, D, and E of The Ocean Front of the City of Long Beach, as recorded in Miscellaneous Records Book 39, pages 18 to 33, Records of Los Angeles County; and any and/or all

highways, streets, ways, roads and/or alleys within the 'described area'.

"As to any and all right, title, and/or interest which Lessor may now have, and/or may hereafter acquire by whatsoever means, in and to all or any part of the lands hereinafter described towit:

"All that certain lot, piece or parcel of land situate, lying and being in the City of Long Beach, in the County of Los Angeles, State of California, boun[d]ed and particularl[y] described as follows, towi[t]:

"Bounded on the north by Second Street, on the east by Pacific Avenue, on the south by Ocean Park Avenue, and on the west by Cedar Avenue, as per map of the Town of Long Beach, as recorded in Book 19 of Miscellaneous Records, pages 91 to 96 inclusive, in the County Recorder's office of Los Angeles County; and any and/or all highways, streets, ways, roads and/or alleys within the 'described area'." The property involved in this action is the portion described as "Lot C, D and E of The Ocean Front of the City of Long Beach."

Three companion cases have been reviewed by this court, our civil No. 17796, entitled Taylor v. Continental Southern Corp., reported in 104 Cal.App.2d 425, 233 P.2d 577, 579; No. 17797, Id., reported in 104 Cal.App.2d 435, 233 P.2d 583; and 17798, entitled Taylor v. Continental Northern Corp., reported in 104 Cal.App.2d 438, 233 P.2d 585. The lease involved in the case now on appeal was also the subject of those decisions; in each it was held that plaintiff had failed to make a case. The action at bar involves lots C, D and E of the Ocean Front Tract in Long Beach. These lots are and have been for many years used as a public park. No. 17796 dealt with that portion of the above description which reads: "* * * and any and/or all highways, streets, ways, roads and/or alleys within the 'described area'"; No. 17797 [104 Cal.App.2d 435, 233 P.2d 584] involved the portion described as: "* * * Bounded on the north by Second Street, on the east by Pacific Avenue, on the south by Ocean Park Avenue, and on the west by Cedar Avenue." This portion is known as Pacific Park. No. 17798 covered streets, etc., falling within the same description as No. 17796, but lying to the north of those streets.

The major question presented in the former cases was whether defendant lessee could question the title of plaintiff lessor. This was answered in the affirmative. This court, speaking through Mr. Justice Wood, said at page 432 of 104 Cal. App.2d, at page 581 of 233 P.2d: "It is the general rule that a tenant is not permitted to deny the title of his landlord, but there are exceptions thereto. When the provisions of the lease show that it was contemplated by the parties that the lessee may question the title of the lessor, the general rule is not applicable. It is to be noted that in describing the property leased the lessor did not state that she leased the streets and alleys. The description of that which she leased was any right, title or interest which she may now have or may hereafter acquire in the streets and alleys. Although said description of the property leased would be consistent with a theory that plaintiff was leasing the streets and alleys even though she might not own any part of them, it is not to be assumed that she intended to participate in the royalties from the community lease without contributing to the community interest something of value. In other words, it is not to be assumed that she entered into the lease for the purpose of obtaining something for nothing. The reasonable interpretation to be placed upon the provisions of the lease, in view of the particular provisions relating to plaintiff's ownership hereinabove referred to, is that it was a condition of the lease that plaintiff should own a right or interest in the streets or alleys in order to participate in the royalties. She had covenanted to the effect that she was an owner of land in the area covered by the lease. It was a community lease, and she agreed with the other persons who were lessors in the community lease and with the lessee that any person might become a lessor under the lease provided such person was an owner of land within the area covered by the lease. She agreed that if her title to the streets or alleys should be declared to be defective or

contested, then at the sole option of the lessee her alleged share of the royalties might remain in escrow until such title is cleared. It therefore appears that it was contemplated, under the provisions of the lease, that the lessee could question the title of the plaintiff."

Having determined this central proposition the court held in that same case that plaintiff's proof failed to show that she had any legal interest in any of the streets in question and therefore the judgment should be affirmed. Plaintiff in that case relied upon the same chain of title as in the cause now on appeal; but defendant introduced at the trial of the instant case certain evidence which raises a title question peculiar to this action.

In No. 17797 [104 Cal.App.2d 435, 233 P.2d 585], relating to Pacific Park, plaintiff rested upon certain secondary evidence which was stricken, and she "elected to avoid the production of the best evidence" with the result that she had no proof at all, and the judgment was affirmed. In No. 17798 the evidence was substantially the same as in No. 17796, and affirmance also followed.

[1–3] These three decisions of this court, determining the effect of the lease here involved, established the law to be that defendant herein may attack the title of its lessor. Of course they are not technically the law of the case, because the actions are different. In re Estate of Wickersham, 153 Cal. 603, 614, 96 P. 311. Nor do they operate as *res judicata* (as claimed by respondent), for they were not alleged or proved as such, and courts will not take judicial notice of a former judgment as a basis for applying the *res judicata* rule. Willson v. Security-First Nat. Bk., 21 Cal. 2d 705, 711, 134 P.2d 800. But they do stand as an authoritative declaration of the legal effect of the instant lease and are sufficient authority for a holding, without further discussion, that defendant was free to question the title of plaintiff in this instance.

In both of the street cases the court significantly remarked "There was no proof that the Long Beach Land and Water Company reserved or had any reversionary interest in the streets or alleys." [233 P.2d 582] This last observation points up a difference in proof which requires an independent consideration of the nature of plaintiff's title, if any, to lots C, D and E. That question turns largely upon the effect of a certain deed of May 13, 1889 from The Long Beach Land and Water Company to City of Long Beach which became Exhibit A in this case but was not placed in evidence in any of the cases previously decided by this court. It enters into the chain of title which must be examined.

The Long Beach Land and Water Company is a common source of title for the parties to this suit and for the City of Long Beach. On May 13, 1889 it made a deed to the City of Long Beach conveying said lots C, D and E and other properties for park purposes. It starts with a recital of a resolution of the grantor's board of directors expressing an intention to "remise, release, convey and quit-claim" to the city certain lands "in consideration of and in full settlement of all differences, difficulties and disputes which have hitherto arisen between it and the said city of Long Beach and in full settlement of the rights of the said City of Long Beach, involved in the case of the Long Beach Land and Water Company against the City of Long Beach, and for the use and benefit of the inhabitants of the said City of Long Beach in the said county of Los Angeles, State of California to be used exclusively as and for a public park or parks for the purpose of ornamentation, and as a place for recreation, public health and pleasure and upon the conditions hereinafter named and reserved:" Here follow descriptions of parcels. Then this: "Upon the condition that the above described property and the whole thereof, be used exclusively for the benefit of the inhabitants of said city, and of all the public as and for a public park for the health and recreation and pleasure of the inhabitants of said town and of the public: and upon the further condition that no buildings or structures of any kind be erected upon said premises which would obstruct the view of the Pacific Ocean from the lots north of and immediately opposite the property above de-



public playground shall be so leased". It was held that this prohibited surface leasing, not slant drilling. A similar ruling was made in 21 Op.Cal.Atty.Gen. 26.

In 9 Op.Cal.Atty.Gen. 6 it appeared that the City of Long Beach had quitclaimed to the State certain tidelands "for a park, playground, recreational center and/or beach used for recreational purposes," the conveyance being upon express condition subsequent that the lands be so used. The attorney general ruled that the State had acquired a fee title including minerals and that it could lease the lands for oil production without violation of the condition.

[7] It is clear that a public agency, such as a municipality, which takes a grant of land for park purposes acquires title to the minerals therein,—being in the case of oil and gas the exclusive right of capture. 8 Cal.Jur. Ten Year Supp. (1948 Revision) § 18, p. 616. It would seem that the mere possibility of forfeiture of title for breach of condition subsequent could not affect that vested interest, not unless or until the owner of the reversionary right has invoked the condition by re-entering or suing in some form for declaration of termination of the grantee's title. See Firth v. Los Angeles Pacific Land Co., 28 Cal.App. 399, 404, 152 P. 935.

Cases dealing generally with the effect of conditions subsequent establish that such is the law. Parry v. Berkeley, etc., Foundation, 10 Cal.2d 422, 74 P.2d 738, 114 A.L.R. 562, was an action to quiet title against conditions subsequent in certain deeds. Plaintiff had bought lots upon such conditions, which were held to have been violated. In response to plaintiff's action the Foundation cross-complained for reconveyance based on violation of the condition, and the lower court rendered such a judgment. In affirming it the Supreme Court used this language which is pertinent to the case now in hand: "Plaintiff's argument commences by making the assumption that a right of reentry for breach of a particular condition is an estate in reversion, a definite, identified part of the fee which is left in the grantor and his successors after transfer of a lesser estate to the grantee. It is true that decisions occasionally characterize the right of re-entry as a 'reversionary interest' or 'contingent reversionary interest,' and it is so regarded for some purposes. See Strong v. Shatto, 45 Cal. App. 29, 187 P. 159; Barkhaus v. Producers' Fruit Co., 192 Cal. 200, 219 P. 435; Backus v. Duffy, 103 Cal.App. 775, 284 P. 954. * * *

"A more accurate analysis of the interests involved discloses that when the grantor conveys the fee simple on condition subsequent, he has no actual *estate* remaining with him. The grantee takes the entire estate of the grantor, and unless he breaches the conditions is in the same position as an owner in fee simple absolute. The interest of the grantor in such case is not, strictly speaking, a residue of the estate left in him; it is merely a right or power to terminate the estate of the grantee and retake the same, if there is a breach of condition. Restatement, Property, § 45, Comment a; § 154; 1 Simes, Future Interests, § 159, p. 281." 10 Cal.2d at page 425, 74 P.2d at page 740. And referring to successive grants containing conditions subsequent: "In each instance the grantee takes the whole fee, with the same rights as a grantee in fee-simple absolute, as long as the conditions are obeyed." 10 Cal.2d at page 426, 74 P.2d at page 740.

To the same effect are City of Long Beach v. Marshall, 11 Cal.2d 609, 613, 82 P.2d 362; Aller v. Berkeley Hall S. Foundation, 40 Cal.App.2d 31, 36–37, 103 P.2d 1052; Shultz v. Beers, 111 Cal.App.2d 820, 823, 245 P.2d 334; City of Santa Monica v. Jones, 104 Cal.App.2d 463, 232 P.2d 55. In the last cited case it was held that the successor to the grantor of a fee upon condition subsequent is not entitled to any portion of a condemnation award where there has been no re-entry or its equivalent through court action. At page 473 of 104 Cal.App.2d, at page 61 of 232 P.2d the opinion says: "The case up to this point has been dealt with upon the assumption, as contended for by the appellants, that a mere breach of a condition subsequent (which breach we have shown did not exist) prior to a condemnation of the property automatically permits the heirs at law of the grantor of a fee simple on condition

subsequent to participate in the award of a subsequent condemnation. The rule of law is otherwise.

"In the case of a fee simple defeasible the grantor and his heirs are vested with the 'possibility of a reverter,' as distinguished from a 'right of entry' or a 'power of termination' in the case of a fee simple subject to a condition subsequent. 1 Simes, Law of Future Interests, sec. 159, p. 282; sec. 163, p. 291; sec. 176, p. 318; 2 Powell on Real Property, sec. 188, p. 40; sec. 191, pp. 56–57; 1 Tiffany, Real Property, 3d ed., secs. 188 and 220, pp. 302 and 383. In short, upon the occurrence of the stated event in a grant of a fee simple defeasible the possibility of reverter takes effect in possession immediately, 'whereas, on the happening of the event named' in the deed of a fee simple subject to a condition subsequent 'the possessory interest does not vest immediately in the one having the right of entry for breach of condition; he must elect to terminate the granted estate before a possessory interest vests in him.' 1 Simes, Law of Future Interests, sec. 177, p. 321.

"Accordingly, if in the instant case there had been a material breach of one of the conditions subsequent the heirs would nevertheless have had no right to participate in the award. This for the reason that the breach is not regarded as a breach until the grantor or his heirs elect to give it the requisite vitality by declaring a forfeiture based thereon by the process of reentry or its legal equivalent. Unlike a fee simple defeasible upon a limitation the breach does not cause an automatic reverter. 'Strictly speaking, the owner of a right of entry for breach of condition has a privilege and a power, but not a right; for by a right, in the strict sense, is meant a claim which may be enforced by legal machinery of some sort, and until an election to forfeit for breach, there is no such right in the one for whose benefit the condition exists.'"

[8] The cases just discussed do not specifically deal with the right to minerals as between the grantor and the grantee, but they necessarily lead to the conclusion that they reside in the owner of the conditional fee until a forfeiture of his title has been effected. It will be noted that the attorney general reached this result in 9 Op.Cal.Atty.Gen. 6. And certain cases in other jurisdictions are in accord. In Central Land Co. v. City of Grand Rapids, 302 Mich. 105, 4 N.W.2d 485, the grantor sought to enforce a forfeiture of a condition subsequent in a park deed because the grantee made an oil lease which contemplated surface drilling. The court held there was no violation of the condition requiring use solely as a park, highway, street or boulevard, saying, 4 N.W.2d at page 486: "Title to the land here involved was conveyed by plaintiff to the defendant city in fee subject to condition subsequent. Upon conveyance in fee title to the oil and gas under the land passed by the grant from plaintiff to the city, see Attorney General v. Pere Marquette Ry. Co., 263 Mich. 431, 248 N.W. 860, 94 A.L.R. 520; Quinn v. Pere Marquette Ry. Co., 256 Mich. 143, 239 N.W. 376, 380. In the latter case we said: 'The deed contains no reservation to grantors. The grantee took title to the gas and oil in place. If there is a pool common to the lands of both parties, then, if defendant may not drill, plaintiff, by tapping the pool, may take oil belonging to defendant. Such a result could not be sanctioned * * *.'

"To the same effect see 24 American Jurisprudence, page 535, wherein it is also stated: 'Thus, it appears to be settled that when the fee to land has been granted or dedicated to the public for use as a street or highway, any subterranean deposits of gas or oil therein pass with the fee and do not remain in the grantor or dedicator.'"

Langston City v. Gustin, 191 Okl. 93, 127 P.2d 197, was a suit by the city to quiet title to land previously donated to it for cemetery purposes. Defendants were heirs of the donor and they were about to make an oil lease, claiming the city had only an easement. The court said, 127 P.2d at page 198: "The question in this case is whether a municipality of this state acquires a fee simple title to property acquired for a cemetery by a statutory dedication when the property was marked on the plat as

'Donated'." It held that a qualified or base fee passed under the statute, at page 200, that that fee carried the mineral rights, at page 206, and plaintiff City was therefore entitled to a decree quieting title against defendants.

Cases cited by appellant are not contrary to the foregoing conclusions. Marshall v. Standard Oil Co., 17 Cal.App.2d 19, 61 P.2d 520, was an action to enjoin drilling of an oil well in a public street. The drilling was held to be a public and a private nuisance and properly enjoined. The court said at page 26 of 17 Cal.App.2d, at page 523 of 61 P.2d: "The ownership of the minerals lying beneath the surface of the street is not material if the premises were accepted upon trust" and that it had been so accepted. The case is not in point.

Carter Oil Co. v. Myers, 7 Cir., 105 F.2d 259, held that a grant of a right of way to a county for highway purposes passed only an easement and hence the mineral rights remained in the grantor. The discussion reveals that in Illinois, where the dispute arose, a grant to a city for street purposes carries a fee while the same grant to a county conveys only an easement. The Carter Oil case recognizes, as does Southern Pacific R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961, 70 L.R.A. 221, that the grantor of a mere easement to use the surface of land retains all mineral rights. Neither of those cases is persuasive here. Flaten v. City of Moorhead, 51 Minn. 518, 53 N.W. 807, 808, 19 L.R.A. 195, merely holds that a grant to a municipality " 'to be forever held and used as a public park' " does not convey an "absolute title in fee." But the court also observed that "It is not incumbent upon us at this time to determine the precise nature of the estate conveyed by this instrument, whether a mere easement was acquired by the village, or an estate on condition or in trust."

United Fuel Gas Co. v. Morley Oil & Gas Co., 102 W.Va. 374, 135 S.E. 399, holds that the successors to the grantor of property conveyed for use as a school site only are entitled to enjoin surface drilling for oil. At page 399 of 135 S.E. the court said: "The sole question presented for our decision is: Do the words 'to be exclusively appropriated and used as a site for a schoolhouse and school for the said township' merely express the purpose of the conveyance, or do they constitute a covenant restricting the use of the property?" No condition subsequent or question of ownership of minerals by the one having a possibility of reverter was involved or discussed. Other cited cases require no comment.

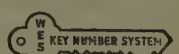
[9] Appellant relies upon a superior court case entitled Jotham Bixby v. City of Long Beach, claiming it is *res judicata* in her favor. She also makes the same claim for Dunn v. Long Beach L. and W. Co., 114 Cal. 605, 46 P. 607. But she did not plead or prove either of these judgments in the trial court and that is fatal to her present belated contention. Willson v. Security-First Nat. Bk., supra, 21 Cal. 2d 705, 711, 134 P.2d 800; 15 Cal.Jur. § 231, p. 211. This is also true of the case of Strand Improvement Co. v. City of Long Beach, 173 Cal. 765, 768, 161 P. 975, to which appellant has referred from time to time.

[10–12] Another contention of appellant concerns a procedural aspect of the trial,—denial of a motion to reopen plaintiff's case. The trial was on August 26, 1949. The court ordered the City of Long Beach brought into the case and continued the matter until October 3, 1949. On that date a demurrer of the city was argued and sustained; a pending demurrer to the answer to plaintiff's amended complaint and a motion to strike said answer were placed off calendar awaiting final disposition of a certain interpleader action entitled Continental Consolidated Corporation v. Eva C. Taylor and City of Long Beach. The rulings of this court in Civil Nos. 17796, 17797 and 17798 were made on May 25, 1951. The cause lay dormant until November 30, 1953, when defendant gave notice of a motion to restore the cause to the calendar, for judgment in its favor and for other or further relief. It was made on the ground that said interpleader action had gone to final judgment and that plaintiff was not entitled to any relief upon the proof made. In response to this notice

plaintiff presented an affidavit referring to the decisions in the appealed cases, claiming this court had established new law, and alleging "That the plaintiff has not rested in the instant case, but desires to introduce additional evidence, both oral and written, in support of her cause of action. That plaintiff desires to offer evidence of the contemplation and intent of the parties at the time of the execution of the lease between plaintiff and defendant." Plaintiff had definitely announced at the trial that she rested and defendant had produced some evidence. On the hearing of the motion on December 28, 1953, plaintiff consented to restoration to calendar and the motion to reopen was presented on behalf of plaintiff, was argued and denied. Defendant rested and judgment was ordered in its favor. Appellant argues that the court withheld from her substantial rights in denying her motion to reopen. Counsel's opening brief says at page 4: "The Court erred in refusing to permit plaintiff to introduce any evidence, either oral or written, as to the contemplation and intent of the parties at the time of the execution of the lease on the question as to whether or not lessee could question the title of the plaintiff." At page 12: "So in view of said Appellate decision, plaintiff wished to produce in evidence written documents showing that it was not contemplated that lessee would question plaintiff's title, but that lessee had been fully informed as to plaintiff's title prior to the execution of the lease and that defendant wanted immediate execution of the lease by the plaintiff and that defendant was satisfied that plaintiff's title was good." Respondent points out that plaintiff's affidavit "* * *" did not set forth what evidence she wished to introduce as to the contemplation and intent of the parties nor what that contemplation and intent was, nor did it contain a sufficient showing of the diligence on her part." This of itself was sufficient ground for denial. But counsel for appellant misapprehends the effect of our former rulings. The language we have quoted from 104 Cal.App.2d at page 432, 233 P.2d at page 581, shows that the court held as a matter of law that the lease itself required plaintiff to be an owner in order to participate in royalties and "that it was contemplated, under the provisions of the lease, that the lessee could question the title of the plaintiff." It is thoroughly settled that the implications of a written contract are as impervious to parol evidence as are express terms. Standard Box Co. v. Mutual Biscuit Co., 10 Cal.App. 746, 751, 103 P. 938; Calpetro Producers Syndicate v. Chas. M. Woods Co., 206 Cal. 246, 252, 274 P. 65. The suggested additional evidence was inadmissible and the court's ruling was correct.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



131 Cal.App.2d 241

Robert D. SMITH, transacting business under the firm name and style of Advance Muffler Company, and Forrest W. Ricks, Plaintiffs and Respondents,

v.

Clifford E. PETERSON, Commissioner of California Highway Patrol, E. Raymond Cato, Chief thereof, C. C. Tibbs and J. N. Cullen, Highway Patrol Officers, Defendants and Appellants.

Civ. 4696.

District Court of Appeal, Fourth District, California.

March 2, 1955.

Rehearing Denied March 22, 1955.

Hearing Denied April 27, 1955.

Proceeding by muffler manufacturers and installers against Highway Patrol Commissioner, Chief, and officers to restrain defendants from enforcing Vehicle Code Provision requiring use on motor vehicles of mufflers which prevent "excessive" or "unusual" noise. The Superior Court, Fresno County, Edward L. Kellas, J., granted injunction, and defendants appealed. The Court of Appeals, Griffin, J., held that enforcement of statute was improperly enjoined.

Order reversed.

1. Criminal Law ⇐13

Criminal statute, which is so indefinite, vague, and uncertain that definition of crime or standard of conduct cannot be ascertained therefrom, is unconstitutional and void.

2. Statutes ⇐47

Statute will not be held void for uncertainty if any reasonable and practical construction can be given to its language.

3. Statutes ⇐47

Fact that meaning of statute is difficult to ascertain or that statute is susceptible of different interpretations does not render statute void.

4. Constitutional Law ⇐48

All presumptions and intendments favor validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity of such statute.

5. Constitutional Law ⇐48

Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears, and doubts as to construction of statute will not justify disregard of statute.

6. Criminal Law ⇐13

In determining whether a penal statute is sufficiently explicit to inform those who are subject to it of that which is required of them, courts must endeavor if possible, to view statute from standpoint of reasonable man who might be subject to its terms.

7. Statutes ⇐47

To be valid, statute need not have that degree of exactness which inheres in a mathematical theorem, and it is not necessary that statute furnish detailed plans and specifications of the acts or conduct prohibited.

8. Statutes ⇐47

Requirement of reasonable certainty in a statute does not preclude use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.

9. Criminal Law ⇐13

Under Vehicle Code provision requiring every motor vehicle to have an adequate muffler which will prevent any "excessive" or "unusual" noise, quoted words are sufficiently certain to inform persons of ordinary intelligence of nature of offense prohibited and to establish standard of conduct ascertainable by persons familiar with the operation of automobiles, and, therefore, enforcement of statute was improperly enjoined. Vehicle Code, §§ 673, 684; West's Ann.Code Civ.Proc. §§ 526, subd. 4, 1963, subd. 33; West's Ann.Const. art. 1, §§ 11, 13, 21; art. 3, § 1; art. 4, § 1; U.S.C.A. Const. Amend. 14.

Edmund G. Brown, Atty. Gen., G. A. Strader, Deputy Atty. Gen., for appellants.

Matt Goldstein, William A. Quinlan, Fresno, for respondents.

GRIFFIN, Justice.

This proceeding involves the constitutionality of sections 673 and 684 of the Vehicle Code in reference to the prevention of excessive or unusual noises from mufflers on automobiles. These sections read in part as follows:

"§ 673. Every motor vehicle subject to registration and operated on a highway shall at all times be equipped with an adequate muffler in constant operation and properly maintained to prevent any excessive or unusual noise and no such muffler or exhaust system shall be equipped with a cut-out, by-pass, or similar device. No person shall modify the exhaust system of a motor vehicle in a manner which will amplify or increase the noise emitted by the motor of such vehicle above that emitted by the muffler originally installed on the vehicle and such original muffler shall comply with all of the requirements of this section * * *."

"§ 684. It shall be unlawful for any person to sell, lease, install or replace, either for himself or as the agent or employee of another, or through such agent or employee, any * * * muffler, exhaust, * * * for use in any vehicle, * * * that is not in conformity with the provisions of this code or the regulations made thereunder."

Plaintiffs, Robert D. Smith, transacting business as Advance Muffler Company, and Forrest W. Ricks, its agent operating in

Fresno, allege that the California Highway Patrol Commissioner, and other officers, periodically and frequently arrested them and their customers for installing, selling and replacing mufflers upon various motor vehicles in violation of these sections; that plaintiffs were so arrested on a complaint filed in Fresno Municipal Court on December 18, 1952, charging them with the "sale or installation of unlawful equipment * * * mufflers"; that they have suffered great detriment and expense in defending said actions, posting bail, etc.; and that the trial of the above mentioned action was continued for trial at a later date. A restraining order was sought restraining the officers from enforcing or attempting to enforce the provisions of these sections.

It is also alleged that plaintiffs, for approximately 13 years, have been engaged in the business of manufacturing and installing mufflers, etc., particularly their "Advance Steel Pack muffler", and that they have been manufactured, sold and installed on cars throughout the state. It is then claimed that these mufflers do not make any excessive or unusual noise, do not annoy the public, and that it is impossible for plaintiffs to know whether these exhaust pipes will amplify or increase the noise emitted by the motors of the vehicles upon which they are installed above that emitted by the mufflers originally installed thereon, and that accordingly these sections violate the Constitution of the United States and of California in the following particulars, i. e., that these sections are discriminatory and violate plaintiffs' right of equal protection of the laws and deprive them of their property and their liberty without due process of law, and their right to follow a lawful occupation; that these sections are uncertain, indefinite and vague in that no reasonable standard is set up; that they interfere with the rights of plaintiffs to dispose of their property in a lawful manner and to make a lawful contract; that they tend to create a monopoly for the benefit of the manufacturer of mufflers originally installed on vehicles; that they are arbitrary, capricious, unreasonable and confiscatory; that the acts alleged in these sections are made criminal acts of the plaintiffs although such acts are performed by other persons; and that under the provisions of said sections, if plaintiffs installed such mufflers in compliance with said sections they could be held guilty even though the operator of said vehicle otherwise created excessive or unusual noises by the *operation* of said vehicle, citing such authority as United States Constitution, 14th Amendment; California Constitution, art. III, sec. 1; art. IV, sec. 1; Art. I, secs. 11, 13 and 21; State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal.2d 436, 254 P.2d 29; Pacific Palisades Association v. City of Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782; Schaezlein v. Cabaniss, 135 Cal. 466, 67 P. 755, 56 L.R.A. 733; Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; People v. Forbath, 5 Cal.App.2d, Supp., 767, 42 P.2d 108; Franchise Motor Freight Ass'n v. Seavey, 196 Cal. 77, 235 P. 1000; State v. Lantz, 90 W.Va. 738, 111 S.E. 766, 26 A.L.R. 894; Barker Bros., Inc., v. City of Los Angeles, 10 Cal.2d 603, 76 P.2d 97; and People v. International Steel Corp., 102 Cal.App.2d, Supp., 935, 226 P.2d 587.

Section 673, as reasonably construed, fixes a standard of all originally installed mufflers in this, that they must "comply with all of the requirements of this section". This section requires that they must be "effective in reducing noise" and be "an adequate muffler" so as to "prevent any excessive or unusual noise", and not be equipped with a cut-out, by-pass, or similar device. It then provides that every motor vehicle operated on the highway shall, at all times, be so equipped and maintained in constant operation. It then provides that no person shall modify the *exhaust system* (which includes placing a muffler thereon) in a manner which will amplify or increase the noise emitted by such vehicle above that emitted by the muffler originally installed on the vehicle. In fixing the original standard it must be presumed that at the time of the original installation of the muffler there was a compliance with the law in its installation, and that the vehicle was equipped with an adequate muffler so as to prevent any "excessive or unusual noise". Section 1963, subd. 33, Code Civ.Proc. Section 684 then makes it unlawful for a person, either for

himself or as agent for another, to sell, lease, install or replace any muffler or exhaust that is not in conformity with the provisions of that section. We see no justification for the conclusion that plaintiff might be criminally liable for the operation of a vehicle by another with a defective muffler if plaintiffs installed or replaced a muffler that complied with said section 673.

It was the conclusion of the trial court, expressed in the memorandum opinion, that by the descriptive words "excessive" or "unusual" noise, the noise emitting from such muffler may appear to be excessive or unusual to one and may not be excessive or unusual to another; that accordingly the only standard fixed would be the opinion of the law-enforcing officer; and that a more definite and better standard than that fixed in the section, as to noise, should be employed such as the standard of measuring sound or noise in decibels. It concluded that the provisions of section 684, supra, insofar as it attempts to provide enforcement of section 673 of the Vehicle Code, are unconstitutional and unenforceable, and accordingly restrained defendants from enforcing them against plaintiffs.

No request for a reporter's transcript was made by defendants on this appeal. However, plaintiffs thereafter made in this court an application to produce the evidence submitted to the trial judge in the lower court for the purpose of showing the unenforceability and the unconstitutionality of these acts, as applied to plaintiffs. This motion was denied, and accordingly no issue of fact is here presented.

It is defendants' position here that plaintiffs are not entitled to an injunction unless the statute in question is unconstitutional and, accordingly, unenforceable, citing section 526, subd. 4, Code Civ.Proc. The contentions are that these sections are not vague, indefinite or uncertain and that at the time of their enactment they provided for the only reasonable standard upon which they could operate fairly and without discrimination, citing Paraco, Inc. v. Department of Agriculture, 118 Cal.App.2d 348, 257 P.2d 981; Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14; and Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 65 P.2d 884, 109 A.L.R. 895. Accordingly, if the standard fixed is proper and might reasonably be applied to plaintiffs, the demurrer of defendants to plaintiffs' complaint might well have been sustained without leave to amend and the evidence adduced at the trial would not be material to the issues involved but might become material in the trial of the crime charged, after the prosecution established, beyond a reasonable doubt, the fact that defendants in that action had violated said sections.

[1–8] It is well settled that a criminal statute which is so indefinite, vague and uncertain that the definition of the crime or standard of conduct cannot be ascertained therefrom, is unconstitutional and void. However, there is a uniformity of opinion among the authorities that a statute will not be held void for uncertainty if any reasonable and practical construction can be given to its language. Nor does the fact that its meaning is difficult to ascertain or susceptible of different interpretations render the statute void. All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. Doubts as to its construction will not justify us in disregarding it. In determining whether a penal statute is sufficiently explicit to inform those who are subject to it what is required of them the courts must endeavor, if possible, to view the statute from the standpoint of the reasonable man who might be subject to its terms. It is not required that a statute, to be valid, have that degree of exactness which inheres in a mathematical theorem. It is not necessary that a statute furnish detailed plans and specifications of the acts or conduct prohibited. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, 171 P.2d 21, 166 A.L.R. 701; Collins v. Riley, 24 Cal.2d 912, 152 P. 2d 169; Pacific Coast Dairy v. Police Court,

214 Cal. 668, 8 P.2d 140, 80 A.L.R. 1217; People v. Ring, 26 Cal.App.2d, Supp., 768, 70 P.2d 281; Smulson v. Board of Dental Examiners, 47 Cal.App.2d 584, 118 P.2d 483; Lorenson v. Superior Court, 35 Cal.2d 49, 216 P.2d 859; Sproles v. Binford, 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed. 1167.

The case of Department of Public Safety v. Buck, Tex.Civ.App., 1953, 256 S.W.2d 642, is directly in point on this question and the statute there involved is quite identical to the California statute. It provided that "Every motor vehicle must have devices in good working order which shall at all times be in constant operation to prevent excessive or unusual noises * * *. Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke * * *." Vernon's Ann.P.C. art. 797, Vernon's Ann. Civ.St. art. 6701d, § 134(a). The constitutionality of that statute was attacked on the ground that the use of the words "excessive" or "unusual" was vague and uncertain and did not set forth an adequate standard of conduct. The trial court there, as here, issued an injunction on that ground. In reversing the judgment of the trial court it said: "We think any ordinary and interested person would have no difficulty in determining whether or not an excessive and unusual noise or offensive or excessive exhaust fumes accompanied the operation of a motor vehicle." It held that the meaning of the term "excessive" is to be determined in the light of, and with reference to, the cause of action asserted, and, as applied to the operators of motor vehicles, it is to be interpreted as descriptive "'of the evil or mischief intended to be prohibited'." It then cites Webster's New International Dictionary, Second Edition, as giving the full definition of the word "excessive", i. e., "'Characterized by, or exhibiting excess, as: a. Exceeding what is usual or proper; over much. b. Greater than the usual amount or degree; exceptional, very great.' The word 'unusual' simply means not usual, uncommon." It cites Omaechevarria v. State of Idaho, 246 U.S. 343, 38 S.Ct. 323, 62 L.Ed. 763, for the general statement that men familiar with actual conditions and desirous of observing the law will have little difficulty in determining what is prohibited.

In Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 449, 93 L.Ed. 513, 10 A.L.R.2d 608, cited and discussed in Haggerty v. Associated Farmers of California, Inc., 44 Cal.2d 60, 279 P.2d 734, 735, the court upheld an ordinance which declared it unlawful for any person to use or operate on the public streets any device which emits "loud and raucous" noises. The objection centered around the use of the words "loud and raucous". The court said while these are abstract words, they have, through daily use, acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden; that every motor vehicle, when in normal operation, necessarily makes some noise, makes some smoke, and permits gas or steam to escape to some extent; that they are in constant operation on our streets and highways; and even in the sparsely settled areas of our state they are in constant operation in view of the citizens.

The Haggerty case, supra, involved an anti-noise ordinance making unlawful the emission or transmission of "'any loud and raucous'" noise upon a public highway, etc. It then endeavored to define "'loud and raucous'" noise as any noise made by the motor of a vehicle "'not reasonably required in the operation thereof * * *'" including "'backfiring, motor racing'" etc., and the human voice "'when amplified by any device * * * to such an extent as to cause it to carry on to private property or to be heard by others using the public highways'" and any sound of such volume "'as to tend to interfere with the peace and quiet of persons'" thereon. The majority court cited the Kovacs case, supra, where it is said that "this ordinance", involving the emission of sound from a truck by means of a sound amplifier or any instrument which emits "'loud and raucous noises'" is an exercise of the authority granted to the state of New Jersey "'to prevent disturbing noises * * * nuisances well within the municipality's power to control.'" It then held that the ordinance was a proper regulation of the conduct of all persons seeking to use such devices and that the restrictions are uniformly applicable; that it was a rea-

sonable one; that the term loud and raucous noise was not so vague and indefinite as to establish no ascertainable standard of guilt; and approved the ordinance in the Kovacs case in this respect and the statement that "while these are abstract words, they have, through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden".

Attack was similarly made in the Haggerty case upon clause one which included noise "of 'the motor * * * *not reasonably required* in the operation thereof under the circumstances.'" The claim was that "'not reasonably required'" was too vague and indefinite a standard of guilt. Many cases are there cited which our Supreme Court discussed and said:

> "These cases, however, involve loose definitions in fields where generally there may be great differences of opinion as to what conduct may be reasonable. A restriction upon the operation of motor vehicles so as to eliminate unreasonable noises operates in an area where a determination as to what is necessary and reasonable may be made more precisely and has a content of fairly fixed meaning to operators of such vehicles. More nearly in point are prohibitions against 'unreasonable and unsafe speed' * * * and the use of horns emitting 'an unreasonably loud or harsh sound'." Citing vehicle Code sec. 671.

The terms of the ordinance defining noises which "interfere" and "tend to interfere" with the "peace and quiet" of persons were also similarly challenged. This was held to be a sufficient standard of definiteness.

Similar terms to "excessive" or "unusual" have been upheld by this and other states as not being indefinite or uncertain. "Unreasonable waste of gas", "Unreasonable restraints of trade", "unreasonable use of water"—People v. Associated Oil Co., 211 Cal. 93, 294 P. 717, 720, 724; Bandini Petroleum Co. v. Superior Court, 110 Cal.App. 123, 293 P. 889; "Unprofessional conduct" authorizing the dismissal of a teacher—Board of Education of City of Los Angeles v. Swan, 41 Cal.2d 546, 261 P.2d 261; "Dissolute and immoral"—People v. Deibert, 117 Cal.App.2d 410, 256 P.2d 355, 358; "'Willful or wanton disregard for the safety of persons or property'"—People v. Smith, 36 Cal.App.2d, Supp., 748, 92 P.2d 1039, 1040; "Unjustifiable physical pain"—People v. Curtiss, 116 Cal.App., Supp., 771, 300 P. 801, 802; Undue or unreasonable "restraint of trade"—Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619; "Excessive bail"—"Excessive fine"—In re Morehead, 107 Cal.App.2d 346, 237 P.2d 335; and Ex parte Ryan, 44 Cal. 555. See also People v. Kiser, 112 Cal.App.2d, Supp., 903, 245 P.2d 1125; Ex parte Trafton, Tex.Cr.App., 271 S.W.2d 814; Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 55 P.2d 177; Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109; Weco Products Co. v. Reed Drug Co., 225 Wis. 474, 274 N.W. 426.

In People v. Finch, 119 Cal.App.2d, Supp., 892, 258 P.2d 1124 (Appellate Department of the Los Angles Superior Court) the claim of the unconstitutionality of section 673 of the Vehicle Code was held to be without merit.

It appears to us that the requirement that a motor vehicle be equipped with a muffler in constant operation so as to prevent any excessive or unusual noise seems as certain as any rule which could be practically enforced. Motor vehicles have been used so long and have become so common, and mufflers so uniformly used to minimize the noise from their exhaust that what is usual has become a matter of common knowledge, and anything in excess of that is excessive and unusual, and usually capable of ascertainment as such. It may be that physicists have established definite standards of loudness of sound and means for measuring it, but this does not mean that such laboratory operations must be carried out by traffic officers on the highway where violators of this statute must be found and the evidence against them obtained. The tendency of the recent decisions is toward a more liberal construction of the rule requiring certainty. Pacific Coast Dairy v.

Police Court, 214 Cal. 668, 8 P.2d 140, 80 A.L.R. 1217. The sections here involved have been on the statute books in substantially the same form since 1913. Stats. 1913, p. 639, chap. 326, sec. 16. The standard there defined has since been applied. The mere fact that there may have been some new scientific instrument capable of measuring noise more scientifically would not make the statute unconstitutional.

[9] We conclude that the words "excessive" or "unusual", when viewed in the context in which they are used are sufficiently certain to inform persons of ordinary intelligence of the nature of the offense which is prohibited, and are therefore sufficient to establish a standard of conduct which is ascertainable by persons familiar with the operation of automobiles.

In view of the conclusions here reached and from the decisions cited, the other claimed reasons advanced why the sections are unconstitutional are equally untenable.

Order reversed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, J., dissenting.



131 Cal.App.2d 378

Samuel L. SIMON, Ralph Simon, Willard M. Marks and Edward M. Marks, co-partners, doing business as Commercial Liquidating Company, Plaintiffs and Respondents,

v.

BEMIS BRO. BAG COMPANY, a Missouri corporation, Defendant and Appellant.

Civ. 20683.

District Court of Appeal, Second District, Division 2, California.

March 9, 1955.

Action by buyer against seller to recover for alleged shortage in shipment of bags. The Superior Court, Los Angeles County, Robert H. Scoot, J., entered judgment for buyer and seller appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained finding that only 210,100 bags instead of 239,105 bags were received by buyer.

Judgment affirmed.

1. Sales ⇐181(11)

In action by buyer to recover for alleged shortage in shipment of bags, evidence sustained finding that only 210,100 bags instead of 239,105 bags were received by buyer.

2. Appeal and Error ⇐1010(1)

Where substantial evidence supports finding, judgment based on finding will not be disturbed on appeal.

3. Appeal and Error ⇐989

On appeal from judgment on trial court's finding, evidence will not be reweighed, however strongly appellant's evidence may have impressed reviewing court.

4. Evidence ⇐441(9)

In action by buyer to recover for alleged shortage in shipment of bags, parol evidence of facts and circumstances leading up to the execution of the written agreement was incompetent and properly excluded. West's Ann.Civ.Code, §§ 1541, 1698.

5. Evidence ⇐441(1)

Conversations and negotiations preceding the execution of a written contract are merged in the written contract and evidence thereof is inadmissible. West's Ann.Civ. Code, § 1625.

6. Costs ⇐260(5)

In action by buyer against seller for alleged shortage in shipment of bags, where evidence introduced by seller was substantial and persuasive but trial court found for buyer, seller's appeal was not frivolous and motion to fine for frivolous appeal was denied.

Paul F. Moore, Los Angeles, for appellant.

George I. Devor, Los Angeles, for respondents.

MOORE, Presiding Justice.

The purpose of this opinion is to demonstrate to appellant that under the rules of appellate procedure, the judgment now under review cannot be reversed. Not that its appeal is without merit, but because the law cannot alter its doctrines or its methods in determining whether any litigant has enjoyed a fair trial. These parties have submitted an acrid controversy to the arbitrament of reason under the guidance of long established principles. That the learned trial judge might with honor have decided for appellant is obvious upon a review of the record. But the flaming facts proved by respondents so enthralled the heart of his intelligence that he was compelled to adopt them as the basis for decision. Because the proof appropriated by the court is the warp and woof of the judgment, it ill behooves the reviewing court to linger among the charred ruins of the evidence introduced by appellant.

On July 13, 1951 "the windows of the heavens were opened and the floods descended" upon the fair state of Kansas. The resultant waters overran the Kansas river which in turn inundated portions of Kansas City and fatally injured the merchandise and the plant of appellant. Many types and sizes of bags were rendered unfit for the salesroom of appellant. Consequently, they were offered for sale as damaged merchandise. Pursuant to appellant's invitation, the witness Schneider, agent for respondents, visited the scene left by the disastrous flood in July, 1951, saw that the bags were in bales, "scattered over a very large field; some of them completely broken, some of them were partially broken open." He closed a deal with appellant "for so much apiece and didn't know exactly how many bags, and for 289,795 bags was to pay $15,000, the balance sight draft and bill of lading." That made the price $85 per thousand bags. A week later, respondent Simon visited appellant's plant and found that the bags had been wrapped and baled and fastened with wire. Each bale was marked with a heavy tag bearing the order number, name of customer and number of bags. It was fastened with heavy wire. The bales so tagged were hauled from appellant's factory to a vacant lot in North Kansas City and placed on a railroad siding to be loaded for shipment; they were there guarded by a night watchman employed by appellant. Employees of appellant counted the bales, but they "assumed that there were a given number of bags to a particular bale." [1]

The bales of bags were finally loaded onto three wooden cattle cars and duly arrived at San Pedro in three cars with their seals intact. They stood on a siding about a block from the Harbor Laundry. The seals were broken by Mr. Schneider on behalf of respondent, and by Elbert Dunscomb, superintendent of the laundry. Both men entered the cars. They caused the cotton bags to be conveyed in the laundry's trucks to the laundry and to be guarded and watched during transportation. The cotton sacks were laundered, re-baled after a double count. The laundry processed 210,100 cotton bags, the total from the three cars, all done under the immediate supervision of Mr. Dunscomb. The latter made clear that he had inspected both sides of each car before the seals were broken. Attempts had been made to remove some of the bags. The corners of about fifteen bags were pulled out. "Although they hadn't been able to apparently take anything from that car, someone had attempted to do so. * * * The slats on these cattle cars I estimate to be three inches apart." The cars had been on the siding at San Pedro less than an hour before Mr. Dunscomb went to open them about four p.m. His trucks arrived before the seals were broken. The bundles of sacks were not stacked in rows in the cars. He segregated the cotton from the burlap and paper. The employees of the Harbor Laundry unloaded only the cotton bags. It required 14 hours of continuous work throughout the night. The second and third cars were successively unloaded in the same manner without stopping. There were two men present guarding the inside and outside of each car during the period of unloading. When the bags from the first

1. Testimony of witness Bayne, manager of appellant's plant.

car arrived at the laundry, the major portion were "put in process" directly into the waiting washers. The balance were stored inside a room adjacent to the laundry washroom. The second car unloaded into another building south of the washroom but on the premises. The third car repeated the first car in operation. All the bags "were within a building or within a closed area next to a building, enclosed and locked. The loading was not done through an open doorway, it was done over the top of a wall at a truck level, approximately six feet * * * we unloaded over the top of it."

The several kinds of bags were cotton, cotton and burlap, and cotton and burlap waterproof paperlined. The laundry had nothing to do with the bags made of burlap. They were handled at a later time by the Commercial Steel Company of respondents who used the laundry's trucks for the unloading. There was no shortage of the burlap and paperlined bags. The Commercial Steel Company did not unload any cotton bags. Either Mr. Dunscomb or a person under his supervision was in attendance at the segregating in the cars at all times.

[1] The bags were counted after they had been laundered by passing them across a sorting, segregation table. They were there piled in stacks of one hundred; thence to a table where they were recounted and weighed; then tied on a second table. Tally sheets were maintained on the segregating table and by the weigher and they were compared at the end of the day. Such is the customary practice of the laundry. By such testimony of Mr. Dunscomb, it was proved to the satisfaction of the court that only 210,100 cotton bags were received by respondents instead of 239,105.

[2, 3] It has become fundamental that when substantial evidence is found in the record to support a finding, a judgment will not be disturbed. Evidence will not be reweighed, however strongly the appellant's evidence may have impressed the reviewing court. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Scott v. Nevis, 120 Cal.App.2d 619, 621, 261 P.2d 797; Overton v. Vita-Food Corporation, 94 Cal.App.2d 367, 370, 210 P.2d 757.

Appellant's implication that respondents were responsible for the loss for the reason that it occurred in transit after sale and delivery to respondents is answered by the conclusion of the court that "because of unsettled conditions and imperfections in the manner of counting, the figure given by the defendant is not correct and that there was, in fact, the shortage claimed by plaintiffs."

[4, 5] Appellant assigns as error the ruling which excluded testimony of an oral agreement of sale between the parties, and the facts and circumstances surrounding the agreement. It cites in support of its contention: Civil Code, §§ 1541, 1698; Standard Oil Company v. Johnson, 24 Cal.2d 40, 147 P.2d 577, in which it is said that whether delivery to a carrier constitutes delivery, depends upon the intention of the parties as ascertained from the contract and other circumstances. There are two answers to such contention: (1) the court overruled respondents' objection to the question; (2) it is a familiar rule that conversations and negotiations preceding the execution of a written contract are inadmissible as having been merged in the writing. Civ.Code, § 1625; Lifton v. Harshman, 80 Cal.App.2d 422, 432, 182 P.2d 222. The admission of the testimony makes no difference in the result. Its incompetency to vary a written contract is a matter of substantive law. (Ibid.)

[6] Respondents' complaint that the appeal is frivolous is hardly justified. The proof introduced by appellant was substantial and persuasive and was presented in a courteous and gracious manner. To the impartial mind it is clear that appellant's counsel, after nursing the facts of his case for three years could believe in it so fervently that he might convince a reviewing court of the injustice he erroneously felt had been done his client.

The motion to fine for a frivolous appeal is denied.

The judgment is affirmed.

FOX, J., concurs.

McCOMB, J., concurs in the judgment.

Eula Mae SINGLETON, Plaintiff and Respondent,

v.

Manuel Smith PERRY, as Administrator with the Will Annexed of the Estate of S. W. Corlett, deceased, substituted in the place and stead of S. W. Corlett, deceased, Defendant and Appellant.

No. 16217.

District Court of Appeal, First District, Division 1, California.

March 2, 1955.

As Corrected on Denial of Rehearing April 1, 1955.

Hearing Granted April 27, 1955.

Action for malicious prosecution and false arrest for alleged theft of automobile. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., entered judgment for plaintiff. Defendant appealed from judgment, from order denying motion for judgment notwithstanding verdict and from order denying new trial motion. The District Court of Appeal, Bray, J., held that where action to recover damage for malicious prosecution and false arrest for alleged theft of automobile was, by agreement of parties, tried at same time as action to recover for malicious prosecution and false arrest and alleged theft of personalty, each case retained its identity and distinctive characteristics in all matters except that of joint trial, with separate verdicts and judgments in each instance, and, consequently, on appeal by defendant from judgment in one case, court could not consider effect of finding for defendant in second case.

Judgment and order denying motion for judgment notwithstanding verdict affirmed, and appeal from order denying new trial motion dismissed.

1. Appeal and Error ⇐110

Order denying motion for new trial is not appealable separately from judgment and from order denying motion for judgment notwithstanding verdict.

2. Action ⇐57(1)

There can be no consolidation of two or more cases unless they can be merged and combined into one.

* Opinion vacated 289 P.2d 794.

3. Trial ⇐2

Only effect of order providing several actions shall be tried together is to consolidate cases for purposes of trial, and such order does not merge the several actions into one, but each case retains its distinctive characteristics and remains separate in all matters except the one of joint trial; and if there is error in one case only, it is fatal to the judgment in that case only.

4. Appeal and Error ⇐837(2)
Trial ⇐2

Where action for malicious prosecution and false arrest for alleged theft of automobile was, by agreement of parties, tried at same time as action for malicious prosecution and false arrest for alleged theft of personalty, each case retained its identity and distinctive characteristics in all matters except that of joint trial, with separate verdicts and judgments in each instance, and, consequently, on appeal by defendant from judgment in one case, court could not consider effect of finding for defendant in second case.

5. Judgment ⇐585(3)

Fact that plaintiff in malicious prosecution and false arrest suit based on alleged theft of automobile had failed to recover damages in similar suit based on theft of personalty at same time as alleged theft of automobile and tried at same time would not bar recovery of damages by plaintiff in action based on automobile theft, in view of fact that, although tried at same time, cases were separate cases, and judgment in one case could not be considered in determining other case.

6. Malicious Prosecution ⇐52

Mere fact that a plaintiff in malicious prosecution case was imprisoned on another warrant at same time on charge found by jury to be malicious did not require plaintiff to segregate damages, or preclude recovery by such plaintiff for one incarceration even though recovery had been denied for other incarceration.

7. Appeal and Error ⇐1068(4)

Rule that a judgment cannot be properly rendered for any greater sum than is claimed or demanded by plaintiff in declara-

tion or complaint did not warrant reversal of judgment because of erroneous instruction by court that plaintiff in malicious prosecution suit should recover sum greater than amount demanded where, in fact, damage awarded was less than amount demanded.

Theodore M. Monell, William Klein, San Francisco, for appellant.

Pierre J. Ibos, James A. Himmel, San Francisco, for respondent.

BRAY, Justice.

[1] Two actions filed the same day were tried together. Each action contained two counts, and in the prayer asked for $100,000 damages. The first count of the first action (the one in which this appeal was taken) was for malicious prosecution of plaintiff by the original defendant, now deceased,[1] for alleged violation of section 503, Vehicle Code (felonious theft of a Cadillac automobile). The second count was for false arrest upon the same charge. The complaint in the second action in the first count charged malicious prosecution for alleged grand theft of three diamond rings, two portable radios, two sets of silver, one smoking stand, one pistol and five pieces of luggage.[2] The second count charged false arrest upon the same charge. There were separate pleadings, causes of action, verdicts and judgments in the two actions. In the first case plaintiff was awarded $10,000 actual damages and $15,000 punitive or exemplary damages. In the second case judgment went for defendant, from which no appeal was taken. In the first case defendant appealed from the judgment, from the order denying his motion for judgment notwithstanding the verdict, and from the order denying his motion for new trial. (The latter order is not separably appealable and the purported appeal therefrom should be dismissed.)

1. The administrator of the estate of S. W. Corlett, deceased, was substituted as party defendant subsequent to the filing of the appeal herein. For convenience "defendant" as used herein refers to the original defendant.

Questions Presented.

1. In actions tried together but with separate pleadings, causes of action, verdicts and judgments, may the verdict in the second action be considered on the appeal in the first action to determine if the verdicts are inconsistent?
2. Is plaintiff entitled to damages?
3. Alleged error in instructions.

Facts.

Inasmuch as no contention is made that the evidence is insufficient to justify the verdict (except on the question of damages), a bare outline of the facts as apparently found by the jury will be given.

Plaintiff and defendant, without benefit of clergy, had been living together and holding themselves out as husband and wife. Defendant gave plaintiff many presents. In 1949 defendant presented plaintiff with a Buick convertible. In 1952 plaintiff traded it in on a Cadillac, paying additionally $500 in cash from moneys given her by defendant. The balance of the cost of the car was financed through a bank. Because of defendant's anger over the purchase of the car, plaintiff drove to Los Angeles. This was about the time the first installment payment on the car fell due. Plaintiff did not notify the bank she could not meet the payment. While she was in Los Angeles defendant went to the bank, paid the balance owing in full and had the new "pink slip" issued in his name. Defendant then went to Los Angeles and persuaded plaintiff "to come back home." It is not clear whether defendant took the car away from her when he first came to Los Angeles to see her. At any rate she had possession of it from then on. They made a trip to Reno together. Returning to San Francisco, they continued to live together although "we argued and we squabbled and fought." One Sunday, while plaintiff was absent from the house, defendant was taken ill to the hospital. The next day, after a row with de-

2. All of these items are hereafter referred to as "personalty."

fendant at the hospital, plaintiff left for Cleveland in the automobile. Defendant, claiming that plaintiff had stolen the automobile and the personalty, contacted his attorney, reported the alleged thefts to a police inspector and to a deputy district attorney. Defendant swore to a complaint charging plaintiff with theft of the automobile and later a separate one charging her with theft of the personalty. She was arrested thereon in Cleveland, extradited and brought to San Francisco in police custody. On her preliminary examination in the municipal court, both actions were dismissed and she was discharged. She had been in custody approximately 35 days.

1. Only One Case before Us.

While defendant contends that the verdicts in the two cases are inconsistent, his real contention is that the effect of the finding for defendant in the second case was a finding that defendant had probable cause for causing plaintiff's arrest on the personal property theft charge, and as her detention thereon was simultaneous with her detention on the automobile theft charge which the jury, in effect, found was improperly brought, she could not suffer any damage from the latter detention as she was in jail anyhow on the second charge. As the circumstances relating to the possession of the automobile by plaintiff were different from those relating to her possession of the personalty and therefore there would be no inconsistency in the verdicts, the effect of the verdict in the second case is not before us.

[2] We must look at the situation in the trial court. At the outset of the trial it was agreed that "these two cases be consolidated and be tried as one." Actually there was no true consolidation as they had separate verdicts and separate judgments. "The term 'consolidation' is used in three different senses. First, where several actions are combined into one and lose their separate identity and become a single action in which a single judgment is rendered; second, where all except one of several actions are stayed until one is tried, in which case the judgment in the one is conclusive as to the others; third, where several actions are ordered to be tried together but each retains its separate character and requires the entry of a separate judgment." 1 C.J.S., Actions, § 107, p. 1341. This third is the sense in which the actions were "consolidated" here. As said in National Union Fire Ins. Co. v. Chesapeake & O. Ry. Co., D.C., 4 F.Supp. 25, in the strict sense of the word there can be no consolidation of two or more cases unless they can be merged and combined into one. In the procedure adopted in our case, "each case retains its identity and distinctive characteristics in all other matters except the one of joint trial." 1 C.J.S., Actions, § 107, p. 1342.

[3] "The only effect of an order providing that several actions shall be tried together is to consolidate the cases for the purpose of trial; it does not merge the several actions into one; each case retains its distinctive characteristics and remains separate in respect of docket entries, depositions previously taken in one cause, verdicts, findings, judgments, proceedings to obtain an appellate review, and all other matters except the one of joint trial; and if there is error in one case only, it is fatal to the judgment in that case only. Likewise, the trial of two or more cases together by consent of all the parties does not merge the cases into one." 64 C.J., Trial, § 7, p. 37; 88 C.J.S., Trial, § 6.

In Hutchings v. Post, 90 Cal.App. 382, 265 P. 968, the plaintiff sued to foreclose a mechanic's lien. The defendant counterclaimed for damages for failure to complete the work according to contract. The plaintiff then commenced an independent action upon a promissory note given by the defendant as part payment on the contract. The defendant counter-claimed asking that the note be cancelled. "* * * the parties stipulated that the two [actions] might be tried at the same time and upon the same evidence. This was done, and separate findings and judgments were entered." 90 Cal.App. at page 383, 265 P. at page 968. In the first action, the trial court found that the plaintiff had failed to complete the contract as agreed and gave the defendant judgment for $128.33. In the second action

it gave the defendant judgment for costs. The plaintiff appealed from both judgments. In her answer in the first action the defendant had claimed an offset of $216 on account of work undone. In her answer in the second action she claimed $446 on the same account. "It is now argued that defendant was bound by the first pleading and that the trial court erred in allowing her an offset in the full sum of $446." 90 Cal. App. at page 383, 265 P. at page 968. To this contention the reviewing court held, 90 Cal.App. at pages 383–384, 265 P. at page 968: "The actions were not consolidated for trial, but were merely tried at the same time upon separate pleadings. In the first action damages were claimed for the delay, and the judgment was well within the sum prayed for."

In McNett v. Volfi, 1928, 205 Cal. 89, 269 P. 932, the complaint contained two causes of action, one for damages for alleged personal injuries and the other for alleged damage to the plaintiff's automobile. The jury rendered a verdict for the plaintiff for $5,000 on the first cause of action. Upon the second cause of action it rendered a verdict in favor of the defendant. On appeal the defendant contended the verdict against him was void for inconsistency. It was held that while the plaintiff probably had grounds for complaint because of the finding upon the second cause of action, the defendant had no such grounds.

[4] As our two cases were merely tried together, and as the first case retained its distinctive characteristics, we are not concerned with what happened in the other case.

2. Damages.

True, the evidence showed that at the same time that plaintiff was arrested upon the auto theft charge, she was likewise arrested on the other charge. But we are only concerned here with the question of whether the evidence supports the finding of the jury that in bringing the automobile theft charge defendant was guilty of malicious prosecution or false arrest and if so, whether the evidence supports the damages awarded. Whether plaintiff was properly or improperly in detention on another charge is immaterial.

Counsel and this court have found but two cases dealing with this precise question. In Doherty v. Munson, 1879, 127 Mass. 495, the defendant was a "trial justice" who had committed the plaintiff to confinement in the house of correction on two warrants for conviction of two separate crimes. The sentence of the magistrate upon one of these convictions was erroneous. The plaintiff brought action for false imprisonment against the magistrate. It was held that, as the plaintiff during the whole time of his imprisonment was legally held upon the other conviction, "The fact that the master of the house of correction also held another warrant, which was illegal, did not affect the character of his [the plaintiff's] imprisonment, and he sustained no damage thereby." 127 Mass at page 496. For his imprisonment on the illegal warrant the plaintiff was allowed only nominal damages, in the sum of $1. In Boogher v. Bryant, 1885, 86 Mo. 42, the defendant had caused the plaintiff's arrest on five counts of criminal libel. At the criminal trial two of the counts were dismissed by the prosecutor and the plaintiff was at first convicted on the other three counts. On a new trial of these, the defendant was fully acquitted. The plaintiff sued for malicious prosecution as to the two counts which were dismissed. A jury awarded the plaintiff $5,000. On appeal to the Court of Appeals that court reversed the judgment on the ground that there was no basis for the damages, no injury shown, in view of the fact that the plaintiff was simultaneously being prosecuted on the other three counts concerning which the plaintiff had not sued. The Missouri Supreme Court, however, reversed the decision of the Court of Appeals and reinstated the judgment on the jury verdict, and said, 86 Mo. at pages 49–50: "* * * the court of appeals, speaking of the impropriety and injustice of defendants uniting good and bad counts in the same information, use[s] this language: 'Upon principle, it would seem that the fact that some of the charges are well founded, or that a conviction could be procured upon

them even, would not justify the defendants, if they had maliciously, and without good grounds, preferred other charges in the same indictment. It is difficult to see, whatever might be the difficulty as to the measure of damages, how the cause of action, arising from the presentation of the ill-grounded charges would be done away with, because well-grounded charges were presented. The obligation would surely be on the defendants to discriminate, and to avoid uniting, with the charges for which probable cause existed, those for which there was not foundation.' From this, it is manifest that whatever difficulty, or impossibility even, there may be in discriminating between the injuries, resulting from the good and bad counts, thus improperly blended, is chargeable to the wrongful act of the defendants themselves, and, upon principle, it would seem that they should not now be permitted to plead their own wrong in their own justification. If, by their wrongful acts, the plaintiff could not readily apportion his expenses, or dissect his trouble, care, anguish and vexation, and opportion them among the five counts in the information, it would seem cruel to hold that no basis could therefore, be afforded by which to adjust the damages to the injuries sustained.

"Indeed, it would seem almost a mockery to hold that, by uniting groundless accusations with those for which probably cause might exist, the defendants could thereby escape liability, because of the injured party's inability to divide his damages between the two with delicate nicety. Such, we think, is not the law."

The Doherty case, supra, contains no reasoning of its decision. Moreover, it is evident that the court was reluctant to hold a committing magistrate liable in damages for what was merely an erroneous judgment in imposing sentence where the magistrate had jurisdiction of the subject matter and person. It stated that at the trial all parties had assumed that the magistrate could be held liable for such a judgment, but intimated that there was grave doubt that a magistrate could be held liable therefor at all. The Boogher case, supra, on the other hand, is well reasoned. Its language to the effect that a defendant should not be permitted to escape liability for his malicious accusation against a plaintiff merely because she is unable to divide her damages between the two accusations made against her is particularly applicable here.

[5, 6] As we have heretofore stated, this action should be determined without regard to the other action tried at the same time. Moreover, assuming that we can consider the outcome of the other action (although the verdict and judgment do not appear in the record) that verdict and judgment in favor of defendant is not necessarily a finding that defendant had probable cause to bring the charge there involved or that he acted without malice. There are a number of other reasons which could have prompted the jury's action. At most it is a finding that plaintiff in that action failed to make out a case against the defendant. Therefore, so far as this case is concerned, we merely have the situation that the evidence discloses that plaintiff was incarcerated on another warrant at the same time she was incarcerated on the warrant issued on the charge found by the jury to be malicious. As held in the Boogher case, supra, that fact does not require plaintiff to segregate her damages. In spite of the fact that the jury found for defendant in the other case (if we can consider that fact), it must be remembered that in fixing the damages in this case, the jury had full knowledge of the circumstances of the other arrest, and nevertheless, knowing full well what it intended doing in the other case, gave her damages here.

Defendant cites the rule stated in Allen v. Gardner, 1954, 126 Cal.App.2d 335, 340, 272 P.2d 99, 102: "Uncertainty as to the fact of damage, that is, as to the nature, existence or cause of the damage, is fatal. But the same certainty as to the amount of the damage is not required." Monroe v. Owens, 1946, 76 Cal.App.2d 23, 30, 172 P.2d 110, to the same effect. Defendant contends that the rule precludes plaintiff from recovery of damages. On the contrary, it authorizes their recovery.

3. Instructions.

In the complaint in the first action plaintiff alleged in the first count (the malicious

prosecution count), general damages of $100,000. In the second count (the false arrest count) she alleged no actual damages but "plaintiff demands exemplary and punitive damages against said defendant in the sum of $100,000.00." It would, therefore, appear that in the complaint as a whole she was asking for a total of $200,000. However, in the prayer she merely asked for $100,000. The court instructed that each complaint asked for $100,000 for general damages and $100,000 for punitive damages, or a total in the two complaints of $400,000.

[7] Assuming that the rule "'A judgment cannot be properly rendered for a greater sum * * * than is claimed or demanded by plaintiff in his declaration or complaint'", Meisner v. McIntosh, 205 Cal. 11, 269 P. 612, quoting from 33 C.J. 1164; 49 C.J.S., Judgments, § 54, means that where the prayer of the complaint is less than its ad damnum clause, the former controls, and assuming that the prayer in the second complaint was less than the ad damnum clauses therein, nevertheless we can see no harm in the court's mistake. The jury were properly instructed in all other respects concerning the issue of damages. The jury gave $10,000 general damages and $15,000 punitive. It is unreasonable to assume that it would have given any less had the court told them the total asked for in the two cases was only $200,000 or any more had the demand been for $500,000. Obviously the award was well within the amount of the prayer.

In Eastlick v. City of Los Angeles, 29 Cal.2d 661, 177 P.2d 558, 170 A.L.R. 225, the items of damage alleged in the body of the complaint totalled only $7,385. The prayer asked for $8,895 and in charging the jury the trial court used the latter amount as the maximum the jury could award. On appeal the defendant claimed error by the trial court in instructing concerning the larger amount. The reviewing court held that objection "should have been made in the trial court so that the discrepancy could have been there obviated (Lahti v. McMenamin, 204 Cal. 415, 421, 268 P. 644), [but] no harm appears to have resulted from the inaccuracy in the instruction. The verdict was for $5,000, well within the figure conceded by defendant to represent the limit of plaintiff's total demand." 29 Cal.2d at page 674, 177 P.2d at page 566. In the instant case, the attention of the trial court should have been called to the alleged error in the figures given by it.

The order denying motion for judgment notwithstanding the verdict and the judgment are affirmed. The appeal from the order denying the motion for a new trial is dismissed.

PETERS, P. J., and FRED B. WOOD, J., concur.



131 Cal.App.2d 432

VALLEY GROUP PIPE TRADES TRUST FUND, Harvey Holland, Paul Reeves, Harold Ringrose, Grant Haglund, Harold Bertram, R. L. Hateley, Richard Gardner, J. G. Mohan, C. V. Miller and E. R. Arbuckle, trustees thereof, Plaintiffs and Appellants,

v.

L. R. STRAIN PLUMBING AND HEATING CO., Inc., a California corporation, Defendant and Respondent.

Civ. 4914.

District Court of Appeal, Fourth District, California.

March 11, 1955.

Rehearing Denied April 4, 1955.

Hearing Denied May 4, 1955.

Action by members of trust fund created by claimed written collective bargaining agreements, for accounting of funds allegedly owed by defendant corporation to such trust fund pursuant to implied agreement by defendant to be bound by such agreement. The Superior Court, Fresno County, Edward L. Kellas, J., entered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Griffin, J., held that evidence sustained trial court's finding that no implied agreement to bind defendant corporation to pay into

trust fund sum claimed had been established.

Judgment affirmed.

1. Evidence ⇐313

Uncorroborated testimony as to alleged declaration of deceased person is weakest kind of evidence and is open to suspicion, and where admissible at all, it will be received and weighed by trier of facts the same as other evidence and may be disregarded when shown to be unbelievable or unsubstantial.

2. Corporations ⇐432(12)

In action by members of trust fund created by claimed written collective bargaining agreements, for accounting of funds allegedly owed by defendant corporation to such trust fund pursuant to implied agreement by defendant to be bound by such agreements, evidence sustained trial court's finding that plaintiffs had failed to supply clear and convincing proof that oral agreement to be bound by collective bargaining contract had been entered into on behalf of defendant corporation by its president and principal stockholder.

3. Appeal and Error ⇐931(1)

On appeal, evidence must be considered in light most favorable to support findings and judgment of trial court.

4. Corporations ⇐519(3)

In action by members of trust fund created by claimed written collective bargaining agreements, for accounting of funds allegedly owed by defendant corporation to such trust fund pursuant to implied agreement by defendant to be bound by collective bargaining agreements, evidence sustained trial court's finding that no implied agreement to bind defendant corporation to pay into trust fund sum claimed had been established.

5. Appeal and Error ⇐930(1), 931(1)
Trial ⇐143, 382

Where evidence is conflicting, trier of fact is sole judge of weight of such evidence, and reviewing court must presume that evidence in support of verdict or finding is true and will construe any substantial conflict in support of it.

P. H. McCarthy, Jr., F. Nason O'Hara, Herbert S. Johnson, San Francisco, for appellants.

Lawrence W. Young, Fresno, for respondent.

GRIFFIN, Justice.

This is an action for an accounting between the plaintiffs and appellants, as members of the Valley Group Pipe Trades Trust Fund, and defendant and respondent L. R. Strain Plumbing and Heating Co., Inc., a corporation. It arises out of claimed written collective bargaining agreements, not signed by defendant corporation, which provide that the employer shall contribute to said trust fund (welfare fund) 7-½ cents per hour for each hour worked by each employee, for the purpose of purchasing certain insurance benefits for the employees. The claim is that although defendant did not sign these instruments, it did, by oral declarations, promises and acts of the officers of the corporation, agree to be bound by them and failed to make such payments. The court found against plaintiffs' contentions and found generally that defendant neither "orally agreed or otherwise" to become bound by the agreement to pay any amount into said welfare trust fund, nor did it agree to be bound by the provisions of the collective bargaining agreement and declaration of trust.

Defendant was engaged in the general plumbing and contracting business. It was incorporated in 1948. L. R. Strain was president and principal stockholder. Apparently, defendant was then operating under an agreement dated June 23, 1947, between the "Northern California Conference of the Plumbing and Heating Industry, Inc." (of which defendant was not a member) and such other employers as "may become signatory hereto" and certain listed local unions. The agreement applied to all workmen employed by the individual employers covered by the agreement in which they recognized the Union as the sole collective bargaining representative of all such employees performing work over which the Union had jurisdiction. Therein the Union agreed to furnish competent workmen for the production of all work

covered by the agreement. It likewise contained a provision in reference to a contemplated welfare plan in which the parties signatory agreed "subject to any wage stabilization policies" or requirements, that they will establish a health and welfare plan for workmen covered by the agreement to be jointly administered by a board of trustees of five representatives of employees and five representatives of the Union, commencing August 1, 1951, and that the individual employer shall pay $.075 per hour for each hour worked by workmen into the welfare fund. It also provided that in the event no welfare fund was established, etc. the $.075 should be returned to the individual employer paying into the fund. It provided that the agreement was to be effective as of June 30, 1951, and remain in force until June 30, 1952, and from year to year thereafter unless 60 days notice was given of a desire to modify or change its terms. The agreement received in evidence (Ex. 5) does not indicate that defendant became a signatory thereto. The health and welfare plan here referred to was never established or set up under that agreement, and defendant made no payments under it.

A "Master Contract" (Ex. 1) between Northern California Plumbing and Heating Industry, Inc., as employer on behalf of certain designated employer associations, and individual employers covered by the agreement and the Valley Group Negotiating Committee, was entered into on July 20, 1952. This represented certain specific local unions in different districts, including Fresno Local No. 246, of which L. R. Strain, individually, was a card-holding member. Defendant corporation was not a member of any one of these named associations and it did not sign the agreement. By its terms, among other things (Sec. 14), provision is made for a welfare plan whereby each individual employer shall pay to the welfare fund $.075 per hour for each hour worked by each employee employed on work covered by the agreement, effective "as of *June 30, 1951,* since January 1, 1952" to July 20, 1952; the fund to be administered by a board of trustees in accordance with the provisions of a trust instrument executed on *June 24, 1952* (Ex. 2) and all payments for hours already worked since January 1, 1952 to April 4, 1952, should be "made in full thirty (30) days from the date of C.I.S.C. approval" and all payments made for hours worked after July 20, 1952, shall be made in accordance with the provisions of the trust agreement (Ex. 2). Exhibit 2 declares and creates a trust fund to be known as Valley Group Pipe Trades Trust Fund. It defines "employer" as used in the agreement to be Northern California Conference of the Plumbing and Heating Industry, Inc., and the Northern California and Central California Negotiating Committee for Industrial Pipe Work Contractors, as representing "individual employers", which means any employer covered by a collective bargaining agreement with the "Union" and who "assents and consents" to participate in and contribute to the fund. It then sets out the powers of the trustees and includes the right to collect said contributions. The agreement and declaration of trust is made effective as of January 1, 1952. It was signed by the parties indicated, the Valley Negotiating Committee, five "Union trustees" and five "Employer trustees". Defendant corporation was not a signatory thereon and was not a member of any of these groups under the name or title indicated.

On July 28, 1952, it is claimed that a circular letter (Ex. 7) was addressed and mailed to L. R. Strain individually, from one Reeves, business manager for the Union, advising him that "an Agreement covering Plumbing, Heating, Refrigeration and Piping has been reached effective July 3rd, 1952, between the Northern California Conference of the Plumbing and Heating Industry, Inc., also the Northern and Central Chapters of the Associated General Contractors of America and the Valley Group Negotiating Committee. The Valley Group Negotiating Committee represents Local Unions 62–228–246 * * *. Seven and one half ($.075) per hour retroactive to January 1st, 1952 to be paid within 30 days of date of approval which was obtained on July 21st. Employers have until August 20th to send their payments to Valley Group

Pipe Trades Trust Fund * * *. Forms will be mailed to you in the near future which will be self explanatory so these payments can be made properly."

The letter also contained other changes that had been made in reference to wages, overtime, etc. (There is no direct proof that defendant received this letter.) Exhibits 1 and 2 were submitted to Strain for signature, but the corporation refused to sign it. Strain died on September 28, 1952. The corporation ceased to employ members of the Union after December, 1952, and it ceased business on February 9, 1953.

It is plaintiffs' contention, as pleaded in their complaint, that notwithstanding defendant corporation was not a signatory of either Exhibits 1 or 2, or a member of any association or group therein mentioned, it did, through its president, Strain, prior to the effective date of the welfare plan, "agree, orally" with Local Union No. 246, one of the participating unions, "in consideration of the furnishing" of workmen to work for defendant corporation by said Union, to be bound by all of the provisions of Exhibits 1 and 2, requiring defendant to pay into that trust fund, for the purpose therein indicated, the sum therein provided; that after January 1, 1952, workmen were supplied and defendant refused to pay about $3,000 into that fund. An accounting is sought under these agreements for the period between January 1, 1952, and February 9, 1953.

In support of their contentions plaintiffs cite such cases as Division of Labor Law Enforcement v. Dennis, 81 Cal.App.2d 306, 183 P.2d 932; Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 P. 1086; Zurich etc. Assur. Co. v. Industrial Accident Commission, 132 Cal.App. 101, 22 P.2d 572; Beatty v. Oakland Sheet Metal etc. Co., 111 Cal.App.2d 53, 244 P.2d 25; Powers v. Journeymen Bricklayers' Union No. 3, 130 Tenn. 643, 172 S.W. 284, L.R.A.1915E, 1006; Grant v. Long, 33 Cal.App.2d 725, 92 P.2d 940; and Panno v. Russo, 82 Cal.App.2d 408, 186 P.2d 452.

Defendant denied the allegations of plaintiffs' complaint and averred that it did not sign nor have a part in the alleged agreements and was not bound thereby, and that nothing was due plaintiffs by reason of such alleged agreements. The learned trial judge filed a memorandum opinion setting forth the related facts and said that the only evidence bearing on plaintiffs' contention that there was an "oral agreement" or an "implied agreement" of Strain to bind the corporation to perform under Exhibit 1 arose as a result of two conversations, after Strain allegedly received the letter of July 28, 1952 (Ex. 7), between the witness Reeves and the deceased Strain, about August 1st, 1952, when it was claimed that "he (Strain) would pay" the welfare charge, and that anything called for by the master agreement was all right with him; and another claimed conversation had with Strain about September 1, 1952, wherein he told him that the Union would have to withdraw employees from employers not paying the welfare charge, but that this policy would not apply to Strain because he was paid up.

As pointed out, Strain, at the time of trial, was dead and was unable to testify. Opposed to Reeves' testimony was the testimony of the secretary of the defendant corporation. She unequivocally testified that the corporation had made no payments under the plan, and no payments were ever contemplated by it; that when the written welfare agreement was tendered to defendant corporation for signature defendant corporation refused to execute it; that she saw Strain in his office many times a day and she never heard any conversation with Reeves in which Strain agreed to pay any money into such a fund; that on the other hand, Strain told her not to sign Exhibits 1 and 2 on behalf of the corporation, and that she subsequently told Reeves, after Strain's death, that the corporation had refused to sign such agreements.

[1, 2] The court specifically found that plaintiffs did not supply "clear and convincing" proof of such an oral agreement. It has been held that uncorroborated testimony as to an alleged declaration of a deceased person is the weakest kind of evidence and is open to suspicion; that where admissible at all it will be received and weighed by the trier of facts the same as other evidence and may be disregarded

when shown to be unbelievable or unsubstantial. In re Estate of Emerson, 175 Cal. 724, 727, 167 P. 149; Ostertag v. Bethlehem Shipbuilding Corp., 65 Cal.App.2d 795, 800, 151 P.2d 647; Rogers v. City of Los Angeles, 6 Cal.App.2d 294, 296, 44 P.2d 465; 10 Cal.Jur. p. 1097, sec. 329. This finding has evidentiary support and the trial judge was justified in disregarding such testimony.

It is now argued in the briefs that there was a liability under Exhibits 1 and 2 because of some "implied" agreement on the part of defendant corporation to accept the terms thereof because of the claimed receipt of the letter indicated, without repudiation of its terms, and because of the acts of defendant corporation in hiring, and the Union in furnishing workmen through the local indicated, without notice that defendant had repudiated the contract. It is then claimed that the offer of the Union to furnish workmen and the acceptance by defendant of that offer, bound defendant to the same extent as if it had been a signatory thereto.

It was pointed out by the trial judge that Exhibit 1 purports to bind those employers signatory thereto, or members of organizations signatory thereto, and that the term "individual employer" is defined therein as "all holders of one or more contractor's license * * * who are members of the employer or any of the employer associations" set out and "any nonmember holder" of one or more such licenses, who may, *"with the written consent of the Union,* execute this agreement". He held that from the facts stipulated, defendant corporation fell only within the term "non-member holder". It was stated that defendant corporation, at no time, executed the agreement, with the *written consent of the Union,* or otherwise. The letter (Ex. 7) even if received by defendant corporation, does not appear to be an offer. It is information only to parties operating under or signatory to it, and appears to be a notice by the Union to Strain that non-signers to Exhibit 1 were being informed of the provisions of the new agreement, which constituted changes to preexisting bargaining agreements, and that the Union was extending its assent to the signing of the agreement by the recipient of the letter. The placing of the agreements in defendant's possession for signature, and its apparent refusal to sign them rather indicates that before defendant was to be bound by their terms it would be necessary for the defendant to sign them through the duly authorized act of the corporation. Apparently the agent for the Union was notified of the refusal of the corporation to sign them. This evidence indicates that no ratification was intended by the corporation. The evidence further indicates that the Union had other knowledge that they were not signed and that the corporation had not assented to them. After Strain's death Reeves endeavored to have the secretary of the corporation sign them. The Union's agent testified that he told Strain, about three weeks before his death, that the workmen furnished by the Union would be withdrawn if defendant did not conform to the agreements and pay the money into the welfare fund, and Strain said "We are paid in". Apparently no money was paid into the welfare fund and the workmen were not withdrawn. Whether the Union was furnishing workmen under the old agreement or under some claimed oral agreement is not clear from the evidence.

[3–5] Considering the evidence in its most favorable light in support of the findings and judgment, as we must do, it fully supports the conclusion reached by the trial court that no "implied" agreement to bind the corporation to pay into the welfare fund the sum claimed was established. Where the evidence is conflicting, as here, this court is bound by the time-honored rule that the trier of fact is the sole judge of the weight of the evidence, and we must presume that the evidence in support of the verdict or finding is true and will construe any substantial conflict in support of it. (4 Cal.Jur.2d p. 449, sec. 575.) It cannot be said that plaintiffs have established, *as a matter of law,* an oral or implied agreement that the corporation would be bound by the written agreements.

Since the findings and judgment are supported on the grounds indicated, it becomes unnecessary to decide other claimed con-

tentions of defendant why the judgment should be affirmed, i. e., that the alleged oral agreement violated the statute of frauds, Civ.Code, § 1624, subd. 1, and that it lacked mutuality and was not supported by any consideration.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



131 Cal.App.2d 349

M. Earl MALTBY, Plaintiff-Appellant,

v.

Charles J. SHOOK, Royal Machine Works, et al., Defendants,

Roy W. Solomon and Robert K. Jasper, Defendants-Respondents.

Civ. 20602.

District Court of Appeal, Second District, Division 2, California.

March 8, 1955.

Action by alleged assignee of rights of cafe which cashed checks payable to defendant partnership and endorsed and cashed by one of defendants, who was bookkeeper for the partnership. From summary judgment of the Superior Court of Los Angeles County, Leon T. David, J., in favor of defendants and from order denying plaintiff's motion to set aside the judgment, the plaintiff appealed. The District Court of Appeal, Fox, J., held that where affidavit filed in opposition to defendants' motion for summary judgment recited that affiant believed one of defendants, who was employed as bookkeeper for other defendants, had authority to endorse and cash checks payable to defendant partnership, that deposition and affidavits of defendant partners indicated bookkeeper had such authority and that plaintiff had been informed by person answering partnership's telephone that bookkeeper has such authority, affidavit was insufficient.

Judgment affirmed.

1. Judgment ⇐185.2(5)

Where affidavit filed in opposition to defendants' motion for summary judgment recited that affiant believed one of defendants, who was employed as bookkeeper for other defendants, had authority to endorse and cash checks payable to defendant partnership, that deposition and affidavits of defendant partners indicated bookkeeper had such authority and that plaintiff had been informed by person answering partnership's telephone that bookkeeper had such authority, affidavit was insufficient. West's Ann. Code Civ.Proc. § 437c.

2. Judgment ⇐185.2(5)

In summary judgment proceeding, deficiencies in affidavit filed in opposition to defendants' motion for summary judgment may not be supplied by a resort to the pleadings. West's Ann.Code Civ.Proc. § 437c.

3. Judgment ⇐178

While summary judgment proceeding does not authorize trial of any bona fide issues which affidavits may reveal, it permits court to pierce allegations of pleadings to determine whether genuine cause of action in fact exists in interests of avoiding needless trials.

4. Appeal and Error ⇐113(1)

No appeal lies from an order denying motion to vacate a summary judgment.

Gray, Glass & Allen, Gardena, for appellant.

Blek & Wilcox, Inglewood, for respondents.

FOX, Justice.

Plaintiff appeals from a summary judgment in favor of defendants Solomon and Jasper and from the order denying his motion to set aside the judgment.

In his first amended complaint, which purports to state three causes of action, plaintiff Maltby alleged that he is the assignee of the rights of the Monterey Cafe, a partnership, and the lawful owner and holder of the "within claim." The first count alleges that Charles J. Shook, one of the defendants, was an employee of defendant Royal Machine Works, and at all times referred

to acted within the course and scope of his employment. Upon information and belief, plaintiff further alleges that the Royal Machine Works gave Shook authority to endorse checks of which it was the payee and that plaintiff relied upon such authority and received and cashed a number of checks "under the above mentioned belief;" and that there are more checks which were cashed by Shook whose amount was not yet ascertainable. The second count, after realleging the assignment to Maltby and Shook's employment by the Royal Machine Works, and that he acted within the scope of his employment, proceeds to allege, upon information and belief, that Shook "fraudulently passed checks wherein Royal Machine Works was the payee; that * * * Shook had no authority to negotiate same; that because of said representations by * * * Shook and the reasonable reliance by plaintiff, the plaintiff was damaged in the sum of $7,277.51." The third count again realleges the assignment and Shook's employment as previously recited. It then alleges that the defendant Royal Machine Works "negligently, carelessly and unlawfully permitted their records to be falsified and they negligently, carelessly and unlawfully failed to ascertain that the checks involved herein were not in fact credited to them;" and that plaintiff was damaged in the sum of at least $7,277.51, although the full amount was not yet ascertained, as the direct and proximate result of such negligence, carelessness and unlawfulness.

An answer denying liability was filed for themselves alone by Roy W. Solomon and Robert K. Jasper, doing business under the fictitious firm name of Royal Machine Works. Thereafter, these defendants moved for a summary judgment. In support thereof, affidavits were filed by Solomon and Jasper and by two accountants, G. M. Elberson and Cecil Coe. The affidavits of Elberson and Coe were essentially to the effect that during the period in question they were in the employ of the Royal Machine Works and personally examined its books and records and that they found therein no evidence of irregularity, embezzlement or wrong doing on the part of Charles Shook. Elberson averred that not until September, 1953, when he was advised that the bank account of Royal Machine Works was overdrawn, did he ascertain that Shook had made false entries in the books by checking with customers of the Royal Machine Works.

The affidavits of Solomon and Jasper were virtually identical. They disclose that Solomon and Jasper are the sole owners of the Royal Machine Works, a partnership, and that Shook was their bookkeeper from May, 1952, to September, 1953, during which time his duties consisted in part of making entries of debits and credits in the partnership books; that in the course of his work, Shook received partnership mail containing checks payable to the Royal Machine Works, which checks he was authorized only to deposit in its bank account by placing a printed stamp on the back with the legend "for deposit only to the account of Royal Machine Works;" and that Shook had no other authority to endorse checks. These affidavits further aver that neither Jasper nor Solomon ever represented that Shook had any authority to endorse or sign checks payable to the Royal Machine Works or that he had any authority other than that of a bookkeeper; that only the partners are authorized to give such authority; that after Shook left their employment, affiants for the first time discovered that he had been taking checks payable to the Royal Machine Works and endorsing and cashing the checks at gambling places and using the proceeds for his own purposes; that during Shook's employment, affiants employed accountants who checked the books of the Royal Machine Works about once a week and at no time did said accountants report any irregularity in the books; that affiants also examined these books from time to time and discovered no irregularity; that affiants were unable to discover Shook's unauthorized actions because he falsely entered debit memos on the books covering the amount of the checks that he took for his own purposes.

In opposition to the motion made by defendants, there was filed an affidavit executed by Dudley Gray, of plaintiff's counsel. Plaintiff himself did not file an affidavit. Gray's affidavit asserts that he has

conducted an investigation of the facts surrounding plaintiff's cause of action and "that set forth hereinafter are some of the facts which have been discovered by your affiant and/or his agents." The body of the affidavit then recites:

"I

"That your affiant verily believes said Charles J. Shook, defendant, having been the agent of the defendant, Royal Machine Works and of the defendants, Roy W. Solomon and Robert K. Jasper, doing business as Royal Machine Works and that as agent, he had authority in excess of that stated in the affidavits supporting this motion and particularly that said Charles J. Shook had authority to sign for and on behalf of Royal Machine Works and to endorse and cash checks of said Royal Machine Works and to sign other formal documents of the Royal Machine Works; that said belief is based partially upon the notice of intention to chattel mortgage certain property of Royal Machine Works as reflected by such a notice attached hereto and marked Exhibit A.

"II

"That your affiant on or about the —— day of December, 1953, took depositions of said Robert K. Jasper and Robert W. Solomon relative to the above entitled action and said depositions are attached hereto and marked Exhibit B and made a part hereof by way of reference; that said depositions, together with the affidavits of said Solomon and Jasper which are on file in support of this motion indicate that said Charles J. Shook was given authority by the Royal Machine Works to endorse and cash said checks of the Royal Machine Works.

"III

"That your affiant has discussed this case in detail with M. Earl Maltby, plaintiff herein, and said Earl Maltby if sworn would testify that on or about the day that the Monterey Cafe cashed the first check of Charles J. Shook, that said M. Earl Maltby contacted the Royal Machine Works by telephone by dialing either ORchard 1-7704 or OREgon 8-1449 and that said telephone was answered by a feminine voice who stated that said number or numbers were those telephones then installed in the Royal Machine Works and that said Earl Maltby inquired of said person as to what capacity said Charles J. Shook held in connection with Royal Machine Works and that the feminine voice replied that said Charles J. Shook was a partner of Royal Machine Works and as such, had authority to endorse and cash checks made payable to Royal Machine Works; that said M. Earl Maltby is not presently available to sign such affidavit but your affiant herein makes these statements on his behalf as have been previously represented to your affiant by said M. Earl Maltby."

Exhibit A showed a notice of intention to execute a chattel mortgage on certain machinery and equipment of the Royal Machine Works signed by Charles J. Shook, mortgagor.

Section 437c of the Code of Civil Procedure provides, *inter alia,* that if it is claimed that an action has no merit, the defendant may notice a motion, supported by the affidavit of some person having knowledge of the facts, that the complaint be dismissed and judgment entered unless the plaintiff, "by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." In referring to the contents of the affidavits in behalf of a plaintiff, the third paragraph of said section provides, in its material portion, that such "affidavit or affidavits in opposition to said motion shall be made by the plaintiff * * * or by any other person having knowledge of the facts, and together shall set forth facts showing * * * that *a good cause of action exists upon the merits.* The facts stated in each affidavit shall be within the *personal knowledge of the affiant,* shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, *if sworn as a witness,* can testify competently thereto. * * *" (Emphasis added.)

It is at once obvious that the crucial requirements last set out—that the affidavits in behalf of a plaintiff opposing a motion for summary judgment shall show (1) that a good cause of action exists upon the merits;

(2) facts within the personal knowledge of the affiant and (3) to which affiant can competently testify as a witness—have not been met. Turning first to points (2) and (3), it is clear that there is not a single statement therein which shows the affiant possesses facts within his personal knowledge to which he would be competent to testify.

[1] In paragraph I, Gray states no facts attesting to Shook's authority to endorse checks of which the Royal Machine Works is the payee. He merely asserts his belief that Shook had such authority. Such belief, without more, is not competent testimony but a mere opinion or conclusion. There is no showing that Gray ever had any transaction with Shook or any personal knowledge of any matter of fact that would engender such belief, even if such testimony were competent. Even assuming Shook was authorized to sign the notice of intention to execute a chattel mortgage, this falls far short of any authority to endorse and cash checks owned by the Royal Machine Works. Paragraph II refers to the depositions of Solomon and Jasper taken by the affiant and to the affidavits of those gentlemen filed herein. Gray then asserts as his conclusion the legal effect of the testimony by those deponents. This, of course, is a complete departure from any compliance with section 437c. Paragraph III, based on statements made by Maltby to Gray, is pure hearsay. Thus, the defendants' affidavits have in no way been controverted by the Gray affidavit so as to raise a triable issue.

But even more fatal to plaintiff's case, and of fundamental significance, is the fact that the Gray affidavit fails to measure up to point (1), supra, in that, in the language of section 437c, it does not "set forth facts showing * * * that a good cause of action exists upon the merits" in plaintiff. At the very threshold we are met by the fact that plaintiff is suing as an assignee, as the lawful owner and holder of the rights of the Monterey Cafe. This was denied by the answer and was placed in issue. Yet nowhere is there any statement in the Gray affidavit that plaintiff Maltby is in fact such lawful assignee or that he had standing, as such, to bring this action. But plaintiff, who could competently testify that he was in fact the owner of such assignment, filed no affidavit. In Kimber v. Jones, 122 Cal.App.2d 914, 918, 919, 265 P.2d 922, this court had occasion to emphasize the importance of such a showing in a plaintiff's affidavit in support of a motion for summary judgment, its absence being declared fatal to the existence of his cause of action. Plaintiff's first cause of action is based on the plaintiff's alleged receipt and cashing of checks endorsed by Shook. Once again, nowhere in Gray's affidavit is there any assertion of a personal knowledge of such transactions by the affiant and certainly no indication that he would be competent to testify to the occurrence of those transactions. The gravamen of plaintiff's third cause of action is defendant's negligent failure to check their records, which was negatived by defendant's affidavits. Yet not a single reference to any facts suggestive of such negligence, or negligence of any character, appears in Gray's affidavit. In short, the lone affidavit submitted fails utterly to establish by any competent averments on the part of one having personal knowledge of the facts that plaintiff herein has any cause of action as alleged in his complaint. So inadequate is the Gray affidavit, so lacking in the essentials necessary to create any triable issue or show the existence of a cause of action in plaintiff, and so replete with hearsay, conclusions and personal opinion, that the appeal from the judgment rendered verges on the frivolous.

[2, 3] Plaintiff's brief indicates that he is under the impression that the deficiencies in his affidavit may be supplied by a resort to the pleadings. Such belief is without foundation. Coyne v. Krempels, 36 Cal.2d 257, 262–263, 223 P.2d 244; Kimber v. Jones, supra, 122 Cal.App.2d at page 918, 265 P.2d 922. In Cone v. Union Oil Co., 129 Cal.App.2d 558, 277 P.2d 464, this court pointed out that while the summary judgment procedure does not authorize the trial of any bona fide issues which the affidavits may reveal, it permits the court to pierce the allegations of the pleadings to determine whether a genuine cause of action in fact exists in the interests of avoiding needless trials. We there stated, 129 Cal. App.2d at page 563, 277 P.2d at page 467: "[T]he sufficiency of the allegations of a

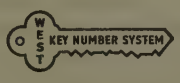
complaint do not determine the motion for summary judgment. Rather, it must be determined from the affidavits whether there exists a genuine issue as to any material fact. Often there is no genuine issue of fact, although such an issue is raised by the formal pleadings."

Since an examination of the affidavits discloses that the Gray affidavit contains no facts showing the existence of a cause of action in plaintiff, and the affidavits in support of the motion state facts which, if proved, would support a judgment in favor of the moving party, the judgment granting defendant's motion was proper. Coyne v. Krempels, 36 Cal.2d 257, 261, 223 P.2d 244.

[4] Following the entry of the summary judgment, plaintiff moved to set it aside. This motion was denied. Plaintiff purports to appeal from the order denying his motion to vacate the judgment. No appeal lies from such an order. Bank of America, etc., v. Oil Well Supply Co., 12 Cal.App.2d 265, 271, 55 P.2d 885. The appeal from the order denying the motion to set aside the judgment is dismissed.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



131 Cal.App.2d 382

AMERICAN TRUST COMPANY, as Executor of the Last Will and Testament of Loraine Ward Temps, alias, deceased, substituted in the place of Loraine Ward Temps, Plaintiff, Cross-Defendant and Respondent,

v.

Frank M. FITZMAURICE and Kathleen T. Fitzmaurice, Defendants, Cross-Complainants and Appellants.

Civ. 16131.

District Court of Appeal, First District, Division 2, California.

March 10, 1955.

An aunt's action against her nephew and his wife for a declaration that defendants held certain realty and personal property, which plaintiff had transferred to them, in trust for plaintiff, and for an order that they reconvey said property to her. Defendants contended that there had been an absolute gift with mere retention of right to income and receipts. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., entered a judgment, the adverse portions of which were challenged by defendants' appeal. The District Court of Appeal, Nourse, P. J., held that evidence supported finding that all transfers were revocable and in trust during aunt's lifetime; but held that the aunt should bear a proportionate share of the real property taxes and repairs on property in which she had retained life tenancy.

Affirmed in part and in part reversed with directions.

1. Trusts ⇐44(1)

In aunt's action against her nephew and his wife for a declaration that defendants held certain realty and personal property, which plaintiff had transferred to them, in trust for plaintiff, and for an order that they reconvey said property to her, wherein defendants contended that there had been an absolute gift with mere retention of right to income and receipts, evidence supported finding that all transfers were revocable and in trust during aunt's lifetime.

2. Trial ⇐140(1)

Credibility of witnesses is solely for trial court where no impossibility or inherent improbability is involved.

3. Evidence ⇐271(15), 317(15)

Self-serving testimony of donor or trustor is admissible as to question whether transfer was intended as gift or trust, and even hearsay evidence as to such declarations of trustor or donor is admissible as an exception to hearsay rule, to show his or her frame of mind in that respect.

4. Appeal and Error ⇐995
Witnesses ⇐67

An attorney is competent to testify like any other witness and, on appeal his testimony must be considered in support of decision below just as any other evidence,

5. Joint Tenancy ⇐5

If an actual and present joint interest is created in bank deposit, withdrawal of funds does not change joint tenancy character, unless there has been a change of character by agreement of parties.

6. Evidence ⇐461(1)

Agreement with bank that all funds deposited in joint account would be held by parties as joint tenants was not incontestable proof of intention to create present joint interest even though all funds had belonged to one of parties, and parol evidence would be admissible to show intention and realities of ownership.

7. Joint Tenancy ⇐3

Fact that parties had rented safe deposit box in joint tenancy did not establish joint tenancy in contents of said box.

8. United States ⇐91

Placing of second name on government bonds does not establish intention of former sole owner to restrict his or her power to dispose of bonds during lifetime or to give person whose name is placed second on bond a present equal interest.

9. Evidence ⇐594

Witnesses ⇐311, 316, 363(1)

Trier of facts may reject testimony of uncontradicted witness, provided rejection is not arbitrary; and relevant to such rejection are such things as the witness' interest in result of case, his motive, and contradictions appearing in evidence.

10. Evidence ⇐589

In action involving issue as to whether transfer had been absolute or in trust, trial court's rejection of defendant's uncontradicted testimony that gift tax had been paid could not be deemed arbitrary where defendant had not been present when tax allegedly was paid, the only supporting exhibits were blank return forms, and he had not filed a donee's return.

11. Life Estates ⇐28

In view of Civil Code section requiring life tenant to contribute to taxes and repairs, court decreeing that plaintiff had retained life estate in property conveyed to defendants and requiring defendants to execute deed conveying such life estate to her should have provided for proportionate contribution with regard to such taxes and repairs. West's Ann.Civ.Code, § 840.

Charles R. Collins, San Francisco, for appellant.

Fred A. Watkins, San Francisco, for respondent.

NOURSE, Presiding Justice.

Loraine Ward Temps instituted against her nephew Frank M. Fitzmaurice and his wife an action for a declaration that defendants held certain real and personal property which plaintiff had transferred to them in trust for plaintiff, and for an order that they reconvey said property to her. The property consisted of (1) certain shares of Transamerica Corporation and of Bank of America, N. T. and S. A.; (2) a note and deed of trust securing it, given by Thomas F. Fenton and wife for the balance of the purchase price of a parcel of improved real property sold to them by plaintiff, which note mentions defendant Frank M. Fitzmaurice as payee; (3) a parcel of improved real property on Funston Avenue in San Francisco, in which both plaintiff and defendants lived in separate apartments. Plaintiff alleged a confidential relationship with defendants, especially with her nephew, that the transfers were made at his instigation so that he would handle the property for her during her lifetime and pay her all the income, that he would reconvey to her on demand, and in case of her death retain what he had still under him, and that demand for a reconveyance was made and refused.

In their answer defendants admitted the confidential relationship and the agreement to pay to plaintiff during her lifetime all income and receipts from the property but denied the alleged trust and obligation to reconvey, taking the position that except for the retention of the right to income and receipts the transfer of the title (by way of gift) was absolute. In a cross-complaint defendant husband asked a declaration that he was a joint tenant with his aunt in some $55,000 of government bonds originally held by her but following her directions transferred into the names of

herself or him and the certificates of which were kept in a safe deposit box taken by both in their joint names, and that the court provide for sequestration of said bonds. During the trial it was also claimed by this cross-complainant that he had a joint tenancy interest in a bank account opened by Mrs. Temps in the joint names of herself and him. It was stipulated at the trial that this appellant never paid anything for the advantages he received.

As to the shares of stock and the note and deed of trust the court, sitting without a jury, held that no gift had been intended, that defendants held the title in trust and ordered him to reconvey to plaintiff. As to the real property on Funston Avenue, it was held that plaintiff had only retained a life estate in the flat she lived in and defendants were ordered to execute a deed conveying such life estate to her and providing that all real property taxes and repairs should be paid by defendants. A court commissioner was appointed to execute the transfer ordered if defendants failed to do so. It was further adjudged that cross-complainants had no interest in the bonds and bank account in the joint names of his aunt and himself. Defendants and cross-complainants appeal.

Pending the appeal Mrs. Temps died and the American Trust Company as the executor of her will was substituted for her.

Appellants' only contention is that the evidence does not support the findings and decision in so far as adverse to them. Except as to one minor point the contention is without merit. The essential question was whether in the different transactions the intention was a transfer in trust terminable on demand during Mrs. Temps' lifetime or a present gift with retention of a right to the income for life. In this respect the evidence was in sharp conflict. Respondent testified that at the time of the trial (May, 1953) she was 75 years old and that for 15 years she had been in bad health. At the end of 1948 or the beginning of 1949, after the Funston Avenue property had been deeded to appellants, she had a conversation with appellant Frank about her properties in connection with her care in her old age and the possibility of her death in not too long a time. Appellant wanted her to give him everything, her stocks and bonds. If he had not told her he would return the property she would of course not have transferred it to him. She would not have given him anything. She might still live, a sick woman, ten more years. She gave him the key of the safe deposit box for a while, but when she found out that he was getting in the box clandestinely, she asked for the key and he gave it back. When she asked him to return her securities he said that he would not give them back, he had changed his mind. She considered the property still hers.

Fred A. Watkins, attorney of respondent, testified that he had had a conference with Frank about the return of the stock and the note and that at the end of said conference he said: "'I admit I told her I would give them back to her when she gave them to me, but I am not going to do it.'" This is sufficient in itself to sustain the judgment.

[1–3] All the above evidence sufficiently supports the holding that all transfers were revocable and in trust during Mrs. Temps' lifetime. All evidence to the contrary given by appellants could only cause a conflict resolved by the trial court against appellant. Appellants' attack on the weight of Mrs. Temps' testimony as confused and conflicting cannot be reviewed by this court as the credibility of witnesses is solely for the trial court where no impossibility or inherent improbability is involved. There is no doubt that self-serving testimony of the donor or trustor is admissible as to the question whether a transfer was intended as a gift or a trust. Even hearsay evidence as to such declarations of the trustor or donor is admissible to show his or her frame of mind in that respect as an exception to the hearsay rule. Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, 173 et seq., 168 P.2d 946; Casey v. Casey, 97 Cal.App.2d 875, 879 et seq., 218 P.2d 842; Kelly v. Bank of America Nat. Trust & Savings Ass'n, 112 Cal.App.2d 388, 394, 246 P.2d 92, 34 A.L.R.2d 578; Emden v. Verdi, 124 Cal.App.2d 555, 561, 269 P.2d 47.

[4] Appellants also attack the testimony of the attorney Fred Watkins. An attorney is competent to testify like any other witness. 27 Cal.Jur. 31. "The propriety of a lawyer occupying the dual capacity of attorney and witness is purely one of legal ethics, largely to be determined by the attorney's own conscience. While it is not a practice to be encouraged, it may often occur that conditions exist in which an attorney cannot justly or fairly withhold from his client either his legal services or his testimony as a witness." Hotaling v. Hotaling, 187 Cal. 695, 709, 203 P. 745, 751. On appeal we must consider his testimony in support of the decision below just as we would any other evidence.

[5–8] Appellants contend that the agreement of the parties with the bank provides that all funds deposited in the joint account will be held by the parties as joint tenants; that therefore the parties necessarily had an equal interest in the funds so deposited and that the proceeds of said joint tenancy property retained the same character after Mrs. Temps had disposed of the original funds. The same rule is urged as to the contents of the joint safety box and the Government bonds placed in the name of Mrs. Temps or appellant Frank. The contention is without merit. It is true that if an actual and present joint interest is created, the withdrawal of the funds does not change the joint tenancy character unless there has been a change of the character by agreement of the parties. Wallace v. Riley, 23 Cal.App.2d 654, 665, 74 P.2d 807; Fish v. Security-First Nat. Bank, 31 Cal.2d 378, 387, 189 P.2d 10. However the agreement with the bank is not an incontestable proof of the intention to create a present joint interest notwithstanding, as in this case, all the funds had belonged to one of the parties. Parol evidence remains admissible to show the intention and the "'realities of the ownership'". Paterson v. Comastri, 39 Cal.2d 66, 72 et seq., 244 P.2d 902, 906. On the basis of the evidence stated the trial court could, as in the Comastri case, hold that there was no intention to make a gift of the funds in the account prior to Mrs. Temps' death. Although Mrs. Temps did not testify specifically as to each item in issue, the court could conclude from the general tenor of her testimony that she did not intend to part definitely with her property, which she thought she might still need in the ensuing years of sickness. This applies as much to property placed in the joint name of herself and appellant Frank as to property placed in his name alone. The fact that the parties had rented a safe deposit box in joint tenancy does not establish a joint tenancy in the contents of said box. California Trust Co. v. Bennett, 33 Cal.2d 694, 698, 204 P.2d 324. Neither does the placing of a second name on government bonds establish an intention of the former sole owner to restrict his or her power to dispose of the bonds during lifetime or to give the person whose name is placed second on the bond a present equal interest. It is of probative importance that Mrs. Temps did not wish this appellant to enter the joint deposit box which contained the bonds without her knowledge, that she asked for return of the key when the appellant did so, and that the key was returned to her, indicating an admission that this appellant had no present equal right to the contents of the box.

[9, 10] Appellant Frank testified that Mrs. Temps paid gift tax on all properties that she put in his name. Mrs. Temps did not recollect whether she had done so. The trial court in an opinion made part of the record states that it was not proved that gift taxes were paid as to these transactions, or that any gift tax return was filed. The trier of fact may reject the testimony of an uncontradicted witness provided he does not act arbitrarily. Hicks v. Reis, 21 Cal.2d 654, 659–660, 134 P.2d 788. Relevant in that respect are many other things—the witness' interest in the result of the case, his motive, and contradictions appearing in the evidence. Huth v. Katz, 30 Cal.2d 605, 609, 184 P.2d 521. In this case this appellant's interest was evident; he had not been present when the tax allegedly was paid. The only supporting exhibits were blank return forms. He did not file a donee's return. Under these circumstances it cannot be said that the rejection of this appellant's testimony was arbitrary.

[11] With respect to the Funston Avenue property, as to which the decision of the trial court was mainly favorable to defendants, they complain of the provision, to be contained in the deed conveying to Mrs. Temps a life estate in the flat she lived in, that the defendants should pay all real property taxes and repairs. According to section 840, Civil Code a life tenant must contribute to taxes and repairs in the manner there stated. No agreement freeing Mrs. Temps from such payments appears. She herself testified that she paid taxes and repairs. The deed should have provided for a proportionate contribution from Mrs. Temps based on section 840 and the consideration that her life estate was restricted to one flat only of the property.

In so far as the judgment required the deed conveying a life estate to Mrs. Temps to contain a provision that all the real property taxes and the repairs affecting said real property should be assumed and paid by defendants and cross-complainants, the judgment is reversed with directions to amend said provision in accordance with our above decision. In all other respects the judgment is affirmed, appellants to bear the costs of the appeal.

DOOLING and KAUFMAN, JJ., concur.



131 Cal.App.2d Supp. 874

Al C. DAVIDSON, Plaintiff and Respondent,

v.

HERRING-HALL-MARVIN SAFE COMPANY, etc., Defendant and Appellant.

C. A. 8626.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 24, 1954.

Petition for Rehearing Denied March 8, 1955.

Buyer's action against seller for breach of warranty. The Municipal Court of Los Angeles Judicial District, Joseph Marchetti, J., rendered judgment for buyer, and seller appealed. The Appellate Department of the Superior Court, Patrosso, J., held that where buyer of safe discovered that defective manufacture of safe was responsible for moisture damage to stamp collection stored therein, but did not notify seller of defect or of damage to stamps until more than 15 months later, delay in giving notice was unreasonable, and buyer could not hold seller liable for breach of warranty.

Judgment reversed.

Sales ⇐285(2)

Where buyer of safe discovered that defective manufacture of safe was responsible for moisture damage to stamp collection stored therein, but did not notify seller of defect or of damage to stamps until more than 15 months later, delay in giving notice was unreasonable, and buyer could not hold seller liable for breach of warranty. West's Ann.Civ.Code, § 1769.

John R. Allport & John T. La Follette, Los Angeles, for appellant.

Chas. L. Nichols, Beverly Hills, Thomas W. Hughes, Los Angeles, and Anthony T. Carsola, Beverly Hills, for respondent.

PATROSSO, Judge.

Action for damages for breach of warranty wherein plaintiff recovered judgment, from which defendant appeals. Briefly stated, the facts, viewed in the light most favorable to plaintiff, are these: On September 9, 1949 plaintiff purchased from defendant a safe wherein on or about January 7, 1950 he placed a valuable stamp collection. Thereafter, in the month of September, 1950, plaintiff opened the safe and discovered that the stamp collection had been damaged by the adherence of the stamps to each other, which he ascertained was occasioned by an unusual amount of moisture within the safe. The evidence is to the effect that the presence of this moisture in the safe was due to the fact that the safe was defectively manufactured in that it was not "cured" so as to remove the moisture which is present in safes in the course of manufacture.

Defendant urges various grounds for a reversal of the judgment, but we need consider but one of them as it is determinative of the controversy.

While, as noted, plaintiff alleged, and he so testified, that he discovered the damage to his stamps on September 14, 1950, and that the damage was occasioned by the undue amount of moisture in the safe, he further testified that he did not notify defendant of the defective condition of the safe or of the damage to the stamps until the "early part" of 1952.

Section 1769, Civil Code, provides that there shall be no liability for a breach of warranty where, as here, the goods are accepted, if the buyer fails to notify the seller of any breach within a reasonable time after the buyer knows or ought to know of such breach. Our Supreme Court had occasion to consider this section in Whitfield v. Jessup, 1948, 31 Cal.2d 826, 829–830, 193 P.2d 1, 3, 5, and held that it was applicable to "a warranty such as we have here whether an action thereon be said to sound in tort or contract." The court also declared that what constitutes a reasonable time "'must be determined from the particular circumstances in the individual case'". There the plaintiff alleged that she contracted undulant fever from drinking raw cream purchased from defendant, and notice of breach of warranty was given to defendant within eleven months of the time she purchased the cream and six months from the time when she learned that she had contracted the disease. Under these circumstances, the majority of the court held that it could not be said "as a matter of law that the notice was not given within a reasonable time." However, the court was there careful to observe, 31 Cal.2d at page 832, 193 P.2d at page 4: "What constitutes a reasonable time where the goods sold are foods containing latent defects, which are immediately consumed, *presents a different question than does the ordinary sale where the article is subject to examination and use which will reveal its defect.* For all these reasons little light is shed upon the issue by an examination of the cases deciding that certain periods of time were or were not reasonable. *The case must be controlled by its special circumstances.*" (Emphasis added.)

The fair inference from this language is that in the case of sales of goods other than foodstuffs "containing latent defects," the court would regard a delay in giving notice of six months from the date plaintiff had knowledge of the breach as unreasonable as a matter of law. And such appears to be the fairly uniform holding of the courts which had occasion to consider the question under statutes identical with our own which is a counterpart of section 49 of the Uniform Sales Act. See Columbia Axle Co. v. American Automobile Ins. Co., 6 Cir., 1933, 63 F.2d 206, 208; Stewart v. B. R. Menzel & Co., 1930, 181 Minn. 347, 348, 232 N.W. 522; Patterson Foundry & Machine Co. v. C. S. Williams Lacquer Co., 1932, 52 R.I. 149, 151, 158 A. 721, 723; Chess & Wymond Co., v. La Crosse Box Co., 1921, 173 Wis. 382, 387, 181 N.W. 313, 315; Bomze v. M. Schwarz Textile Corp., 1931, 100 Pa.Super. 588, 592; Laundry Service Co. v. Fidelity Laundry Machinery & Engineering Co., 1932, 187 Minn. 180, 183, 245 N.W. 36, 38. In the foregoing cases delays of from four to six months were held to be unreasonable as a matter of law. And in Ice Bowl, Inc., v. Spalding Sales Corp., 1943, 56 Cal.App.2d 918, 921, 133 P.2d 846, wherein defendant sought damages for an alleged breach of warranty of ice skates, and where it appeared that some eight months elapsed between the date that the skates were ordered (when they were delivered does not appear) and notice by defendant of the claimed breach of warranty, it was held that section 1769, Civil Code, precluded recovery. See also cases collected in 1A U.L.A. (Sales), pp. 108–110, and in Cum. Supp. thereto.

In the circumstances here a delay in giving notice of more than fifteen months, from the time plaintiff admittedly had knowledge of the breach of warranty and the damage occasioned thereby, must be held to be unreasonable as a matter of law.

The judgment is reversed.

BISHOP, Acting Presiding Judge.

I concur.

131 Cal.App.2d Supp. 882

FIRST NATIONAL BANK OF BELLFLOWER, etc., Plaintiff and Respondent,

v.

Georgia CHAMBERS, Defendant and Appellant.

C. A. 8604.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 25, 1955.

Action to recover possession of an automobile or the value thereof. From a judgment of the Municipal Court of the Downey Judicial District, A. D. Boone, J., for plaintiff bank, defendant appealed. The Superior Court, Appellate Department, Patrosso, J., held that the presumption of good and sufficient consideration for defendant's agreement, in letter to bank, to assume debt against defendant's automobile in amount due bank on defendant's note, secured by mortgage on automobile, at the time of her husband's delivery to bank of another note and mortgage, to which he signed defendant's name without her knowlege or consent, for a new loan by bank in larger sum, was dispelled and without probative value, where bank's evidence disclosed that defendant received no benefit for her promise and that bank suffered no detriment in reliance thereon.

Judgment reversed.

1. Bills and Notes ⇐54

No right to enforce payment of note can be acquired through or under forged signature, unless party against whom such right is sought to be enforced is precluded from setting up forgery. West's Ann.Civ. Code, § 3104.

2. Contracts ⇐47

A promise, without new consideration, to pay amount due on note to which promissor's name was forged, will not create liability, in absence of estoppel, ratification or adoption.

3. Contracts ⇐88

There is a presumption of good and sufficient consideration for written contract, and a presumption is evidence.

4. Evidence ⇐89

A presumption is dispelled and entitled to no probative value, where litigant invoking it introduces evidence encompassing subject-matter of presumption.

5. Contracts ⇐88

The presumption of consideration for wife's agreement to assume debt against her automobile in amount due bank on her note, secured by mortgage on automobile, at time of her husband's delivery to bank of another note and mortgage, to which he signed wife's name without her knowledge or consent, for new loan by bank in larger sum, was dispelled and without probative value, where bank's evidence as to circumstances surrounding writing of letter disclosed that wife received no benefit for her promise and that bank suffered no detriment in reliance thereon.

Macbeth & Ford, Los Angeles, for appellant.

Crowley & Curry, Bellflower, for respondent.

PATROSSO, Judge.

Action to recover possession of an automobile or in the alternative the value thereof. Plaintiff recovered judgment as prayed, and defendant appeals.

Plaintiff's complaint alleges that defendant, Georgia Chambers, (hereinafter referred to as defendant) is the owner of the Lincoln automobile therein described; that she executed and delivered to plaintiff a promissory note in the sum of $1,194.32, together with a chattel mortgage upon said automobile securing the same; that defendant defaulted in the payment of said note, whereupon plaintiff demanded possession of said automobile, which was refused by defendant. The prayer is for the possession of the automobile or the sum of $610, the balance alleged due upon the note. Defendant's answer consists of a general denial, except that defendant admits that she executed a note and chattel mortgage upon the automobile in question; that all sums due thereon had been paid except $100, which defendant had tendered to plaintiff and the latter had refused to accept, as a result of

which it is alleged the note was discharged pursuant to the provisions of section 1485 of the Civil Code.

There is no dispute with respect to the facts of the case. On July 11, 1952 defendant borrowed $1,194 from plaintiff, executing her note therefor, together with a chattel mortgage upon the automobile in question. On January 9, 1953, at which time there was a balance due on this note of $610, defendant's husband arranged a new loan with plaintiff in the sum of $1,000, and thereafter delivered to plaintiff a promissory note therefor together with a chattel mortgage securing the same upon the automobile, each of which purported to be signed by defendant, but to which her name had been signed without her knowledge or consent. It was stipulated that if the defendant was bound by these forged instruments, the balance due was $610, but if not, the balance remaining due upon the original note and chattel mortgage executed by defendant was only $100. The defendant did not obtain any knowledge of the forgeries mentioned until April, 1953, when she was advised of this fact by a representative of the plaintiff. As a result of this conversation, however, defendant wrote a letter to the plaintiff, wherein she stated, among other things: "I agree to assume the $610 debt against the car."

[1, 2] Admittedly if defendant incurred any liability to plaintiff it is solely by reason of said letter. No right to enforce payment can be acquired through or under a forged signature unless the party against whom it is sought to enforce such right is precluded from setting up such forgery. Civ. Code, § 3104; Anglo-California Trust Co. v. French American Bank, 1930, 108 Cal. App. 354, 357, 291 P. 621. "In the absence of the elements necessary to create an estoppel, ratification, or adoption a promise by one whose name is forged, made without any new consideration, to pay for or take care of the paper, will not create liability." Annotation 48 A.L.R. 1369.

We agree with the trial judge, as stated in his memorandum opinion, that there is no evidence which would support a finding of estoppel, ratification or adoption. He, however, rested his judgment upon the ground that the defendant's promise, being in writing, was presumptively supported by a consideration. He also stated that, "although we have no direct evidence to that effect," he believed there was "an understanding" between defendant and her husband "concerning the balance," it appearing that in a property agreement executed between defendant and her husband preceding the writing of the letter, there is a recital that the automobile "is registered in the wife's name and is her separate property."

[3–5] We dismiss at once the suggestion that there may have been some understanding or agreement between defendant and her husband with reference to the payment of the note as mere conjecture, having no support in the evidence. And while it is true that there is a presumption "that there was a good and sufficient consideration for a written contract," and that a presumption is evidence, this does not aid plaintiff's cause. Here plaintiff produced evidence as to the circumstances surrounding the writing of the letter, and it is now firmly established that a presumption "is dispelled from the case and entitled to no probative value when the litigant invoking the presumption has introduced evidence encompassing the subject matter of the presumption." Stout v. Southern Pac. R. Co., 1954, 127 Cal.App.2d 491, 274 P.2d 194, 197, and cases there cited. The evidence introduced upon behalf of the plaintiff discloses that defendant received no benefit for her promise and that the plaintiff suffered no detriment in reliance thereon. The case here is ruled in principle by Tiffany & Co. v. Spreckels, 1927, 202 Cal. 778, 789, 262 P. 742.

The judgment is reversed.

BISHOP, Acting P. J., concurs.

131 Cal.App.2d Supp. 871

Grover A. SMITH, Plaintiff and Respondent,

v.

BERT M. MORRIS COMPANY, etc., Defendant and Appellant.

C. A. 8566.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 24, 1955.

Action by printing broker to recover price of printed matter. The Municipal Court of Los Angeles Judicial District, Ida May Adams, J., gave judgment for printing broker. Defendant appealed. The Appellate Department of the Superior Court, County of Los Angeles, Patrosso, J., held that where defendant contended that contract for printed matter was between its advertising agency and printing broker, and that it was not a party to contract, court erred in refusing to admit copy of contract for printing.

Judgment reversed.

1. Evidence ⇐184

In action by printing broker to recover price of printed matter, where defendant contended that printed matter contained word "iridium" contrary to its instruction placed on proof and plaintiff on demand failed to produce proof, court erred in refusing to allow witness for defendant to testify that printing broker's attorney stated he had proof of printed matter, where printing broker had testified that such proof had been lost. West's Ann.Code Civ.Proc. § 1963, subd. 5.

2. Evidence ⇐185(1)

In action by printing broker to recover price of printed matter, where defendant contended that contract for printed matter was between its advertising agency and printing broker, and that it was not a party to contract, and printing broker testified it had never received a purchase order for printing, court erred in rejecting a copy of purchase order on ground that it was not best evidence and no demand had been made upon broker to produce original.

3. Brokers ⇐85(1)

In action by printing broker to recover price of printed matter, where defendant contended that contract for printed matter was between its advertising agency and printing broker, and that it was not a party to the contract, a copy of purchase order for printing in question was relevant to issue that printing contractor believed his contract was with defendant, and should have been admitted to evidence.

4. Witnesses ⇐406

In action by printing broker to recover price of printed matter, where printer employed by printing broker stated that he did not keep brown line proofs of work he did because they faded within a relatively short time, court erred in excluding testimony of defendant that brown line proofs remained legible for as much as three years.

5. Evidence ⇐506

In action by printing broker to recover price of printed matter, where defendant contended that such printed matter was not of good artistic and workmanlike quality, court erred in excluding testimony of expert witness whose qualifications were unquestioned, that printing did not measure up to ordinary standards of quality in the industry. West's Ann.Code Civ.Proc. § 1870, subd. 9.

6. Evidence ⇐505

In action by printing broker to recover price of printed matter, where trial was to court, the court was not bound to accept expert witness' testimony, but that fact did not operate to render such testimony inadmissible.

Wright, Wright, Green & Wright, Los Angeles, for appellant.

Donald R. Krag, Alhambra, for respondent.

PATROSSO, Judge.

Plaintiff instituted this action against Bert M. Morris Company and others, but as the action was dismissed as to all defendants except the Morris Company, we shall refer to the latter as the defendant.

The complaint is in two counts. The first alleges that the parties entered into an agreement whereby plaintiff agreed to prepare and print 250,000 pieces of advertising matter for the defendant, for which the latter promised and agreed to pay $756.50 plus $26.48 sales tax; that plaintiff fully performed his part of the contract by printing and delivering the advertising matter to the defendants who refused to pay for the same. The second cause of action is in the form of a common count for work, labor and material alleged to be of the reasonable value of the same amount.

Defendant's answer consists of a general denial and a special defense wherein it is alleged that the work in question was performed for and pursuant to a contract with the Irwin Advertising Agency (not a party herein) who had been engaged by defendant to conduct certain advertising for it, by the terms of which contract plaintiff agreed to prepare, manufacture and deliver to the advertising agency the advertising matter in question, which was to be printed on buff color bond in royal blue ink of uniform appearance and texture in a good, artistic and workmanlike manner; that the printed matter was to have printed thereon a reproduction of the tip of a fountain pen which was *not* to contain thereon the word "iridium"; that plaintiff failed to perform his agreement in these respects and that the advertising agency and the defendant refused to accept the same.

The court found in accordance with the allegations of plaintiff's first cause of action and that the allegations of defendant's special defense were untrue. From the resulting judgment in favor of plaintiff, defendant appeals.

It should perhaps be noted at the outset that the plaintiff is not engaged in the printing business as such but is what may be denominated a printing broker who solicits and secures orders for printing which in turn are executed by printers under an independent contract between himself and the latter.

Defendant earnestly contends that the findings are unsupported by the evidence, but an examination of the reporter's transcript satisfies us that the evidence, although conflicting, when viewed in the light most favorable to the plaintiff is sufficient to support the findings in each particular concerning which defendant complains.

Defendant further contends that the court erred in its rulings on evidence, to which we now direct our attention.

[1] Defendant in part defended upon the ground that the printed matter caused to be produced by plaintiff was unacceptable because it contained the picture of a fountain pen upon the point of which the word "iridium" appeared; that the use of the word was prohibited by the United States Government, and when plaintiff submitted a preliminary proof of the advertisement he was advised of this fact by defendant and a notation was made upon the proof that the word was to be eliminated. Upon the trial plaintiff failed to produce the proof upon demand therefor, and introduced evidence to the effect that it had been delivered by him to the printer who stated he could not locate the same. The defendant then offered to prove by the president of defendant corporation that in a conversation had with plaintiff's attorney after the controversy arose wherein she requested the return of the art work and the proof which plaintiff had submitted to defendant, the attorney stated "that they had the art work and proof, but they would not return it because they needed it for evidence." Upon objection of the plaintiff, the offer of proof was rejected. The ruling was erroneous, for, if received, it would have tended to establish that the printer had not lost the proof as plaintiff undertook to testify, but that the same was in possession of plaintiff or his agent, in which circumstances from plaintiff's failure to produce the same there would arise the presumption that, if produced, it would be adverse to plaintiff. Subd. 5, sec. 1963, C.C.P.

[2, 3] Also in support of its contention that the contract for the printing in question was entered into between plaintiff and the Irwin Advertising Agency, and not the defendant, the latter called as a witness an employee of the agency who testified that

the work in question was performed by plaintiff pursuant to a purchase order issued by the agency, one copy of which was delivered to plaintiff and two copies retained by the Agency. Defendant then offered in evidence a copy of the purchase order in question, but the offer was rejected by the court upon the ground that it was not the best evidence and that no demand had been made upon plaintiff to produce the original. However, as plaintiff had previously testified that he had never received a purchase order from the Irwin Agency, a demand to produce would have been futile, and the court's ruling was erroneous. Dold v. Munsor, 1922, 107 Neb. 501, 186 N.W. 353, 354; Michelin Tire Co. of California v. Williams, 1930, 135 Or. 158, 293 P. 938, 939; 32 C.J.S., Evidence, § 844, page 778, and cases cited in notes 84 and 85. If the evidence had been received, it would have tended to establish the untruth of plaintiff's testimony that he did not understand that his contract for the printing was with the Irwin Agency rather than defendant and hence was relevant to an issue tendered by the pleadings.

[4] In explanation of why he did not keep "brown line proof" of matter printed by him, the printer stated that such proofs faded and became illegible within a relatively short period of time. In rebuttal of this, defendant undertook to prove that "brown line proof" remained legible for a long period of time—as much as three years—but upon objection, the court excluded the testimony. The ruling also was erroneous.

[5, 6] Likewise erroneous was the ruling excluding proof by an expert—concerning whose qualifications no question was raised—that the printing done by plaintiff did not measure up to ordinary standards of quality in the printing industry. One of the principal issues in the case was whether the printing was of good artistic and workmanlike quality—a proper subject of expert testimony. C.C.P., sec. 1870(9). True, the trial judge would not have been bound to accept the witness' testimony, but this does not operate to render the proffered testimony inadmissible.

The judgment is reversed.

BISHOP, Acting P. J., concurs.

44 Cal.2d 166

The PEOPLE of the State of California, Respondent,

v.

Jack SYKES, Appellant.

Cr. 5648.

Supreme Court of California.
In Bank.

March 15, 1955.

Defendant was convicted in the Superior Court, City and County of San Francisco, Melvin I. Cronin, J., for unlawfully furnishing marijuana to a minor, and he appealed. The Supreme Court, Edmonds, J., held that evidence sustained conviction.

Affirmed.

Schauer, Traynor, and Carter, JJ., dissented.

Opinion, 273 P.2d 588, vacated.

1. Criminal Law ⇐369(2)

Test for admissibility of evidence offered by prosecution is whether it tends logically, naturally, and by reasonable inference to establish any fact material for prosecution, or to overcome any material matter sought to be proved by defense, and if it does, it is admissible, whether it embraces commission of another crime or not, whether other crime be similar in kind or not, and whether it be part of single design or not.

2. Criminal Law ⇐371(12)

In prosecution for unlawfully furnishing marijuana to minor, evidence that minor had been prostitute, sharing her income with defendant, was admissible to show motive.

3. Criminal Law ⇐372(1)

In cases based upon commission of certain types of crimes, such as sex offenses, and furnishing narcotics to a minor, evidence of similar conduct of defendant with same person who is named in information or indictment is admissible to show disposition of defendant to commit act charged and probability of his having committed it.

4. Criminal Law ⇐1036(1)

Having failed to object, on trial of charge of unlawfully furnishing marijuana to minor, to testimony that defendant had given prosecutrix second opportunity to smoke marijuana cigarette on night following one on which crime charged was alleged to have been committed, defendant could not complain on appeal that he had been prejudiced thereby.

5. Witnesses ⇐277(1)

Where defendant has repeatedly denied, in broad terms, commission of crime, permissible scope of cross-examination is very wide.

6. Witnesses ⇐277(2)

In prosecution, for unlawfully furnishing marijuana to minor, wherein defendant had repeatedly denied, in broad terms, commission of crime charged, it was proper cross-examination to inquire whether defendant had ever had narcotics in his possession.

7. Criminal Law ⇐1169(3)

Where defendant, charged with unlawfully furnishing marijuana to a minor, had admitted that he had previously been in possession of narcotics, any error in admitting third party's testimony as to theft of heroin from defendant was harmless.

8. Witnesses ⇐335, 380(5), 388(10)

Party producing witness is not allowed to impeach his credibility by evidence of bad character, but it may be shown that he made prior statements inconsistent with his present testimony; however, before this can be done, statements must be related to him, with circumstances of times, places, and persons present, and he must be asked whether he made such statements, and, if so, allowed to explain them. West's Ann.Code Civ.Proc. §§ 2049, 2052.

9. Criminal Law ⇐899, 1036(2)

In view of his failure to object to such question and in view of extensive cross-examination with regard to such a guilty plea, defendant, convicted for unlawfully furnishing marijuana to minor, could not complain on appeal that he had been prejudiced when prosecution, seeking to impeach

its own witness, inquired of witness as to whether he had pleaded guilty while under joint indictment with defendant, to charge of giving narcotics to minor. West's Ann. Code Civ.Proc. §§ 2049, 2052.

10. Criminal Law ⇐1037(1, 2)

Where no objection has been made to argument, it has not been assigned as a misconduct, and court has not been requested to instruct jury to disregard it, objection thereto is waived.

11. Poisons ⇐9

Corpus delicti of crime of unlawfully furnishing marijuana to minor was sufficiently proved by testimony of prosecutrix that she had had prior experience with marijuana and indicating its description and effect upon her, and such testimony was sufficient to sustain conviction. Health and Safety Code, § 11714.

Sol A. Abrams and George E. Hammer, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

The appeal of Jack Sykes, who with Rudy Mercado, was indicted for furnishing marijuana to Beverly Detrick, a minor, is from the judgment of conviction of the crime of violating section 11714 of the Health and Safety Code.

Beverly Detrick, 17 years of age, testified that while she was sitting in a cafe, Sykes entered, took a marijuana cigarette from his pocket, and handed it to Mercado. After Mercado lighted the cigarette, he handed it to Beverly. She smoked it and gave it back to Mercado who returned it to Sykes. Sykes smoked it and then passed it back to Mercado, who again smoked it before passing it on to the others seated around the booth. It was then returned to Sykes. Beverly testified that while the cigarette was being passed around, Mercado and Sykes were saying, "Keep it down so no one can see it."

Beverly further testified that on the following evening, while riding in a taxicab driven by Sykes, he handed her another marijuana cigarette. This, she said, was in the presence of a person named Frank or Eddie. When cross-examined she testified that Jesus Gonzales, whom she knew as Frank Cruz, was not present on either occasion. Upon re-direct examination she declared that Jesus Gonzales was the man in the taxicab who gave her the cigarette. Gonzales denied knowing Beverly at the time she said he was with her.

Beverly testified that she was introduced to Sykes sometime in the third week in March by Mercado, with whom she was living at the time. Over objection, Beverly testified at great length that she had been recruited as a prostitute by Sykes, to whom she paid one-half of her income. She further testified that they had discussed the rates she should charge and how to detect venereal disease. He took her to hotels and suggested false names for her to use in registering.

Other testimony by Beverly was that she had smoked marijuana cigarettes 28 or 29 times previous to the evening Sykes offered one to her. She described the cigarette offered to her. She was familiar with the odor of marijuana, she said, and smoking the cigarette that night made her feel "a little high." Beverly said that she had never paid any money to Sykes for marijuana.

Inspector Maloney, a qualified expert on narcotics, testified that her actions and terminology were typical of one who had smoked a marijuana cigarette and her description of marijuana was correct. The method of smoking described by Beverly, the inspector said, was typical as well as the practice of passing of the cigarette from one person to another.

Mercado's testimony was that Sykes did not give him a marijuana cigarette at the cafe. The prosecution claimed surprise and asked to impeach the witness. Over objection, Mercado was asked if he had not pleaded guilty to the crime charged in the indictment. The district attorney also questioned him about the circumstances surrounding the plea and prior inconsistent

statements made at that time. In answer to other questions over objection, Mercado admitted the theft of some heroin from Sykes and the previous possession of narcotics.

Sykes contends that the court erred in admitting Beverly's testimony about her conduct as a prostitute under the direction of Sykes and also her charge that he gave her a cigarette on the night after they were in the cafe. The testimony of Sykes on cross-examination as to his previous possession of narcotics and the admission of Mercado that he had stolen narcotics from Sykes is also said to justify reversal of the judgment of conviction. Another contention is that the district attorney made prejudicial remarks to the jury during his opening and closing arguments by repeated reference to the alleged pimping and narcotic activities of Sykes.

Sykes also claims that the prosecution failed to prove all of the elements of the crime charged, and that the evidence is not sufficient to support the conviction.

The attorney-general argues that the testimony by Beverly and the cross-examination of Sykes insofar as they touched on prostitution was admissible to show the plan, scheme or motive of Sykes. As such it is, the state asserts, an exception to the general rule that evidence of other crimes or immoral conduct is not admissible.

[1] The theory of the prosecution is that Sykes carried on a complete plan to subjugate the mind and body of Beverly to his vile ends. Generally, evidence to show a plan or scheme concerns the means used to gain an end, such as the theft of a pistol before an attack upon a person. Here, the district attorney used the ends to prove the means. It is not necessary to decide whether such evidence shows plan or scheme, because it was relevant to prove motive. The test for admissibility is: "'does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not.'" People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924, 929; also see: People v. Dabb, 32 Cal. 2d 491, 197 P.2d 1; People v. James, 65 Cal.App.2d 709, 710, 151 P.2d 572.

[2] Motive is a material fact. Evidence was offered that Beverly at no time paid Sykes for any narcotics. It is reasonable to believe that he was motivated in giving it to her because of their relationship in connection with prostitution and the sharing of its proceeds with him. Evidence of this relationship with her was, therefore, admissible.

[3, 4] No objection was made to the testimony of Beverly that Sykes gave her a second opportunity to smoke a marijuana cigarette on the night following the one on which the crime charged was alleged to have been committed. On cross-examination, a vigorous attack was made on this testimony. Having failed to object, Sykes cannot now complain that he was prejudiced. Moreover, in cases based upon the commission of certain types of crimes, evidence of similar conduct of the defendant with the same person who is named in the information or indictment "is admissible to show the disposition of the defendant to commit the act charged and the probability of his having committed it." People v. Jewett, 84 Cal.App.2d 276, 279, 190 P.2d 330, 331, and cases there collected. This rule has been applied in prosecutions for sex crimes, and upon a charge of pimping. People v. Bellamy, 79 Cal.App. 160, 248 P. 1042. The reasons for applying that rule where the charge is furnishing narcotics to a minor are just as compelling as in sex cases.

[5, 6] Upon cross-examination of Sykes it was proper to ask if he had ever had narcotics in his possession. Sykes was charged with giving narcotics to Beverly. Previously Sykes had repeatedly denied in broad terms the commission of the crime. In such circumstances, the permissible scope of cross-examination is very wide. People v. Zerillo, 36 Cal.2d 222, 229, 223 P.2d 223. The evidence that at prior times he had narcotics in his possession was admissible to show familiarity with them.

[7] It is contended that the testimony which brought out the admission by Mercado of the theft of heroin from Sykes was highly prejudicial. But, the only effect such evidence could have had on the case against Sykes was to show the previous possession of narcotics by him. As such possession had already been admitted by Sykes in previous testimony, the admission of Mercado's testimony on this point was harmless. People v. Cohen, 94 Cal.App.2d 451, 456, 210 P.2d 911; People v. Booth, 72 Cal.App. 160, 166, 236 P. 987.

Upon direct examination Mercado was asked, "Did Jack Sykes ever furnish you with marijuana?" Mercado replied, "No, sir." Claiming that he was surprised by this reply the district attorney asked leave to impeach the witness. An objection upon the grounds that Mercado was the prosecution's own witness was overruled, the trial judge stating that he might be impeached if surprise were shown and a foundation laid for that purpose. Mercado then was asked if he had pleaded guilty, in a joint indictment with Sykes, to a charge of giving narcotics to Beverly. He replied that he had. He further explained that he had been arrested in another state, brought to California by a police officer, and interrogated by the prosecuting attorney before entering the guilty plea. Mercado testified that he told both of these men that Sykes had given him a marijuana cigarette which he had passed on to Beverly. But, he said, he told the police officer this because he had a grievance against Sykes and was lying when he made the same statement to the prosecuting attorney. The only objection to any of these questions was that one of them had already been asked and answered. This objection was overruled.

Sykes admits that the prosecution was entitled to impeach Mercado but argues that the method of doing so was improper. He contends that by these questions the prosecution was permitted to draw the admission from Mercado that he had pleaded guilty and thus impeached his credibility by showing bad character. He asserts that the police officer and the prosecuting attorney were both available to give testimony as to the prior inconsistent statements.

[8] The party producing a witness is not allowed to impeach his credibility by evidence of bad character, but it may be shown that he has made prior statements inconsistent with his present testimony. Code of Civ.Proc. § 2049. "[B]ut before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. * * *" Code of Civ.Proc. § 2052. The officer and the prosecuting attorney could not be asked about the prior statements until the foundation questions had been asked of Mercado. Once he admitted the inconsistent statements, it would have been error to introduce other evidence of them. See: People v. Pianezzi, 42 Cal.App.2d 265, 272, 108 P.2d 732.

[9] It is unnecessary to decide whether the question regarding the guilty plea was properly a part of the foundation for impeaching Mercado. If it were error, it could have been remedied by an admonition to the jury to disregard it. However, no objection to the question was made. On the contrary, on cross-examination by counsel for Sykes, Mercado was asked if he wished to explain why he had stated to the prosecuting attorney that he had given a marijuana cigarette to Sykes or Beverly. Mercado then related at length the events leading to the entry of his plea of guilty, attempting to show that this statement was part of the transaction in which he was induced to plead guilty to the charge of furnishing marijuana to Beverly in order to escape prosecution upon two other charges. In these circumstances, Sykes cannot now complain that he was prejudiced.

[10] Sykes complains of assertedly prejudicial remarks of the district attorney in his opening and closing arguments. Without determining whether the references to pimping and narcotics were improper, they do not constitute grounds for reversal. "No objection was made to the argument. It was not assigned as misconduct. The court was not requested to instruct the jury to disregard it. Under these circumstances, appellant waived his objection to the challenged statements (case cited) and the mis-

conduct, if any, will not warrant a reversal." People v. Jones, 91 Cal.App.2d 501, 205 P.2d 437; also see People v. Hunter, 49 Cal.App. 2d 243, 121 P.2d 529; People v. Lew, 78 Cal.App.2d 175, 177 P.2d 60.

[11] Other points made by Sykes concern the asserted lack of proof of the corpus delicti, and the insufficiency of the evidence to support the conviction. The testimony of Beverly, if believed, is ample to prove the elements of the crime charged and fully supports the judgment of conviction.

The judgment is affirmed.

GIBSON, C. J., and SHENK and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

In my view the opinion prepared for the District Court of Appeal by Presiding Justice Peters and concurred in by Justices Bray and Wood (Fred B.) (reported in 273 P.2d 588) adequately discusses and correctly resolves all issues of law presented on this appeal. For the reasons therein stated it is my conclusion that the defendant was deprived of a fair trial and that the judgment of conviction should be reversed.

TRAYNOR, Justice.

I dissent.

Defendant was jointly indicted with Rudy Mercado on one count of furnishing marijuana to Beverly Detrick, a minor. Health and Safety Code § 11714. Mercado pleaded guilty, and defendant was convicted after a trial before a jury. Beverly testified that defendant shared one marijuana cigarette with her and others present on the occasion on which the indictment was based and that he shared another cigarette with her and another person a night or two later. She did not pay defendant for the puffs she took from his cigarettes. Defendant admitted that he knew Beverly but denied that he had ever given her any marijuana or shared any marijuana cigarettes with her. Thus the only issue in the case was whether or not defendant shared his cigarette with Beverly on the first occasion mentioned above. To prove its case, the prosecution was permitted to introduce evidence over defendant's objection that a few days before the date of the alleged crime, defendant had discussed prostitution with Beverly and other girls and that during the next two weeks she had engaged in prostitution for defendant on 12 occasions. Defendant secured the customers for her and shared the proceeds with her. He did not supply her with marijuana or discuss marijuana on any of the occasions when he took her to hotels for purposes of prostitution.

It is my opinion that this evidence that defendant was pimping for Beverly was not admissible to prove that he shared his cigarette with her and could serve only to prejudice the jury against him and induce them to convict him, not because he was guilty of the crime for which he was on trial, but because he was a pimp.[1]

Although the rule with respect to the admission of evidence of crimes other than the one charged in a criminal prosecution has frequently been stated as one generally excluding evidence of other crimes subject to certain recognized exceptions, see People v. Albertson, 23 Cal.2d 550, 576, 145 P.2d 7, it is now "settled in this state that except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, is admissible although it may connect the accused with an offense not included in the charge." People v. Woods, 35 Cal.2d 504, 509, 218 P.2d 981, 984; see also, American Law Institute, Model Code of Evidence § 311; National Conference of Commissioners of Uniform State Laws, Uniform Rules of Evidence, Rule 55; Stone, Exclusion of Similar Fact Evidence, 46 Harv.L.Rev. 954 and 51 Harv.L.Rev. 988. In the application of this test, however, the reasons for the exclusionary rule must not be forgotten; there must be care to avoid unnecessary prejudice to the defendant. Evidence that defendant

1. Since no objection was made to the evidence that defendant shared a marijuana cigarette with Beverly on another occasion, it is unnecessary to consider whether that evidence would otherwise have been inadmissible.

has committed other crimes is excluded as proof of his criminal disposition for the same reasons that other evidence of his criminal character is excluded. "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." Jackson, J., in Michelson v. United States, 335 U.S. 469, 475–476, 69 S.Ct. 213, 218, 93 L.Ed. 168. "The common law has not grown in the tradition of convicting a man and sending him to prison because he is generally a bad man or generally regarded as one. General bad character, much less general bad reputation, has not yet become a criminal offense in our scheme. Our whole tradition is that a man can be punished by criminal sanctions only for specific acts defined beforehand to be criminal, not for general misconduct or bearing a reputation for such misconduct." Rutledge, J., dissenting in Michelson v. United States, supra, 335 U.S. at page 489, 69 S.Ct. at page 225. The prejudicial effect of evidence of other crimes lends support to the view that even when such evidence is directly relevant to the proof of a material fact, the trial court should have discretion to exclude it when its relevance is negligible as compared with its prejudicial effect and other proof of the issue is at hand. "This is a situation where the policy of protecting a defendant from undue prejudice conflicts with the rule of logical relevance, and a proper determination as to which should prevail rests in the sound discretion of the trial court, and not merely on whether the evidence comes within certain categories which constitute exceptions to the rule of exclusion." State v. Goebel, 36 Wash.2d 367, 218 P.2d 300, 306; see, also, Adkins v. Brett, 184 Cal. 252, 258–259, 193 P. 251; Stone, Exclusion of Similar Fact Evidence, 46 Harv.L.Rev. 954, 984–985; McCormick on Evidence § 157, pp. 332–333. In any event the court "should be guided by the rule that such proof is to be received with 'extreme caution,' and if its connection with the crime charged is not clearly perceived, the doubt is to be resolved in favor of the accused, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." People v. Albertson, 23 Cal.2d 550, 577, 145 P.2d 7, 20; see also, People v. Peete, 28 Cal.2d 306, 316, 169 P.2d 924; People v. Lane, 100 Cal. 379, 387–390, 34 P. 856; People v. Carvalho, 112 Cal. App.2d 482, 492, 246 P.2d 950.

The basic question is whether defendant's pimping is relevant to prove only his criminal disposition or also relevant to prove facts material to the prosecution's case. For the reasons stated above, failure of the challenged evidence to emerge as clearly relevant compels resolution of the question in defendant's favor.

The attorney general contends that the evidence was relevant on the ground that it was defendant's scheme to reduce Beverly to drug addiction so that he might dominate her completely as a prostitute. The majority opinion does not pass on the validity of this contention. Instead, it moves on to the conclusion that the evidence of pimping was relevant to show defendant's motive for sharing his cigarette with Beverly. The issue of defendant's motive, however, cannot be so divorced from the contention that both crimes were part of a common plan or scheme since, in the absence of proof of such a plan or scheme, there is no logical basis in the evidence for inferring that defendant's motive in sharing his cigarette with Beverly was explained by the fact that he was pimping for her.

It is always possible that two distinct crimes committed by a defendant are part of a common scheme or that one provides or illuminates the motive for the other. Were there evidence in this case that defendant had carried out a plan to subjugate Beverly to his will as a prostitute by reducing her to dope addiction, it could reasonably be inferred that his initial acts of pimping and providing marijuana were part of that plan and that the desire to carry it through was the motive for each of the crimes that it in-

volved. The record is barren of such evidence; it presents two apparently unrelated courses of criminal conduct. It is for the prosecution to supply the missing links; if it fails to do so, evidence conditionally admitted should be struck from the record. People v. Frank, 28 Cal. 507, 518–519; People v. Whiteman, 114 Cal. 338, 343, 46 P. 99; People v. Wright, 144 Cal. 161, 165–166, 77 P. 877; People v. Darby, 64 Cal.App.2d 25, 31, 148 P.2d 28; State v. Goebel, 36 Wash. 2d 367, 218 P.2d 300, 306; see, also, Boyer v. United States, 76 U.S.App.D.C. 397, 132 F.2d 12, 13; 2 Wigmore on Evidence, 3d Ed., § 304, p. 205; 6 Ibid. § 1871, p. 505; Trautman, Logical or Legal Relevancy, 5 Vand.L.Rev. 385, 409. Else prejudicial evidence would be freely admitted, not for its relevance apart from defendant's criminal disposition, but for the possibility of its relevance to show more than the defendant's criminal disposition. What then becomes of the rule excluding evidence that bears only on criminal disposition?

If the facts of the case in the light of human experience do not make it reasonable to infer that one crime is evidence of the motive for another, evidence of the one is not admissible to prove the other. Thus, if a defendant were charged with the murder of a woman's husband, proof of his adulterous relation with the woman would be relevant to show the defendant's motive for killing the husband. But if the evidence showed only that he was committing adultery with a woman who was not his victim's wife, it would not be reasonable to infer that it was relevant evidence of the motive for the murder. It would become relevant, however, if it were shown that the woman's husband had deserted her and that she had become the mistress of the defendant's victim. In such connecting evidence is relevance rooted, not in the drifting sands of speculative possibilities.

Had the prosecution established the elements of the scheme it contends existed, it would have established the relevance of the pimping as part of that scheme and defendant's motive for giving Beverly marijuana. In the absence of such connecting evidence, however, there is no reasonable basis for inferring that defendant's motive in sharing his cigarette with Beverly was the fact that he was pimping for her. Defendant's motive might have been to carry out the scheme the prosecution did not prove existed; it might have been no more than to share the enjoyment of the cigarette with others present as the prosecution expert testified marijuana smokers are wont to do; it might have been not to waste the cigarette, for many users apparently do not like to smoke a whole cigarette at once; conceivably it might have been to reward Beverly for acting as a lookout at a bank robbery or assisting him in the commission of some other crime; conceivably also it might have been to secure Beverly as a customer who would purchase narcotics from him in the future. There is a host of possibilities.

Except for its relevance in proving defendant's criminal disposition, the evidence of defendant's pimping is a neutral quantity neither adding to nor subtracting from the prosecution's case, and since it was clearly prejudicial, its admission should compel reversal of the judgment.

CARTER, J., concurs.



44 Cal.2d 136

Lazard LIPPMAN, Plaintiff-Respondent,

v.

SEARS ROEBUCK & CO., a New York corporation, Defendant-Appellant.

L. A. 23327.

Supreme Court of California.
In Bank.
March 8, 1955.

Action by lessor to recover additional rent under lease calling for payment of base rental plus percentage of annual sales by lessee. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered judgment for plaintiff and defendant appealed. The Supreme Court, Edmonds, P. J., held that evidence established that minimum

rental provision in lease, within contemplation of parties, was not substantial and adequate payment in lieu of payment of percentage of proceeds from the business contemplated by lease.

Judgment affirmed.

Opinion, 271 P.2d 891, vacated.

1. Landlord and Tenant ⇐134(1)

Clause in lease calling for payment of base rental plus percentage of annual sales by lessee, which stated uses to which property could be put, could not reasonably be construed as express covenant on part of lessee to continue in all of enumerated activities, where such clause was included in portion of lease which described nature and location of property and where there was no language of undertaking by either party in connection therewith.

2. Contracts ⇐168

Implied covenant must arise from language used in written agreement or must be indispensable to effectuate intention of parties.

3. Contracts ⇐168

In order to establish implied covenant, it must appear from language used in written instrument that it was so clearly within contemplation of parties that they deemed it unnecessary to express it.

4. Contracts ⇐168

Implied convenants can only be justified on grounds of legal necessity.

5. Contracts ⇐168

Promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it.

6. Contracts ⇐168

There can be no implied covenant where subject is completely covered by contract.

7. Landlord and Tenant ⇐134(2)

Statement as to purpose for which premises are leased does not imply covenant by lessee that he will engage in that use, and he may cease to use premises for any purpose.

8. Evidence ⇐451

Extrinsic evidence to explain terms of instrument may be received only when ambiguity is apparent to reader.

9. Evidence ⇐458

Terms "minimum monthly payments" as used in lease had no fixed legal significance, and meaning of such terms could only be ascertained by reference to circumstances in which lease was executed, and extrinsic evidence was properly admitted to show such circumstances.

10. Landlord and Tenant ⇐233(1)

Finding that, within contemplation of parties to lease calling for payment of base rental of $285 per month plus percentage of annual sales by lessee, $285 per month was not substantial and adequate minimum rent to be paid in lieu of percentage of sales, was sufficient basis for determination that lessee impliedly covenanted to use demised premises for sale of merchandise during entire term of lease.

11. Landlord and Tenant ⇐231(6)

In action by lessor to recover additional rent under lease calling for payment of base rental plus percentage of annual sales by lessee, evidence established that minimum rental provision in lease, within contemplation of parties, was not substantial and adequate payment in lieu of payment of percentage of proceeds from the business contemplated by lease.

12. Landlord and Tenant ⇐134(6)

For breach of implied covenant to remain in business, measure of damages ordinarily is amount which lessor would have received from his share of proceeds of business had lessee operated it in its usual and customary manner.

13. Landlord and Tenant ⇐134(6)

Where lease expressly provided for payment of base rental plus percentage of annual sales by lessee and also provided that if lessee assigned or sublet premises, lessee would pay as rent average monthly rental paid during twelve months last preceding such assignment or subletting, and where lessee, subsequent to execution of lease, discontinued sales operations on such premises

and merely used premises for storage purposes, implication arose that parties had agreed upon same measure of damages for abandonment of purpose for which lease had been executed as those expressly provided for in case of assignment or subletting.

John L. Wheeler, John J. McCue and Lewis Watnick, Los Angeles, for appellant.

Mark L. Herron, Fred Horowitz and Alvin F. Howard, Los Angeles, for respondent.

EDMONDS, Presiding Justice.

The rental agreed to be paid by Sears Roebuck & Co., for a building leased to it by Lazard Lippman was $285 per month and an additional amount based upon the total sales made by the lessee. The appeal of the lessee from an adverse judgment presents for decision the question as to the amount of rent a lessor is entitled to receive under a "percentage" lease from a tenant who discontinues the use of demised property for retail sales and occupies it for other purposes.

Under the lease executed by Lippman and Sears the premises were "to be occupied for the sale and storage of general merchandise and for servicing automobiles, automobile tires, batteries and accessories." Sears promised to pay "as rent for said demised premises the sum of * * * ($285.00) in advance, upon the first day of each month during the term hereof, said monthly installments of rental being hereinafter for convenience respectively referred to as 'minimum monthly payments'. * * * In the event the net sales * * * made by Tenant upon the demised premises during any lease year of the term hereof, are in excess of * * * ($146,800.00), then Tenant will pay as 'additional rent' hereunder for said lease year, a sum equivalent to 2½% of the first * * * ($163,200.) of such excess and 2% of the remainder thereof, within fifteen (15) days after the end of said lease year."

If the lessee assigned or sublet the premises, it agreed to pay as rent "the average monthly rental paid by Tenant to Landlord during the twelve months' period last preceding such assignment or subletting, but in no event shall such monthly rental be less than" $285. In the event of an abandonment of the premises, the lessor is to re-let them at "the best rent obtainable". Sears agreed to pay "as damages" the difference between such rent and the unpaid balance of "the rent herein reserved".

The term of the lease was 10 years. After operating a retail sales business in the building for several years and paying both "minimum monthly payments" and "additional rent", Sears transferred its sales business to another location and used the Lippman premises solely for the storage of merchandise. Only "minimum monthly payments" were made during 1950, the final year of the term, and the lessor is suing to recover "additional rent" for that year.

In his complaint, filed after the expiration of the lease, Lippman alleged that the lessee had agreed to conduct a retail sales business on the premises and, if it ceased to do so, to pay "a monthly rental equal to the average monthly rental it had paid for the twelve months immediately preceding the month in which it ceased doing business." Sears ceased doing business at that location in January, 1950, it was alleged, and for that year there was due him unpaid rent in the sum of $17,024.74, the amount received by him as "additional rent" for the preceding year.

The answer denied generally these allegations. As an affirmative defense, Sears pleaded that an agreement executed by the company and Lippman amounted to a settlement of his claims.

During the trial, extensive testimony regarding preliminary negotiations and circumstances surrounding the execution of the lease was admitted over objection by counsel for Sears that it was incompetent, irrelevant and immaterial and tended to vary the terms of the written lease. That testimony showed the following facts:

For several years prior to the execution of the lease from Lippman, Sears had occupied the building as tenant of one Russell under a written lease calling for the payment of a rental of $285 per month. In

1940, a large part of the premises was destroyed by fire. Sam Jones, manager of Sears' property department, contacted Lippman, who was lessor of other property occupied by the company, and suggested that he purchase and reconstruct the building for investment. According to Jones, the building, reconstructed after use as a garage, had not been completely satisfactory to the company's purposes, and he made specific suggestions for rebuilding it. Lippman was promised "a good lease."

After inspecting the premises, Lippman presented to Jones his estimate as to the costs of purchase and reconstruction and stated he would require a lease with a rental of "at least $800 a month." Jones made a counter proposal of a percentage of profits, to enable Lippman to "gamble" with Sears on the volume of sales, with a guarantee of a minimum of $285 per month. According to Lippman's testimony, he was told that it was necessary to fix the guarantee at the latter figure because the Russell lease was still in effect and the "main office" would not approve a new lease unless the minimum rental was the same amount. Jones testified that "the sum arrived at * * * was a nominal sum to take care of fixed expenses, and * * * the profit on [Lippman's] investment would be arrived at through a percentage of sales."

Lippman purchased the building and began making the contemplated improvements, which totalled in cost more than $75,000, exclusive of overhead, interest, taxes and the value of Lippman's own services as contractor. Sears took possession while the construction work was in progress and before the execution of a lease. A short time later, it submitted to Lippman construction plans and a written lease to which was attached a layout of the proposed store. After further negotiations with regard to the amount of rent, Lippman signed the lease, and it went into effect on January 1, 1941.

Some time later, Lippman acquired vacant property adjacent to the building and offered it to Sears for use as a parking lot. It was accepted but an increase of rent was declined by Sears' representative who suggested that Lippman would be compensated by an increase in sales. Lippman agreed to this proposition.

After the expiration of the lease, a new one was negotiated, calling for a month-to-month tenancy with a rental of $300 per month. Sears continued to occupy the building under the new lease for some four months, until served with notice to remove.

In arguing the objection to this evidence, counsel for Sears stated that it might be received for the purpose of reforming the lease but that the writing itself is unambiguous. The trial judge then invited an amendment to the complaint to state a cause of action for reformation or other equitable relief, but the offer was declined. He then overruled the objection, ruling that it might be received to establish an implied covenant to pay a reasonable rental upon an abandonment of the lease or to show that the guaranteed minimum rental was not substantial or adequate.

The findings of fact declare that the lease provided a minimum monthly rental, which "was intended to be and was, in fact, a nominal rental and was not a substantial or adequate minimum rental." The lease further provided, it was found, that "[i]n the event the defendant did not occupy said premises for the sale of general merchandise but used said premises for the storage of merchandise, it was to pay plaintiff a monthly rental equal to the average monthly rental it had paid for the twelve months immediately preceding the month in which it ceased to use said premises for the sale of merchandise." According to another finding, Sears ceased to occupy the premises for the sale of merchandise on November 1, 1949, and thereafter used the premises solely for the storage of merchandise. As a conclusion of law from these findings, the court decided that Lippman is entitled to recover from Sears $17,004.82, the difference between the minimum monthly payments made in 1950 and the total amount of rent received during 1949.

Sears contends that the lease does not expressly require it to continue its retail sales business for the full term of the lease or, in lieu of its doing so, to pay any amount in excess of the guaranteed minimum rental.

And, the argument continues, because the lease is complete in stating the obligations of the parties with regard to the payment of rent, there is no basis for implication. It urges that the admission of extrinsic evidence to establish such a covenant violates the parol evidence rule. Sears also disputes the materiality of the finding that the guaranteed minimum rental was not substantial or adequate; but if that finding is material to any issue, it asserts, there is no substantial evidence to support it.

[1] The clause which states the uses to which the property could be put cannot reasonably be construed as an express covenant on the part of Sears to continue in all of the enumerated activities. It is included in the portion of the lease which describes the nature and location of the property, and there is no language of undertaking by either party in connection with it.

[2–6] The rules which govern implied covenants have been summarized as follows: "(1) The implication must arise from the language used or it must be indispensible to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered by the contract." Cousins Inv. Co. v. Hastings Clothing Co., 45 Cal.App.2d 141, 149, 113 P.2d 878, 882; see also Stockton Dry Goods Co. v. Girsh, 36 Cal.2d 677, 681, 227 P.2d 1, 22 A.L.R.2d 1460.

[7] As a general rule, it is held that a statement as to the purpose for which premises are leased does not imply a covenant by the lessee that he will engage in that use, but he may cease to use the premises for any purpose. See annotation 46 A.L.R. 1134. Some courts have implied such a covenant when the rental for the premises is based upon a percentage of the proceeds from the business for which they are let. Plassmeyer v. Brenta, 24 N.J.Super. 322, 94 A.2d 508, 510; Selber Bros. v. Newstadt's Shoe Store, 194 La. 654, 194 So. 579; Marvin Drug Co. v. Couch, Tex.Civ.App., 134 S.W.2d 356; see annotation 170 A.L.R. 1113, 1117–1121. These cases rest upon a theory of interpretation similar to that employed in the consideration of "output" contracts, where the courts have found "from the business situation, from the conduct of the parties, and from the startling disproportionate burden otherwise cast upon one of them, a promise implied in fact by the seller to continue in good faith production or sales, or on the part of the buyer to maintain his business or plant as a going concern and to take its bona fide requirements. In other words, this view implies an obligation to carry out the contract in the way anticipated, and not for purposes of speculation to the injury of the other party. * * *" (1 Williston on Contracts [Rev.Ed.1936], § 104A, pp. 357–358.) Where the rental for use of a building is based upon a percentage of sales, the lessee reasonably may be said to covenant impliedly that he will use good faith to insure a continuation of them.

The author of the annotation in 170 A.L.R. states: "greater leeway is allowed to the lessee of a percentage lease with respect to the use and occupancy of the premises and the conduct of the business contemplated where there is a substantial guaranteed minimum rental, upon which the lessor mainly relies, with a percentage of the income made an additional obligation, than where the sole rental is made payable from a percentage of the income." 170 A.L.R. at page 1117. The intention of Lippman and Sears in regard to the monthly payments of $285 is of decisive importance in determining the rights of the parties.

In Cousins Inv. Co. v. Hastings Clothing Co., 45 Cal.App.2d 141, 113 P.2d 878, the lessee had occupied the premises for several years under a written lease calling for the payment of a monthly rental of $2,750. The lease was renewed but with the rental increased to $5,500 per month plus taxes. After the lessee had found it difficult to pay that amount of rent, the parties agreed to a revision of the lease to provide for a "reserved rental" of $4,000 per month plus 5½

percent of the gross income to be paid in such a manner as to limit the total rent during a six-months period to an average of $5,500 per month. With a little more than a month remaining under the revised lease, the lessee removed to a different location and for the final month paid only the minimum rental. The lessor sued for rent upon the theory that the lessee had impliedly covenanted to remain in business at that location for the full term of the lease and had breached that covenant. The court held there was no such covenant. There was nothing in the nature of the transaction, it concluded, "to justify a finding that the implied covenant was indispensable to effectuate the intention of the parties, nor can it be supported on the grounds of legal necessity. On the contrary, as defendant argues, it would seem that the covenant to pay the minimum rental was inserted in the lease as a substitute for an express covenant requiring the continuous operation of the demised premises; that when the rental reserved in a lease is based upon a percentage of the gross receipts of the business, with a substantial adequate minimum, there is no implied covenant that the lessee will operate its business in the demised premises throughout the term of the lease." 45 Cal.App.2d at page 149, 113 P.2d at page 882.

This conclusion was followed in Masciotra v. Harlow, 105 Cal.App.2d 376, 381, 233 P.2d 586. In that case the defendant leased property for the purpose of operating a restaurant, promising to pay a monthly rental of 7% of the gross receipts with a minimum of $250. After several years of successful operation under the name "Pump Room", the defendant opened a new restaurant at a different location, transferring the name "Pump Room" and ⅔ of the personnel to the new location. Defendant continued to operate a restaurant on the old premises, but business fell off and the rentals remained at the minimum. The lessor sued contending that "there is an implied covenant that lessee would, during the term of the lease, so conduct his business on plaintiff's premises as to make it mutually profitable to both parties". 105 Cal.App.2d at page 379, 233 P.2d at page 589. The court refused to imply a covenant, concluding that "the parties considered the stipulated minimum rent to be in itself fair and adequate and any additional sum was in the nature of a bonus which the lessee was willing to pay if his business exceeded his expectations." 105 Cal.App.2d at page 380, 233 P.2d at page 589.

In both the Cousins and Masciotra cases the minimum rental provision was held to be adequate and substantial. Neither decision, therefore, is squarely authority for the proposition that a covenant to remain in business may be implied from an inadequate or insubstantial minimum, and no case has been found which so holds. However, that legal principle follows logically from the rule which permits the implication of a covenant to remain in business where the rent is based entirely upon a percentage of sales, and by their reliance upon the conclusion that the minima involved were adequate, the Cousins and Masciotra cases lend support to that view.

Sears takes the position that the admission of extrinsic evidence to establish an implied covenant violates the parol evidence rule. If the purpose in receiving such evidence were solely to read into the written lease an omitted provision, or one contrary to its terms, Sears' position would be correct. As was stated in the Cousins Investment and Stockton Dry Goods cases, the court may imply such a covenant only where it is a natural implication from the language used or is indispensable to effectuate the expressed intention of the parties. But, as the trial judge stated when ruling upon this evidence, it was admitted also in connection with the question as to whether the minimum monthly payments constituted a substantial minimum rental.

[8, 9] According to the rule followed by a majority of this court, extrinsic evidence to explain the terms of an instrument may be received only when an ambiguity is apparent to the reader. See Union Oil Co. of California v. Union Sugar Co., 31 Cal.2d 300, 306, 188 P.2d 470. The term "minimum monthly payments" has no fixed legal significance; its meaning can be ascertained only by reference to the circumstances in which the lease was executed. Extrinsic

evidence, therefore, was properly admitted to show those circumstances.

[10] Sears maintains that the evidence does not support the finding that $285 per month "was intended to be and was, in fact, a nominal rental and was not a substantial or adequate minimum rental." Ordinarily, when used in connection with monetary obligations, the word "nominal" denotes "a trifling sum" (Black's Law Dictionary, 4th ed.1951, p. 469), and Sears is correct in the contention that more than that amount was required by the lease. But a finding that, within the contemplation of the parties, $285 per month was not a substantial and adequate minimum rent to be paid in lieu of a percentage of the sales is a sufficient basis for a determination that Sears impliedly covenanted to use the demised premises for the sale of merchandise during the entire term of the lease. It was not necessary that the trial court go farther, and the characterization of the minimum rent as nominal is superfluous.

[11] The trial judge was extremely liberal in permitting the introduction of evidence as to events occurring during negotiations. Undoubtedly some of the testimony went beyond that properly admissible to show the circumstances surrounding the execution of the lease. However, a consideration of the entire record compels the conclusion that such error was not prejudicial. The great preponderance of the evidence properly admitted tends to show that the minimum rental provision, in the contemplation of the parties, was not a substantial and adequate payment in lieu of payment of a percentage of the proceeds from the business contemplated by the lease.

The lease was made only after Lippman had repaired and remodeled the building at a substantial cost and with the understanding that he would "gamble" with Sears upon the amount of its retail sales. Later improvements were made and furnished to Sears free of any charge except the anticipated increase in the amount of sales resulting from Sears' use of them. Although some inference that the minimum rent provided was adequate and substantial might be drawn from the similarity in amount of rent charged before and after the term of the lease, it is rebutted by the direct evidence that Sears' tenancy under the new agreement was offered to Lippman as an inducement for him to purchase and repair the building. Finally, there is direct evidence that when the lease, which was drawn by Sears, was presented to Lippman he was told by the lessee's representative that the provision now in controversy had been inserted to provide a sum to "take care of fixed expenses" and to obtain the approval of the "main office."

[12, 13] For breach of an implied covenant to remain in business, the measure of damages ordinarily is the amount which the lessor would have received from his share of the proceeds of the business had the lessee operated it in its usual and customary manner. Cf. Marvin Drug Co. v. Couch, supra, 134 S.W.2d 359. In the present lease, however, the parties have made specific provision for the payment of damages in the event the lessee ceased to occupy the premises. If it sublet or assigned them, it guaranteed that the lessor would receive "the average monthly rental paid by Tenant to Landlord during the twelve months' period last preceding such" subletting or assignment. In the event the lessee abandoned the premises, it agreed to pay as damages the difference between the best rent obtainable by the lessor from a reletting of them and "the rent herein reserved." In effect, these provisions liquidated the damages to the lessor from a loss of a percentage of the income from the lessee's business if it ceased to occupy the premises. It is a reasonable implication from these provisions that the parties agreed upon the same measure of damages when that loss resulted from an abandonment of the integral purpose for which the lease was made. There was no error in the award of damages.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

44 Cal.2d 152

Edward F. McKEON, also known as E. F. McKeon, Plaintiff and Respondent,

v.

Ben. L. GIUSTO, also known as B. L. Giusto, Defendant and Appellant.

S. F. 18963.

Supreme Court of California.
In Bank.
March 15, 1955.

Rehearing Denied April 13, 1955.

Action for money allegedly due for services rendered for defendant, a general contractor, pursuant to oral agreement to share profits. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment for plaintiff, and defendant appealed. The Supreme Court, Traynor, J., held that evidence sustained finding that such agreement had in fact been made.

Affirmed.

Edmonds, Schauer, and Spence, JJ., dissented.

Opinion, 271 P.2d 877, vacated.

1. Contracts ⇐238(2)

The statute prohibiting oral alteration of written contracts does not invalidate a new oral agreement made after written contract has expired by its terms or has been orally abrogated, cancelled, or rescinded by parties. West's Ann.Civ.Code, § 1698.

2. Trial ⇐404(1)

Findings must be considered as whole and liberally construed to support judgment.

3. Master and Servant ⇐80(15)

In action for money allegedly due for services rendered defendant, a general contractor, pursuant to oral agreement, trial court's findings with respect to oral modification of prior written contract between parties could reasonably be interpreted as meaning, not that oral agreement had been modification of existing written contract, but that new terms of employment were in part different from those set out in expired written contract; and therefore there was no fatal inconsistency between such findings and finding that oral agreement had not been made until after expiration of written contract; and such findings supported judgment for plaintiff, notwithstanding statute prohibiting oral modification of written agreement. Labor Code, § 3003; West's Ann.Civ.Code, § 1698.

4. Contracts ⇐46

Where parties made oral agreement with intention to reduce it to writing or supersede it by a new written contract, question as to whether they intended their oral agreement to be immediately effective or only to become binding on execution of writing, is ordinarily question of fact to be resolved by trial court or jury in light of all surrounding circumstances.

5. Master and Servant ⇐80(10)

In action for money allegedly due for services rendered for defendant, a general contractor, pursuant to oral agreement to share profits, evidence sustained finding that such agreement had in fact been made. Labor Code, § 3003; West's Ann.Civ.Code, § 1698.

W. Burleigh Pattee, Bruce M. Casey, Jr., and Chickering & Gregory, San Francisco, for appellant.

Joseph C. Haughey and Toland C. McGettigan, San Francisco, for respondent.

TRAYNOR, Justice.

In August, 1950, defendant orally agreed to employ plaintiff on a full time basis in his general contracting business. The agreement was put in writing in April, 1951, in the form of a letter from defendant to plaintiff, which provided:

"I hereby offer to employ you as an estimator and office manager in my general contracting business for a period of one year commencing January 1, 1951, and ending December 31, 1951, upon the following terms and conditions:

"1. I agree to pay you a salary of One Hundred Dollars ($100) per week, together with a sum which when added to the aforesaid salary will equal thirty (30) percent of my net profits from said business, before income taxes, but after deducting all charges and expenses, during said year, and computed as hereinafter set forth. Said

additional sum shall be payable annually after the completion of the annual audit of the books of my business, but in any event before March 1, 1952.

"2. In computing the said net profits there shall be excluded all payments received by me from the Drs. A. and E. Torre for the construction of a building at Gough and Union Streets in San Francisco, California. There shall be included in computing the net profits, if any, the amount due on all the jobs which have been fully completed during the year 1951, but on which full payment may not have been made during said year; provided, however, that your share of any net profits resulting from said jobs shall not be payable until final payment on such jobs has been received.

"3. It is understood that in determining the net profit from said business all computations shall be based on [an accrual] basis of accounting and that the books shall be audited on a calendar year basis. The final audit as presented by the accountants shall be conclusive and final in determining net profits.

"4. It is agreed that in the event you continue in my employ after December 31, 1951, it shall be at a salary of One Hundred Dollars ($100) per week plus only such amounts, if any, as may hereafter mutually be agreed upon in writing.

"5. The foregoing agreement is intended to supersede the oral agreement under which you entered my employ on August 1, 1950 * * *.

"The Foregoing Terms are hereby accepted and confirmed. [signed] E. F. McKeon."

Although no written agreement extending the profit sharing provision of the contract was executed, plaintiff continued in defendant's employ until February 29, 1952, and he continued to receive $100 per week until his employment terminated. Thereafter plaintiff brought this action to recover profits alleged to be due under the terms of an oral extension of the written contract. Defendant denied that any oral extension had been made and deposited $132.64 in court, the amount he conceded was still due on thirty percent of his profits for 1951.

After a trial before the court sitting without a jury, the court found that "following the expiration of the said written agreement of employment * * * plaintiff and defendant, B. L. Giusto, on or about the 14th day of January, 1952, orally agreed that said agreement would be extended from and after January 1, 1952, and that the plaintiff would continue in the employment of said defendant, and said defendant would continue to employ plaintiff upon the same terms and at the same rate of compensation specified and set forth in Paragraphs 1, 2 and 3 of said written agreement of employment * * *, and contrary to and in modification and abandonment of the provisions of Paragraph 4 * * *, and for such period of time as would be required to bring to completion those * * * [three building] projects which were entered upon by defendant prior to December 31, 1951, but which were not completed on said date." It also found that on or about February 26, 1952, "defendant advised plaintiff that he did not wish to continue with said contract and said defendant did thereupon and wrongfully and without cause notify plaintiff that his services were no longer wanted or required by defendant and plaintiff's contract was terminated and at an end." Judgment was entered in favor of plaintiff for $14,396.28, the amount that the parties stipulated would be plaintiff's share of the profits from the three jobs started in 1951 but not completed until 1952, under the terms of the oral extension agreement found to exist by the trial court. Defendant appeals.

Defendant contends that there is no evidence to support the finding that an oral agreement extending the written contract was made and that even if such an agreement was made, it would be invalid under section 1698 of the Civil Code.

[1] Section 1698 provides that "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." The section presupposes an existing contract in writing, and accordingly, it does not invalidate a new oral agreement made after

a written contract has expired by its terms or has been orally abrogated, cancelled, or rescinded by the parties. Treadwell v. Nickel, 194 Cal. 243, 258–259, 228 P. 25; McClure v. Alberti, 190 Cal. 348, 350, 212 P. 204; Pearsall v. Henry, 153 Cal. 314, 325, 95 P. 154, 159; Burcham v. Caprio, 94 Cal.App.2d 514, 517, 210 P.2d 877; Martin v. Butter, 93 Cal.App.2d 562, 566, 209 P.2d 636; Treat v. Ogden, 56 Cal.App.2d 70, 74–76, 132 P.2d 493; Klein Norton Co. v. Cohen, 107 Cal.App. 325, 331, 290 P. 613; Bevans v. Huntington, 65 Cal.App. 266, 268, 223 P. 572. In the present case, in the absence of an agreement extending the written contract, neither party was bound by its terms after December 31, 1951. After that date plaintiff was free to leave defendant's employ, and defendant was free to discharge him. Thus, the contract was at an end on December 31, 1951, unless the parties agreed that it should continue. It is true that the fact that plaintiff continued in defendant's employ after December 31, 1951 would, standing alone, indicate that the parties had agreed to a continuation of the written contract. (See, Labor Code § 3003.) There is substantial evidence, however, that the parties did not intend that plaintiff's continued employment should be compensated at the rate of $100 per week as provided in the written contract. Thus, in December defendant told plaintiff that he would get his share of the profits on the uncompleted jobs, and plaintiff continued in defendant's employ after the end of the year in reliance on this promise. Although the trial court found that the parties did not execute their new oral agreement until on or about January 14th, the foregoing evidence clearly indicates that the parties did not intend that the provisions of the written contract should be applicable between December 31, 1951 and the time the new oral agreement was made, and the trial court was therefore justified in concluding that the written contract expired at the end of the year. Accordingly, section 1698 would not invalidate any new oral agreement that the parties might make.

[2, 3] It is contended, however, that the findings of the trial court cannot reasonably be interpreted as determining that the written contract terminated on December 31, 1951. This contention is based upon the findings that refer to the oral agreement as a modification of the written contract and upon the lack of a finding that the oral agreement superseded the written contract. The trial court expressly found, however, that the oral agreement was made on or about the 14th day of January "following the expiration of the said written agreement of employment," and as pointed out above, if the written contract had expired it no longer stood in the way of the parties entering into a new oral agreement. Moreover, in view of the finding that the oral agreement was not made until after the expiration of the written contract, the findings with respect to an oral modification of the written contract may reasonably be interpreted as meaning, not that the oral agreement was a modification of an *existing* written contract, but that the new terms of employment were in part different from those set out in the expired written contract. Thus, the oral agreement constituted a modification of the written contract only in the sense that it adopted the provisions thereof with modifications agreeable to both parties. So interpreted, the findings are consistent and support the judgment. To interpret the references to an oral modification as constituting findings that an existing written contract was modified, on the other hand, would create a clear conflict with the finding that the oral agreement was not made until after the written contract had expired and would violate the settled rule that the findings must be considered as a whole and liberally construed to support the judgment. Haight v. Haight, 151 Cal. 90, 92, 90 P. 197; Hotaling v. Hotaling, 193 Cal. 368, 385, 224 P. 455, 56 A.L.R. 734; Hartford v. Pacific Motor Trucking Co., 16 Cal.App. 2d 378, 381, 60 P.2d 476; Snearly v. Hiestand, 50 Cal.App. 393, 396, 195 P. 272.

[4, 5] The pivotal question, therefore, is whether the evidence sustains the finding of the trial court that on or about January 14th the parties orally agreed that plaintiff should continue to share in the profits of defendant's business until such time as the

three building projects commenced in 1951 should be completed. Defendant contends that the evidence shows only that the parties were negotiating the terms of a new contract, but that it was understood that no new contract would become binding until it was reduced to writing and signed by both parties. It is not uncommon, however, for parties to make an oral agreement with the intention to reduce it to writing or supersede it by a new written contract. In such cases, whether they intended their oral agreement to be immediately effective or only to become binding on the execution of the writing, is ordinarily a question of fact to be resolved by the trial court or jury in the light of all of the surrounding circumstances. Empire, etc., Bldg. Co. v. Harvey Machine Co., 122 Cal.App.2d 411, 415, 265 P.2d 32; Columbia Pictures Corp. v. De Toth, 87 Cal.App.2d 620, 629, 197 P.2d 580; Johnston v. Twentieth Century-Fox Film Corp., 82 Cal.App.2d 796, 820–821, 187 P.2d 474.

In the present case plaintiff testified that he talked to defendant in December, 1951, about a renewal of his contract. He pointed out to defendant that some of the jobs on which he had worked would not be completed in 1951 and that he wanted to be covered for his percentage of the profits on those jobs. Defendant told him that he would take the matter up with his lawyer and not to worry, that he would get his share on those jobs. Defendant stated at that time that he would renew the contract. The matter was discussed by the parties again in the middle of January, at which time defendant again promised to have a written contract drawn up and advanced plaintiff $500 as part of his share of the profits anticipated on a construction job for the Navy, one of the jobs started in 1951 and due to be completed early in 1952. In the middle of February, however, defendant told plaintiff that "I would like to change the set-up and possibly put you on a salary basis and a bonus arrangement, or something more definite." He stated that the profit sharing arrangement was unsatisfactory for government work because government contracts were subject to renegotiation. Plaintiff stated that he was unwilling to make any more agreements until he knew what he "had coming from what was on the books." There were further conversations, but the parties were unable to agree on any new terms of employment, and plaintiff left defendant's employ at the end of February, after defendant had made it clear that he was unwilling to continue the profit sharing agreement.

From the foregoing evidence the trial court was justified in concluding that the parties reached a binding oral understanding in January covering the profits on the jobs commenced in 1951 but not completed until 1952, and that defendant wrongfully terminated this agreement at the end of February. Thus, in December defendant told plaintiff that he would get his share of the profits on the uncompleted jobs, and he must have known when plaintiff continued in his employ after the end of the year that plaintiff was relying on his promise. From the fact that in January plaintiff asked for and was given an advance on the anticipated profits of the Navy job, the trial court could reasonably infer that the parties had agreed that the new oral agreement was in effect. Moreover, the trial court could infer from defendant's February proposal to change the set-up from a profit sharing to a salary basis that defendant recognized at that time an existing profit sharing agreement. Finally, the conclusion that the parties had reached a binding oral understanding finds support in the evidence with respect to their dealings in the past. Thus, when plaintiff first entered defendant's employ, he worked for eight months under an oral contract before his agreement was reduced to writing as contemplated by the parties.

Defendant contends, however, that the force of the foregoing evidence was completely destroyed by plaintiff's own testimony, which he interprets as establishing that the parties never reached a new agreement. This contention confuses the issue of whether the parties reached a new oral agreement with respect to the profits for the three jobs started in 1951 with the question whether they agreed to all of the terms of a written contract that would integrate or supersede their oral agreement. It is true

that plaintiff testified that he expected to secure a new written contract and that he did not consider himself bound to accept whatever written contract defendant might offer. Thus it appears that there were certain ambiguities with respect to the meaning of completed jobs and the method of accounting that plaintiff wanted to have clarified in the new contract, and with respect to these ambiguities plaintiff testified that the parties never reached any agreement. It is not contended, however, that the oral agreement found by the court to exist, was too indefinite to constitute a valid contract, and the fact that the parties might thereafter be unable to agree on its clarification would not affect its validity.

Defendant also relies on plaintiff's testimony that he was unwilling to make any "more" agreements until he knew what he "had coming from what was on the books." This testimony, however, referred to plaintiff's response to defendant's February proposal that the profit sharing arrangement be changed. Plaintiff's refusal at that time to make any more agreements until he knew what he had coming is clearly consistent with his position that he was then entitled to share in the profits under the oral agreement. It indicates only an unwillingness to change that agreement until he knew what he would receive under it.

Finally defendant relies on plaintiff's testimony that he left defendant's employ because "I couldn't get an accounting, and I wasn't going to get any more contract or any renewal, and I had to think about going out and getting another job. The rug was pulled out from under me." This testimony is ambiguous. The phrase "any more contract or any renewal" might be interpreted as referring to any contract after, or any renewal of, the 1951 contract. It might also be interpreted as referring to any written contract or renewal after the January 1952 oral contract. It was for the trial court to resolve this ambiguity in the light of all of the evidence. Since at the time to which plaintiff referred, defendant had clearly indicated that he was not going to execute any written profit sharing agreement, as he had promised to do, or recognize plaintiff's right to share in the profits on the job not completed in 1951, as he had also promised to do, we cannot say as a matter of law that the trial court erred in interpreting this testimony as referring to the new written contract that was to integrate or supersede the oral agreement.

The judgment is affirmed.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

EDMONDS, Justice (dissenting).

The judgment is affirmed upon the theory that the written contract was terminated at the end of 1951 and that the parties thereafter made a new, superseding oral agreement. The trial court made no express finding to that effect. It is reasoned, however, that such a finding may be implied from the use of certain phrases in a finding which states that the written contract was orally renewed and modified. Then, under the rule that findings are to be construed liberally in support of the judgment, the implied finding is given controlling effect over nearly a dozen express findings directly in conflict with it.[1]

1. All of the findings relating to the agreement of January 14th are as follows. Emphasis is added:

"IV

"That it is true as in Paragraph VII of plaintiff's first cause of action in his complaint herein alleged and set forth that following the expiration of the said written agreement of employment made and entered into by said plaintiff and said defendant, B. L. *Biusto*, on April 11, 1951, as hereinabove set forth, said plaintiff and defendant, B. L. Giusto, on or about the 14th day of January, 1952, *orally agreed* that said *agreement* would be *extended* from and after January 1, 1952, and that the plaintiff would continue in the employment of said defendant, and said defendant would continue to employ plaintiff upon the same terms and at the same rate of compensation specified and set forth in Paragraphs 1, 2 and 3 of said written agreement of employment as executed on April 11, 1951, and contraty to and *in modification and abandonment* of the provisions *of Paragraph 4 of said agreement* of employment, and for such period of time as would be required to bring to completion those certain hereinafter described projects which were en-

Under the written contract, McKeon was to receive $100 per week plus a percentage of the profits from jobs completed in 1951. Paragraph 4 provided: "It is agreed that in

tered upon by defendant prior to December 11, 1951, but which were not completed on said date, and the court further finds in connection with *said oral extension and modification of said written agreement* that said defendant * * * did thereupon and repeatedly thereafter represent, state to, and advise plaintiff that he * * * would cause the terms of said agreement as orally modified and extended to be reduced to writing and the plaintiff remained in said defendant's employ on and after December 31, 1951, pursuant to the terms, conditions and promises of the *oral modification of said written agreement* and in consideration thereof and in the belief and upon the understanding and representations of defendant that said oral agreement would be immediately placed in writing.

"V

"The Court finds that it is true that plaintiff under and pursuant to *said written agreement of employment* and the *oral extension and modification thereof* as hereinabove found and set forth, performed and rendered work, labor and services for said defendant, * * * from the date of January 1, 1951, up to and including the 29th day of February, 1952. * * *

"VI

"That from and after December 31, 1951 to and including February 29, 1952, the defendant requested, permitted and allowed plaintiff to remain and continue in defendant's employment * * * and led plaintiff to believe that said employment of plaintiff by defendant was to continue until completion of the said projects, and that plaintiff was to be compensated at the same rate and upon the same terms as set forth in that *certain written agreement* between plaintiff and defendant. * * *

"VII

"The court further finds that subsequent to December 31, 1951, and while plaintiff remained in the employ of defendant, B. L. Giusto, under and pursuant to *said written contract of employment as orally extended, modified and executed*, as hereinabove found, plaintiff repeatedly requested defendant to provide a new contract in writing pursuant to the oral agreement of plaintiff and defendant, but that said defendant, although promising so to do, failed and neglected to produce such written contract.

"VIII

"The court further finds that prior and subsequent to December 31, 1951, and while plaintiff remained in the employ of said defendant, B. L. Giusto, under and pursuant to *said written contract of employment as orally extended and modified* as hereinabove found, plaintiff repeatedly requested said defendant to provide plaintiff with a final audit. * *

"X

"The court further finds that on or about the 26th day of February, 1952 and while said plaintiff was continuing to perform work, labor and services for the defendant, and while said plaintiff was awaiting the delivery to him of an agreement in writing covering his extended employment * * * defendant advised plaintiff that he did not wish to continue with said contract * * * and plaintiff's contract was terminated and at end.

"XI

"That it is true that plaintiff had at all times performed and was at all times and on said 26th day of February, 1952, ready willing able to continue to perform all conditions of the *said agreement so made and entered into by and between plaintiff and defendant on the 11th day of April, 1951*, as heretofore found, *and as thereafter and on or about the 14th day of January, 1952, orally modified and extended as of January 1, 1952, and as thereafter executed*, on his part required to be performed but that plaintiff was prevented therefrom by defendant. * * *

"XV

"The court further finds that prior to December 31, 1951, said defendant commenced work upon projects and/or jobs described as follows. * * *

"That plaintiff, at the instance and request of defendant, continued to render and perform and rendered and performed * * * labor and services upon each of said projects * * * from and after December 31, 1951, and up to and including the 29th day of February, 1952, upon the understanding and agreement that he, the said plaintiff would be compensated therefor in accordance with the terms and provisions of his *said agreement with defendant as first written and as thereafter modified and extended and carried out and executed* as hereinabove found.

"XXIII

"The court finds that said written contract of April 11, 1951, was a valid and binding contract.

"XXIV

"The court finds that the *oral agreement entered into* by and between plain-

the event you continue in my employ after December 31, 1951, it shall be at a salary of One Hundred Dollars ($100) per week plus only such amounts, if any, as may hereafter mutually be agreed upon in writing." It is undisputed, and the trial court so found, that McKeon remained in Giusto's employ continuously until February 29, 1952.

In his complaint for "moneys due" filed in April of that year, McKeon sought an accounting to enable him to ascertain "the amount of money remaining due to him under and pursuant to said agreement of employment made and entered into by and between plaintiff and defendant on the 11th day of April, 1951, as aforesaid, and as thereafter extended and continued." He pleaded the making of the written contract and alleged that the parties "orally agreed to extend said agreement and to continue said plaintiff in his employment upon * * * terms * * * contrary to and in modification of the provisions of Paragraph 4 of said agreement of employment."

Findings were made in favor of McKeon upon the theory of a breach of the written contract as extended and modified by a completely executed oral agreement. Specifically, the breach was found to have resulted from Giusto's wrongful discharge of McKeon which prevented him from performing the conditions "of the said agreement so made and entered into by and between plaintiff and defendant on the 11th day of April, 1951, as heretofore found, and as thereafter and on or about the 14th day of January, 1952, orally modified and extended as of January 1, 1952, and as thereafter executed * * *." Throughout the findings the basis of Giusto's liability is stated to be "the oral modification of said written agreement", "said written agreement of employment and the oral extension and modification thereof," and phrases of similar import.

The basis for implying a superseding oral agreement is the portion of finding IV which states that "following the expiration of the said written agreement of employment" the parties "orally agreed" upon terms "contrary to and in modification and abandonment of the provisions of Paragraph 4." The word "expiration" is construed as meaning an abandonment of the terms of the written contract as of December 31, 1951. In that situation, it is said, the oral agreement of January 14th necessarily must be a superseding one.

To construe "expiration" as meaning an "abandonment" of the terms of the written contract is to contradict directly the express findings which state that the written contract was renewed and extended. Those findings are consistent with section 3003 of the Labor Code, which reads: "If, after the *expiration* of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service." (Emphasis added.) It is undisputed and so found by the trial court, that McKeon remained in Giusto's employ for two weeks after December 31, 1951, and before the purported oral agreement was made. In that situation, a renewal of the original contract will be implied in the absence of a contractual provision to the contrary or an affirmative showing that the parties did not so intend. Henkel v. J. J. Henkel Co., 212 Cal. 288, 291–292, 298 P. 28; Williams v. Schalk Chemical Co., 11 Cal.App.2d 396, 397–398, 53 P.2d 1015; Lemley v. Doak Gas Engine Co., 40 Cal. App. 146, 149, 180 P. 671; Labor Code, § 3003.

There is no contractual provision contravening the findings which state that the original agreement was renewed. Instead, the written contract expressly contemplated McKeon's continuing employment beyond 1951. Paragraph 4 provided that "in the event you [McKeon] continue in my employ after December 31, 1951, it shall be at a salary of One Hundred Dollars ($100) per

tiff and defendant, B. L. Giusto, also known as Ben L. Giusto, *on or about January 14, 1952, altering, amending and modifying the provisions of paragraph (4) of said written agreement* as hereinabove found, was thereafter executed by both of said parties and was a valid and binding agreement."

week plus only such amounts, if any, as may hereafter mutually be agreed upon in writing."

The majority reason that "the [written] contract was at an end on December 31, 1951, unless the parties agreed that it should continue. Under its terms, however, it could continue only if plaintiff agreed to continue working for $100 per week, or the parties agreed in writing on additional amounts." I am unable to find in the contract "terms" making a continuation of its provisions dependent upon an agreement as to salary. That matter was fixed in paragraph 4 as being "One Hundred Dollars ($100) per week plus only such amounts, if any, as may hereafter mutually be agreed upon in writing." The only condition precedent to the operation of that provision was that "you continue in my employ after December 31, 1951," which unquestionably McKeon did.

It is suggested also that there is "substantial evidence * * * that the parties did not intend that plaintiff's continued employment should be compensated at the rate of $100 per week as provided in the written contract." This evidence, it is said, "clearly indicates that the parties did not intend that the provisions of the written contract should be applicable between December 31, 1951 and the time the new oral agreement was made, and the trial court was therefore justified in concluding that the written contract expired at the end of the year."

The trial court, however, made no finding that the parties intended to abandon the provisions of the written contract after 1951. On the contrary, it expressly found that the contract was renewed and extended. Whether the testimony relied upon as indicating an intention to abandon the written contract is sufficient to support such an inference is questionable.[2] Certainly, it is not so clearly persuasive as to require the contrary finding to be disregarded.

The pleadings were framed and findings were made, upon the theory of an oral modification of the extended written agreement. Although the findings should be construed liberally in support of the judgment, that principle does not allow a strained construction of them in order to reach what may appear to be an equitable result.

I would reverse the judgment.

SCHAUER and SPENCE, JJ., concur.

Rehearing denied; EDMONDS, SCHAUER and SPENCE, JJ., dissenting.



44 Cal.2d 147

In the Matter of the ESTATE of Joseph C. POISL, Deceased.

Emma POISL, Plaintiff and Contestant,

v.

Robert L. FERGUSON, as Executor of the Last Will and Testament of Joseph C. Poisl, Deceased, Clara Gottman, Helen Kern, John Werner and Charles Werner, Defendants and Respondents.

L. A. 23133.

Supreme Court of California.
In Bank.

March 15, 1955.

Rehearing Denied April 13, 1955.

In the matter of a decedent's estate. From a judgment of the Superior Court, Los Angeles County, Newcomb Condee, J..

2. McKeon was asked if he had a conversation with Giusto in December, 1951, "concerning the extension of the written contract of employment." McKeon replied that he did, and stated:

"On or about the middle of December I told Mr. Giusto that the contract was expiring at the end of the year, and asked him if he would have it renewed, making those corrections that we had discussed back in April on and accrued basis of accounting; and also to clarify those 'complete jobs'. * * * I wanted to be sure that I was covered for my percentage of those jobs, and so advised him. And he said he would take the matter up with the lawyer, and not to worry about it; that I would get my share of these jobs. * * *"

McKeon was asked: "Did Mr. Giusto state to you at that time, and in that conversation, Mr. McKeon, that he would renew your contract?"

The reply was, "He did."

denying a petition by decedent's widow to revoke the probate of his will as to her, she appealed. The Supreme Court, Carter, J., held that a provision of the will that testator intentionally omitted to provide for his surviving heirs, except as specified in will, did not mention petitioner in such a way as to show testator's intention not to provide for her, as required by statute to prevent revocation of will as to her by testator's marriage, to her after execution of will, and that a provision thereof leaving a residence and personal property therein to petitioner by name, without indicating that she was testator's prospective spouse, was insufficient to prevent such revocation.

Judgment reversed.

Spence, J., dissented.

Opinion, Cal.App., 271 P.2d 908, vacated.

1. Wills ⇐191

A provision of will that testator intentionally omitted to provide for his surviving heirs, except as specified in will, did not constitute a mention of woman, whom testator married after executing will, in such a way as to show his intention not to provide for her, and did not prevent revocation of will as to her by such marriage. Probate Code, § 70.

2. Wills ⇐191

A will must show testator's contemplation of his future marriage to comply with fundamental purpose of statute providing that a person's marriage after making will to one who survives maker is revoked as to spouse, unless provided for in will. Probate Code, § 70.

3. Wills ⇐191

Though a testator need not make provision in will for woman whom he marries after executing will in order to prevent revocation of will as to her, he must bear in mind possibility of his subsequent marriage and resulting serious changes in domestic relations. Probate Code, § 70.

4. Wills ⇐191

The object of statutory provision that person's marriage after making will to one surviving maker revokes will as to such spouse, unless provided for in will or so mentioned therein as to show testator's intention not to make such provision is to secure specific moral influence on testamentary act of having in mind a contingent event so momentous as marriage. Probate Code, § 70.

5. Wills ⇐191

The mere naming of a woman or giving of legacy to her by name in will, without indicating that she is testator's prospective wife, is insufficient to prevent revocation of will as to her by her marriage to testator after execution of will. Probate Code, § 70.

6. Wills ⇐191

A provision of will leaving residence and personal property therein to named woman, without indicating that she was testator's prospective wife, was insufficient to prevent revocation of will as to her by her subsequent marriage to testator. Probate Code, § 70.

7. Wills ⇐191, 296

An indication that woman given legacy by name in will is testator's prospective wife must appear on face of will to prevent revocation thereof as to her by their marriage after execution of will because of provision for her in will, and extrinsic evidence is inadmissible to show testator's intention, at least unless there is some ambiguity, which is not created by legacy to named woman alone, though she is later married to testator. Probate Code, § 70.

V. P. Lucas, Los Angeles, J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein and Goldstein, Barceloux & Goldstein, Chico, for appellant.

Thomas W. Hughes, Los Angeles, and Michael A. Gaynes, Beverly Hills, for respondents.

CARTER, Justice.

On December 10, 1950, Joseph Poisl, then 69 years of age, executed a witnessed will in which he declared that he was "unmarried" and had no children. He left a business property in Chicago to his two nieces; $5,000 cash to each niece; promissory notes to two nephews; a residence in San Diego and the personal property therein to "Emmie" also known as "Emma Blackburn" re-

siding in Alhambra; the residue to the two nephews. It also provided that, except as specified in the will, he intentionally omitted to provide for his heirs living at the time of his death.

Poisl died on June 16, 1952. The will was admitted to probate and letters testamentary issued. Emma Blackburn Poisl filed a petition to revoke the probate as to her, alleging that she and Poisl were married on July 18, 1951 (a few days more than seven months after the will was executed and about eleven months prior to his death) and were husband and wife at the time of his death.

The contest was tried by the court without a jury. The court found the foregoing facts but that provision was made for Emma under the will by reason of the legacy to her by name prior to the marriage and that hence the will was not revoked as to her under section 70 of the Probate Code.[1]

From the evidence it appears that Emma had known Poisl and he had lived in her house when he was in the Los Angeles area; Emma Blackburn and testator's surviving widow are the same person. The value of the property of decedent, as shown by the petition for probate of his will, was cash, $23,953.28, the San Diego property devised to Emma, worth $20,000, and promissory notes for $20,051.87. No evidence was offered on the question of whether Poisl contemplated marrying Emma when he made his will.

[1] Applying section 70 of the Probate Code, supra, to the instant case, it is settled that the general disinheritance clause in the will does not constitute a mention of Emma in such a way as to show an intention not to make provision for her. In re Estate of Axcelrod, 23 Cal.2d 761, 147 P.2d 1. The question remains however whether provision has been made for her by reason of her being given a legacy by name.

[2–7] The two recent cases decided by this court which have applied section 70 were both concerned with whether there was a sufficient mention to show disinheritance. In re Estate of Axcelrod, supra, 23 Cal.2d 761, 147 P.2d 1, 2, the general exclusionary clause of "all of my heirs who are not specifically mentioned herein" was held insufficient to prevent revocation as to an after-acquired spouse. In re Estate of Duke, 41 Cal.2d 509, 261 P.2d 235, 238, involved a clause in a will, in addition to the general clause in the Axcelrod case, that excluded all persons who may become the testatrix' heirs " 'by reason of marriage or otherwise' "; that was held sufficient disinheritance to prevent revocation as to an after-acquired spouse. The reasoning of the Duke case is that, while the clause did not disinherit the spouse by name, it showed a contemplation by the executrix of a possibility of marriage in the future, and the effect that marriage would have upon the will; that is, intent to mention a future spouse and to disinherit him. Thus the Duke case is readily distinguishable from the case at bar except that it does indicate that the will must show a contemplation of a future marriage on the part of the testator to comply with the fundamental purpose of section 70, whether we are speaking of disinheritance or making provision for the after acquired spouse. In re Estate of Duke, supra, 41 Cal.2d 509, 513, 261 P.2d 235, 237, we stated: "And, although a testator need not make provision for such a spouse, he is required to bear in mind the possibility of a subsequent marriage and the serious changes in domestic relations resulting therefrom. Construing a similar statute, the supreme court of the State of Georgia has said: 'The object of the provision is to secure a specific moral influence upon the testamentary act,—the moral influence of having before the mind a contingent event so momentous as marriage * * *, and so deserving of consideration in framing a testamentary scheme.' Ellis v. Darden, 86 Ga. 368, 372, 12 S.E. 652, 653, 11 L.R.A. 51; quoted with

1. "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received." Prob.Code, § 70.

approval in Re Estate of Meyer, supra, 44 Cal.App. 289, at page 292, 186 P. 393." See, In re Estate of Ryan, 191 Cal. 307, 311, 216 P. 366; In re Estate of Axcelrod, supra, 23 Cal.2d 761, 767–768, 147 P.2d 1; Corker v. Corker, 87 Cal. 643, 25 P. 922; In re Estate of Meyer, 44 Cal.App. 289, 292–293, 186 P. 393. It being necessary for the testator to have "in mind" a "momentous" occasion such as marriage, it follows that merely naming or giving a legacy to a person by name, as was done in the case at bar, with no indication that she may be a prospective spouse, is not enough to prevent revocation. That indication must appear on the face of the will, and extrinsic evidence is not admissible to show the testator's intention, at least unless there is some ambiguity. As in the Duke case a legacy to a named person alone, although the named person is later married to the testator, creates no ambiguity; it is merely "noncommittal" as were the words "heirs at law" in the Duke case. In re Estate of Duke, supra, 41 Cal.2d 509, 515, 261 P.2d 235, 238.

There are cases in other jurisdictions with statutes similar to ours holding that contemplation of a future marriage must appear on the face of the will to prevent revocation, see cases collected 127 A.L.R. 750. In re Estate of Appenfelder, 99 Cal. App. 330, 278 P. 473, see, also, In re Estate of Brannon, 111 Cal.App. 38, 295 P. 83, a contrary view was taken but no consideration was given to the underlying purpose and policy of section 70 as indicated by the cases heretofore cited. The last cited cases are, therefore, disapproved.

Defendants argue that the Appenfelder case having been decided when the statutory provisions preceding section 70 of the Probate Code were codified in that code, the Legislature knew thereof and thus approved the interpretation which did not require that a contemplation of marriage appear on the face of the will, and along the same line contend that the law in force—the rule in the Appenfelder case—at the time the testator made the will should be applied. Assuming but not deciding the correctness of the legal propositions inherent in those contentions, they can have no application here because the law of this state was not necessarily as stated in the Appenfelder case. This is apparent because in other cases the reasoning in the Duke case had been applied. In re Estate of Meyer, 44 Cal.App. 289, 186 P. 393, quoting with approval the discussion in Ellis v. Darden, 86 Ga. 368, 12 S.E. 652, 11 L.R.A. 51, which in turn was quoted in the Duke case; In re Estate of Ryan, supra, 191 Cal 307, 311, 216 P. 366; Corker v. Corker, supra, 87 Cal. 643, 25 P. 922. While those cases dealt with the question of disinheritance as distinguished from making provision for the after acquired spouse, there appears to be no reason why section 70 should be interpreted differently in the one situation than in the other. See discussion 32 Cal.L.Rev. 213. The Washington cases, In re Steele's Estate, 273 P.2d 235; In re Adler's Estate, 52 Wash. 539, 100 P. 1019, relied upon by defendants, cannot be considered controlling in view of the above discussed authorities in this state.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SCHAUER, JJ., concur.

SPENCE, Justice (dissents).

Section 70 of the Probate Code is clear and unambiguous. It provides, in effect, that a will executed before the marriage of a testator is not revoked by the marriage if "the spouse is provided for in the will." Emma Blackburn, now Emma Blackburn Poisl, became the spouse of the testator after the execution of the will, but the will specifically devised and bequeathed certain real and personal property to her. Therefore she was "provided for in the will", and the marriage did not effect a revocation.

Those courts which have construed provisions similar in material respects to section 70, have been unwilling to engraft additional requirements upon the clear and unambiguous language of their statutes, and therefore have held that it is sufficient that provision be made in a will for a spouse identified by her maiden name. Nothing need appear in the will indicating that at the time of its execution the testator contemplated his marriage to the named beneficiary. In re Steele's Estate,

Wash., 273 P.2d 235; In re Adler's Estate, 52 Wash. 539, 100 P. 1019. It was so held in a well-reasoned opinion in Re Estate of Appenfelder, 99 Cal.App. 330, 278 P. 473, and the Legislature thereafter reenacted the former section when it adopted the Probate Code.

The majority opinion would disapprove the Appenfelder case by reasoning from a supposed analogy between the situation here and that presented in certain cases involving an entirely different provision of the section. In re Estate of Duke, 41 Cal. 2d 509, 261 P.2d 235; In re Estate of Axelrod, 23 Cal.2d 761, 147 P.2d 1. The last-mentioned provision declares that the will is not revoked if the spouse is "in such way mentioned therein as to show an intention not to make such provision." In other words, that portion of the section deals solely with the subject of intentional disinheritance; and the last cited cases deal with situations where the spouse was neither "provided for" or "mentioned" by name in the will. There is no analogy whatever between the two situations. In my opinion, the plain provisions of the section should be followed, and the Appenfelder case should not be disapproved.

I would affirm the judgment.

Rehearing denied; SPENCE, J., dissenting.



131 Cal.App.2d 489

Emma L. LAMB, Plaintiff and Appellant,

v.

Walter A. LAMB, Defendant and Respondent.

Civ. 16272.

District Court of Appeal, First District, Division 1, California.

March 15, 1955.

As Amended on Denial of Rehearing April 14, 1955.

Hearing Denied May 11, 1955.

Divorce proceeding by wife who had used some of her separate funds for acquisition and improvement of property. From decree of Superior Court, Alameda County, Thomas J. Ledwich, J., holding that all the property of husband and wife was community property, the wife appealed. The District Court of Appeal, Bray, J., held that the evidence was sufficient to sustain the finding.

Judgment affirmed.

1. Husband and Wife ⇐264

In proceeding for divorce by wife, who had used some of her own money for acquisition and improvement of property prior to marriage, who assisted her husband in remodeling home, and with husband borrowed money which was deposited in joint bank account in which were also deposited their joint earnings, evidence sustained finding that all of real and personal property of parties was community property. West's Ann.Code Civ.Proc. § 956.

2. Trial ⇐382

It is for trial court to pass on credibility of witnesses.

3. Husband and Wife ⇐262(1)

Where wife, prior to marriage, acquired realty in her maiden name, but after marriage property was conveyed to husband and wife as joint tenants, conveyance after marriage raised presumption that property was no longer neither wife's separate property nor their community property.

4. Husband and Wife ⇐249

In determining whether property is community or separate, trial judge is not bound by form of deed alone.

5. Husband and Wife ⇐262(1)

In determining whether property held by husband and wife is community property, presumption arising from form of deed under which property is held may not be rebutted solely by evidence as to source of funds used to purchase the property.

6. Husband and Wife ⇐279(3)

Where husband and wife, in contemplation of separation, executed settlement agreement and pursuant thereto husband executed to wife quitclaim deed to property held jointly by them, but thereafter husband and wife resumed marital relations, continued to negotiate for purchase of additional property, lived in same house together and generally held themselves out as husband

and wife and in divorce pleadings stated that property was community property, conduct of parties effected mutual rescission of settlement agreement, and by inference, of the quitclaim deed.

7. Husband and Wife ⇐264

In proceeding for divorce, evidence supported finding that personal property was purchased by community funds and was community property. West's Ann.Code Civ. Proc. § 956.

8. Husband and Wife ⇐262(2)

In divorce proceeding by wife who used portion of her separate funds for purchase of personal and real property, which husband had helped to purchase and improve, burden of proof was upon wife to establish her claim that certain of property was her separate estate.

9. Divorce ⇐252

Party to whom divorce is awarded on ground of extreme cruelty must be given more than half of community property, but how much more than half is largely within discretion of trial court and court's division can only be upset upon showing of abuse of discretion.

10. Divorce ⇐252

Award of property valued at $10,900 to wife, who was granted a divorce on ground of extreme cruelty, as against award to husband of property valued at $8,450, was not an abuse of discretion. West's Ann.Code Civ.Proc. § 956.

11. Divorce ⇐151

Where wife, in divorce proceeding, alleged all property to be community property and case was tried on that theory, claim by wife that her community property allegations were made through mistake, and that property settlement agreement was never introduced into evidence although she desired to introduce it were insufficient to compel granting of a new trial to wife on claim of error in holding that all property was community property.

12. New Trial ⇐91

After trial on theory advanced by party, that party, because dissatisfied with outcome, may not claim inadvertence in presenting the theory.

13. New Trial ⇐6

Granting or refusal of new trial lies within discretion of trial court.

14. Divorce ⇐194

Where wife was awarded property valued at a minimum of $10,900 and value of property awarded to husband was $8,450, each party was required to bear his or her own costs on wife's appeal from decree granting her a divorce and distributing the property. Rules on Appeal, rule 26.

Stanley Block, San Leandro, Henry Muller, Oakland, of counsel, for appellant.

Raymond A. Ferrario, Oakland, Wilfred J. Harpham and Hammond K. Holt, Albany, for respondent.

BRAY, Justice.

An interlocutory decree awarded plaintiff a divorce upon the ground of extreme cruelty. She appeals from those portions of that decree relating to the character and disposition of property, and pursuant to section 956, Code of Civil Procedure, asks review of the order denying motion for new trial.

Questions Presented.

1. Is the determination that all of the real and personal property of the parties was community property supported by the evidence?

2. Was the division of the property fair?

3. Did the court err in denying plaintiff's motion for new trial?

1. Community Property.

[1, 2] The court found that all of the real and personal property was community property, additionally that it was treated in the pleadings as such, that the case was tried on that theory, that approximately $4,000 of plaintiff's separate funds were used in the acquisition and improvement of the community property, that said funds were commingled after marriage with the earnings of both parties and their borrowings, and that it is impossible to trace separate funds into any particular property. The character of the property was purely a factual matter, and the findings are amply supported. Most of plaintiff's contentions are based upon the assumption that only plaintiff's testimony should be believed although contradicted by defendant. It was for the trial court to pass upon the credibility of the parties. This it did. We can-

not interfere with its determination of that issue. A brief résumé of the evidence concerning the various properties will be given.

Prior to marriage the parties were living together. Plaintiff, in her maiden name and with her own money, purchased lots on Louisiana Street, Oakland, and two old houses which were moved on to the property. Much of the work of remodeling them was done by defendant. Plaintiff claims she paid him for his services. He denies it. $3,135 of plaintiff's own money went into the purchase and remodeling of the houses. (Plaintiff owned and still owns other property in Alameda from which she derived $40 per month.) June 9, 1948, the parties borrowed money on the Louisiana Street property, depositing $2,000 in a joint bank account. (It is not clear whether they borrowed $2,000 or $3,000 and, if the latter sum, what became of the additional $1,000. Most of the money in the bank account went to repair the house.)

The parties married June 19, 1948, and moved into the unfinished house at 696 Louisiana Street. Plaintiff did not remember how much money she had in the bank at that time. Defendant estimated it to be between $200 and $600. Defendant had about $100. Before the remodeling was completed defendant became disgusted and told plaintiff he would do no more work on the houses unless he received some interest in the property. Pursuant to this discussion and in order to prevent defendant from thinking she wanted to marry him only to get the remodeling completed, plaintiff then conveyed the property in joint tenancy to "Walter Lamb and Emma Lamb." Defendant testified that although there was no understanding as to whether this property was to be community or otherwise he understood it to be "a joint partnership deal," and was theirs for the rest of their lives. While he felt he should have as much to say about it as she, if she "wanted to take over, that was all right. I never stopped her."

Defendant during the day worked as a bus driver. Plaintiff was employed most of the time. At night both parties worked at finishing the house. In order to buy building materials and a new car, the parties borrowed frequently. Their joint earnings and the proceeds of the loans were deposited in a joint bank account. The before-marriage loan was paid out of it. Most of the new loans were used in improving the two houses on the Louisiana Street lots. Plaintiff had a separate bank account. Most of the deposits in it came from the $40 per month rental from her Alameda property. Their living expenses came from their joint earnings.

One of the houses and its lot was sold to one Stephens for $9,500, with a down payment of $3,500. There is a balance due now of around $4,000 on the note and deed of trust on the property. The note was payable to the parties as joint tenants. The other house and lot was sold for $11,500 in 1950, and then reconveyed to the parties as joint tenants in 1952 on default of the purchaser. With the $3,500 above mentioned plus at least $1,000 of their own funds the parties made a down payment on property in San Leandro, title being taken in joint tenancy. During the course of marriage the parties acquired furniture, appliances, tools, an auto, a trailer and other miscellaneous items. In April, 1952, the parties contemplated a separation and executed a property settlement agreement which will hereafter be discussed. Defendant testified that the parties continued to live together until September, 1952, and the court so found. Plaintiff denied this. However, plaintiff admitted that during that period the parties continued to negotiate for additional property, went to the doctor's office together, lived in the same house until October, and generally held themselves out as husband and wife.

[3] Undoubtedly at the time of the marriage even though defendant had done considerable work in the repairing or remodeling of the houses on it, the Louisiana Street property was plaintiff's separate property. After marriage plaintiff conveyed it to herself and defendant in joint tenancy. This raised a presumption that it was no longer her separate property nor their community property. See Gudelj v. Gudelj, 41 Cal.2d 202, 212, 259 P.2d 656; Perkins v. West, 122 Cal.App.2d 585, 589, 265 P.2d 538.

[4, 5] Plaintiff contends that defendant's refusal to work on the houses unless he received an interest in them amounted to "duress." This contention is too absurd to require answer. Obviously the transfer constituted a gift. The court was not bound by the form of the deed. Faust v. Faust, 91 Cal.App.2d 304, 204 P.2d 906. From the commingling of their money and their efforts, their borrowings and all the circumstances of the case, the court was well justified in holding the property to be community property, even though "the presumption arising from the form of the deed may not be rebutted solely by evidence as to the source of the funds used to purchase the property." Gudelj v. Gudelj, supra, 41 Cal.2d at page 212, 259 P.2d at page 662. Particularly is this so in view of the later action of the parties. In the property agreement defendant agreed to relinquish to plaintiff all his interest, "community or otherwise," in the San Leandro property and in the deeds of trust covering the Louisiana Street property, while plaintiff agreed to relinquish to defendant her interest, "community or otherwise," in most of the personal property. In both her original complaint and in her first amended complaint plaintiff alleged all of their property to be community property. Defendant admitted this and in his cross-complaint alleged that the property involved here was the community property of the parties. Plaintiff's answer to the cross-complaint was a general denial. Pursuant to the property settlement agreement defendant executed to plaintiff a quitclaim deed to the San Leandro property. Plaintiff contends that it thereupon became her separate property. That would be the presumption but as shown hereafter the property settlement agreement and the deed executed pursuant to it were rescinded. Plaintiff in her first amended complaint alleged that defendant had "disallowed" the property settlement agreement and plaintiff prayed that the court disregard the agreement. In his answer defendant admitted this allegation. The admissions of the parties in the pleadings that the property was community property, see Silverstein v. Silverstein, 76 Cal. App.2d 872, 174 P.2d 486, to the effect that a party's admission in a pleading may control as against his testimony as to the character of the property, the resumption of marital relations after the execution of the agreement and the deed pursuant thereto and the conduct of the parties[1] shows a mutual rescission of the agreement, and by inference, of the deed. "* * * if parties, after separation, become reconciled and live together, that fact will avoid the deed. (Bright's Husband and Wife, 349.) The reason of the doctrine is obvious. The object of the deed is to provide for the maintenance of the wife whilst living separately from her husband; but, if reconciliation and cohabitation take place, her maintenance being obligatory upon him, the consideration of the deed fails." Wells v. Stout, 9 Cal. 479, 498. Brown v. Brown, 170 Cal. 1, 7, 147 P. 1168, held that subsequent reconciliation and cohabitation operated as an executed oral agreement, which was sufficient to set aside and annul a property agreement.

It should be pointed out that in October, 1952, an interlocutory decree of divorce was entered by default. This decree approved the property settlement agreement. On November 19th this decree was set aside and vacated. The agreement was made in contemplation of separation. It recited that the parties had separated (although they actually had not) and that a divorce action was contemplated. Such an agreement is cancelled by a reconciliation and resumption of the marital rights and privileges. See cases cited in Sanguinetti v. Sanguinetti, 51 Cal.App. 347, 196 P. 799. See also Auclair v. Auclair, 72 Cal.App.2d 791, 799, 165 P.2d 527.

[6] As to the personal property, the evidence amply supports the finding that it is community property. The down payment on the Oldsmobile came from funds derived from 696 Louisiana Street, which was com-

1. After execution of the agreement and deed the parties lived together as man and wife for over five months, had sexual intercourse. 696 Louisiana Street was reconveyed to them as husband and wife in joint tenancy and the parties moved back there from the San Leandro home.

munity property. The remainder of the payments for the car, plus purchase of furniture, tools, etc., likewise came from community funds.

[7] No records were kept by the parties as to what became of their separate funds. They were so commingled with community earnings and with each other that it was impossible to determine them. Therefore, the presumption that the family expenses were paid out of community funds, Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708, is of no help here. See Pope v. Pope, 102 Cal.App.2d 353, 227 P.2d 867, for effect of commingling separate and community funds. Plaintiff admitted that she could not say how much of the $40 per month rental from her separate property went into the Louisiana Street property other than the indefinite statement that "the biggest part of" it did. "If it should appear that separate property has become mixed or confused with the product of the work of a spouse or with community interests of any kind, it is incumbent upon the party contending for the separate estate to clarify the history of the property and to demonstrate, not to an exactitude, but to that degree of proof that clearly and convincingly satisfies an unprejudiced mind, that the property is separate property. [Citation.] The burden of proof is upon the claimant of the property as separate estate." Estate of Fellows, 106 Cal.App. 681, 684, 289 P. 887, 888.

As to the court's findings that plaintiff abandoned all claim of separate property and that the pleadings alleged the property to be community property and that the case was tried on that theory, plaintiff contends that waiver must be pleaded (it was not here) and that the findings of waiver and theory of the case were not supported. We deem it unnecessary to decide this contention for the reason that the judgment is well supported by the findings as to the character of the property and the evidence in support thereof, so that if the findings of waiver and theory of the case were erroneous, such fact would not affect the judgment.

2. Division Was Fair.

Plaintiff was awarded (1) the Stephens note of $4,000 and deed of trust securing it (the court stated that this substantially compensated plaintiff for her separate monies that were invested in the two Louisiana Street properties); (2) the real property at 696 Louisiana Street subject to an encumbrance of approximately $3,200; (3) all household furniture, furnishings, appliances and equipment; (4) $600 (as being half of the value of the 1940 Oldsmobile).

Defendant was awarded (1) the Oldsmobile, value $1,200 less $600 payable to plaintiff, net value $600; (2) the San Leandro property subject to an encumbrance of $6,700; (3) trailer.

Apparently in dividing the property the court placed these valuations upon it:

Awarded plaintiff:		
Stephens note		$4000
696 Louisiana Street, less encumbrance of $3200—net value	$12,000	$8800
furniture etc.		$3000
cash		$600
Total		$16,400

Awarded defendant:	
auto	$600
San Leandro property, value $13,500—less encumbrance $6700	$6800
trailer	$50
tools (no value fixed by court) —plaintiff claims	$1000
Total	$8450

The failure of the court to place a value on the tools is of no importance, particularly as according to plaintiff's own valuation they could not be worth over $1,000. See Pope v. Pope, supra, 102 Cal.App.2d 353, 227 P.2d 867, where this court held that the trial court's failure to place an exact valuation on the community property was not error.

[8, 9] We agree with plaintiff that furniture and furnishings originally purchased for between $3,000 and $4,000 were too

highly valued by the court. But taking plaintiff's valuation of $1,500, the property awarded plaintiff would still be worth $14,900 as against the $8,450 value awarded defendant. (In this figure we have accepted plaintiff's valuation of the tools, which is probably too high.) Plaintiff contends that as the court in awarding her the $4,000 note stated that this substantially compensated her for her separate monies that went into the Louisiana Street properties, that sum cannot be considered in determining whether the court actually awarded her over half of the community property. Assuming, without deciding, this contention to be correct, plaintiff still received a value of $10,900 as against a value of $8,450 received by defendant. The law only requires that the party to whom a divorce is awarded on the ground of extreme cruelty receive more than half of the community property. How much more than half is largely in the discretion of the trial court and the trial court's division in that respect can only be upset on a showing of abuse of discretion. Cash v. Cash, 110 Cal.App.2d 534, 537, 243 P.2d 115; Barry v. Barry, 124 Cal.App.2d 107, 113, 268 P.2d 147. We find no abuse of discretion here.

3. Denial of Motion for New Trial.

[10] In her affidavit on motion for new trial plaintiff took issue with the court's finding that she had abandoned her claims of separate property and that her pleadings admitted that the property was community property. She pointed out that although in her complaint and her first amended complaint she had alleged the property to be community property, she had by her answer to defendant's cross-complaint denied his allegation that it was community property. She then claimed that her community property allegations were made through inadvertence and mistake, and that the property settlement agreement was never introduced into evidence. She desired an opportunity to introduce it. She points out that there was a clause in the agreement to the effect that it was not to be revoked by a reconciliation of the parties and states that when she verified the complaint she was not aware of the significance of the allegation therein "that defendant has disallowed said property settlement agreement and plaintiff prays that the Court disregard said agreement." She points to the court's finding "it is impossible from the evidence to trace said separate funds to any particular property" and asks for an opportunity to show by an accountant's analysis that her separate funds are traceable. She then states that her former attorney failed to follow her instructions to introduce in evidence two checks of payments made by her for certain improvements made to the San Leandro property after the entry of the first interlocutory decree.

[11–13] There is nothing in any of the foregoing which would compel the granting of a new trial. Although the agreement was not introduced in evidence it was called to the attention of the court. The clause to the effect that it was not to be revoked in case of a reconciliation would not control over the evident intention of the parties after reconciliation to revoke it. The case was tried on the theory advanced by plaintiff in her complaint that it had been revoked. It is significant that although the agreement was before the court during the trial, plaintiff at no time asked that it be confirmed. After a trial on a theory advanced by a party, that party, because dissatisfied with the outcome, may not claim inadvertence in presenting the theory. The inadvertence should have been discovered during the trial. There was no showing as to why, if it existed, it was not so discovered. All of the matters referred to in the affidavit were matters which either were or could have been before the court at the trial. The affidavit shows that plaintiff, not having been as successful as she thought she ought to be on the trial, merely wants to try the case over again. The granting or refusal of a new trial is in the discretion of the trial court. (See cases collected in 20 Cal.Jur. § 13, pp. 27, 28; 8 Cal.Jur. 10-yr. Supp. pp. 484–487; 1951–1954 Cal.Jur. Supp. pp. 793–794.)

[14] In the interests of justice, each party shall bear his or her own costs. Rule 26, Rules on Appeal.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

131 Cal.App.2d 533

In the Matter of the ESTATE of Philip GOLDFADER, Deceased.

Robert C. KIRKWOOD, Controller of the State of California, Petitioner and Respondent,

Harold G. Sterling, Contestant,

v.

Dora CHIRLS, Executrix and Appellant.

Civ. 20689.

District Court of Appeal, Second District, Division 2, California.

March 15, 1955

In the matter of a decedent's estate. From an order of the Superior Court, Los Angeles County, Roy L. Herndon, J., fixing the inheritance tax due the State, the executrix under decedent's will appealed. The District Court of Appeal, McComb, J., held that savings and loan accounts, voluntarily established and opened, gratuitously and without consideration, by decedent in his name as trustee for his adult son, to whom the will left the entire estate, were subject to inheritance tax, where they were intended as a gift by decedent to his son, decedent had absolute control of investment of the trust funds, and the son never had physical possession or custody thereof.

Order affirmed.

Taxation ⇐879(1)

Savings and loan accounts, voluntarily established and opened, gratuitously and without consideration, by one depositing his funds therein in his own name as trustee for his adult son, to whom trustee's will left his entire estate, were subject to inheritance tax on his death, as a transfer intended to take effect at death, where accounts were intended as gift to son, trustee had absolute control of investment of trust funds, and son never had physical possession or custody thereof. Revenue and Taxation Code, § 13646.

James W. Hickey, San Francisco, Walter H. Miller and William L. Baugh, Los Angeles, for respondent.

Jacob W. Silverman, Los Angeles, for appellant.

McCOMB, Justice.

From an order fixing the inheritance tax due the State of California in a probate proceeding, the executors appeal.

Facts: Philip Goldfader died testate August 25, 1951, a resident of California, leaving:

a. Probate assets of the appraised clear market value of $54,792.22;

b. Annuity policies of the appraised clear market value of $151,305.42, payable on his death to his adult son, Harold G. Sterling;

c. Savings and loan accounts of the appraised clear market value of $14,500, in decedent's name "as trustee" for his adult son, Harold G. Sterling.

Decedent's will left his entire estate to the aforementioned son. The inheritance tax appraiser filed his report taxing each of the items listed under paragraphs a, b, and c, above. No objection was made to the taxation of items a, and b, but formal objection was made to the report of the inheritance tax appraiser insofar as it taxed item c. above. This objection was overruled and the present appeal has ensued.

It was stipulated that decedent in his lifetime gratuitously opened in his name as "trustee" for his said adult son, various savings accounts which at the date of his death were appraised at the clear market value of $14,500. The funds so deposited were the father's (decedent's) which were never physically in the possession or custody of his son in the lifetime of the decedent.

Question: *Is there substantial evidence to sustain the trial court's finding of fact reading thus:*

"That said decedent gratuitously and without consideration voluntarily established and opened said savings and loan accounts by depositing his funds in various Savings and Loan Associations in his own name as trustee for his adult son, Harold Goldfader, now known as Harold G. Sterling, as follows: (See various Savings and Loan Accounts listed in the total sum of

$14,500.) That the moneys and credits or funds of said decedent so deposited were never at any time in the life of said decedent turned over or delivered to the said adult son, Harold G. Sterling. That said funds of said decedent were and remained the property of said decedent as trustee of revocable trusts and under his exclusive possession and control."

Yes. The stipulation of facts set forth above clearly support the facts as found by the trial court. Section 13646 of the Revenue and Taxation Code provides that a revocable transfer in trust is a transfer subject to the act. It is also provided in section 712 of Title 18, Article 4, of the Administrative Code that: "An inter vivos transfer made without a valuable and adequate consideration * * *, whether in trust or otherwise, subject to a power reserved in the transferor to revoke, terminate, alter, amend, revise or change the interest of the beneficiary, constitutes a transfer intended to take effect in possession or enjoyment at or after the death of the transferor."

Clearly in view of the fact that the record disclosed that these trust accounts were intended as a gift by the decedent to his son, and that he had absolute control of the investment of the funds placed in the trust accounts, and that the son never at any time had physical possession or custody of the trust funds therein, they were subject to taxation under the provisions of the Revenue and Taxation Code. (Cf. Koslos-kye v. Cis, 70 Cal.App.2d 174, 160 P.2d 565.)

In Re Estate of Thurston, 36 Cal.2d 207, 223 P.2d 12, relied on by appellant, is clearly not in point. In such case the court held that a tax was not imposed on transfers inter vivos which were not made in contemplation of death, and where the interest of the transferees and the possession and enjoyment of the property were not affected by whether the transferor lived or died. The facts are entirely different from the present case.

Affirmed.

MOORE, P. J., and FOX, J., concur.

131 Cal.App.2d 535

Patricia FINERTY, a minor, by Lois Finerty, her Guardian ad litem, and Lois Finerty, Plaintiffs and Appellants,

v.

Dennis William PERRIN, Defendant and Respondent.

Civ. 20340.

District Court of Appeal, Second District, Division 3, California.

March 15, 1955.

Rehearing Denied April 11, 1955.

Hearing Denied May 11, 1955.

Action to recover for personal injuries sustained by minor plaintiff as a result of collision between an automobile in which she was riding and another driven by defendant. The Superior Court, Los Angeles County, Walter S. Gates, J., entered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Parker Wood, J., held that evidence was sufficient to support finding that negligence of driver of automobile in which minor plaintiff was riding was sole proximate cause of accident.

Judgment affirmed.

Automobiles ⇐244(36)

In action to recover for personal injuries sustained by plaintiff as result of intersectional collision between automobile in which she was riding and approaching left turning automobile driven by defendant, evidence was sufficient to support finding that negligence of driver of automobile in which plaintiff was riding was sole proximate cause of accident.

Carter, Young, Zetterberg & Henrie, and Stephen I. Zetterberg, Pomona, for appellants.

Nichols, Cooper, Hickson & Lamb, Donald P. Nichols and Robert Firth, Pomona, for respondent.

PARKER WOOD, Justice.

Judgment was for defendant in a nonjury trial for damages for personal injuries resulting from an automobile collision.

In November, 1952, about 6 p. m., plaintiff Patricia Finerty, 14 years of age, was

riding as a guest in a Hudson automobile that was being driven by Charles Coons, 17 years of age, in a northerly direction on Reservoir Street in Pomona. Defendant was driving a Ford automobile in a southerly direction on that street. The main traveled portion of that street is paved and is about 16 feet wide. On each side of that portion there is a seven-foot shoulder. County Road, which is a paved street that extends east and west and is about the same width as Reservoir, intersects Reservoir Street. The collision occurred at that intersection while defendant was making a left turn onto County Road. There was no signal, stop sign, or artificial light at the intersection. It was an "open country intersection." The lights on the automobiles were lighted.

The court found that the sole proximate cause of the accident was the negligence of Coons.

Appellant contends that the evidence was insufficient to support that finding.

Coons testified that when he was about 150 feet from the intersection he was driving about 55 miles an hour, and he took his foot off the accelerator to slow down for a car on County Road that had stopped at the west entrance of the intersection. He did not remember whether, at that time, he saw any car on Reservoir coming toward him. Just before the impact he saw "something shiny," chrome, or something. He did not remember anything about the the collision except that he got out of his car and saw that Patricia's nose and face had been injured.

A police officer, called as a witness by plaintiffs, testified that he arrived at the scene a few minutes after the accident occurred. There was debris on the north side of County Road approximately on the line of the shoulder and the paved portion. The point of impact was about "ten feet west of the east shoulder of Reservoir." When he arrived there the front end of the Hudson (Coons' car) was 24 feet north of the north line of County Road and the right front wheel was about 3 feet east of the paved portion of Reservoir. The Ford was about 33 feet north of the north line of County Road. The front of the Hudson and the right front of the Ford were damaged.

Defendant testified that he first saw Coons' car when he (defendant) was about 20 feet from the intersection (north) and traveling about 10 miles an hour. At that time Coons' car was about 300 feet from the intersection (south), and defendant estimated its speed at approximately 45 miles an hour. Defendant waited until a car going east on County Road came to a stop at the west entrance of the intersection and then he proceeded to make a left turn. When he had completed about one-half the left turn he noticed that Coons' car, which was about 150 feet from the intersection, was traveling from 70 to 80 miles an hour. Defendant put his foot "on the gas," and tried to complete the turn.

Mr. Brennan, called as a witness by defendant, testified that he was driving an automobile east on County Road and when he was about 75 feet from the intersection of County Road and Reservoir Street he saw the Hudson automobile on Reservoir, about 275 feet south of County Road, traveling about 65 miles an hour. At that time he saw the Ford, which was about 40 feet from the intersection, traveling 15 to 20 miles an hour. When the Ford was in the intersection the Hudson was about 200 feet from the intersection. The Ford entered the intersection slowly and turned left in the center of the intersection. The speed of the Hudson did not change before the impact occurred. When the impact occurred, Mr. Brennan (witness) was coming to a stop and was about 50 feet from the intersection. The Ford was knocked back several feet.

Mrs. Brennan testified in substance the same as Mr. Brennan testified.

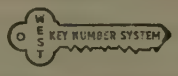
The police officer also testified that defendant told him that he saw the Hudson a block or more away, and that as defendant started his turn he noticed that the Hudson was "on top of him," and he (defendant) tried to cut back but was unable to do so. Defendant denied that he told the officer that he tried to cut back away from the Hudson. He testified that he did not try to cut back to the west side of Reservoir.

Appellant argues to the effect that defendant was negligent in that he was making the left turn before arriving at the intersection (outside the intersection); that defendant was negligent in that he failed to yield the right of way to Coons; and that defendant was careless in judging the speed of Coons' car.

There is no merit to the appeal. Appellant's argument relates to the weight of the evidence. Defendant was not negligent as a matter of law. The questions as to negligence and contributory negligence were questions of fact for the trial court. The evidence amply supports the findings.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



131 Cal.App.2d 308

J. Fred HOWARD, Plaintiff and Appellant,

v.

June Paschall HOWARD, and Bank of America National Trust and Savings Association, as Guardian of the Estate of June Paschall Howard, Defendants,

June Paschall Howard, Respondent.

Civ. 20567.

District Court of Appeal, Second District, Division 1, California.

March 7, 1955.

As Modified on Denial of Rehearing March 30, 1955.

Hearing Denied May 4, 1955.

Action by husband against wife and wife's guardian for declaratory relief adjudicating existence of oral contract between husband and wife providing for husband's support. The Superior Court, Los Angeles County, Ellsworth Meyer, J., sustained wife's and guardian's demurrer without leave to amend. Husband appealed from order sustaining wife's demurrer. The District Court of Appeal, White, P. J., held that under statute providing for declaratory relief, court can not only determine rights of parties under an existing contract, but can also determine whether an alleged contract exists.

Judgment reversed in part and affirmed in part.

1. Declaratory Judgment ⇐313

A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to legal rights and duties of the respective parties under a contract, and requests that these rights and duties be adjudged by the court. West's Ann.Code Civ. Proc. § 1060.

2. Declaratory Judgment ⇐366

In declaratory relief actions, the court may determine disputed questions of fact. West's Ann.Code Civ.Proc. § 1060.

3. Declaratory Judgment ⇐344

In action for declaratory relief, court has the power to take evidence of existence of contract upon which asserted rights are based, and so far as statute is concerned, it makes no difference whether such contract be written or oral. West's Ann.Code Civ.Proc. § 1060.

4. Declaratory Judgment ⇐366

In action by husband against wife and wife's guardian for declaratory relief adjudicating existence of oral contract between husband and wife for husband's support, trial court had power to determine whether alleged oral contract existed. West's Ann.Code Civ.Proc. § 1060.

5. Pleading ⇐225(1)

It is erroneous for trial court to sustain demurrer without leave to amend because of defects in form of pleading, when the complaint is good as against general demurrer.

Charles E. Beardsley, Dora R. Hyman, Los Angeles, for appellant.

Conroy & Conroy and Herbert Grossman, Edward L. Conroy, Los Angeles, for respondent.

WHITE, Presiding Justice.

This proceeding was instituted when plaintiff and appellant, J. Fred Howard (hereinafter referred to as "appellant")

filed in the Superior Court of Los Angeles County a "complaint for declaratory relief and on contract". In said complaint, June Paschall Howard and Bank of America National Trust and Savings Association, as guardian of the estate of said June Paschall Howard, were named as defendants.

Said bank (hereinafter referred to in its capacity as such guardian as "bank") and said June Paschall Howard (hereinafter referred to as "respondent") demurred to said complaint.

The trial court sustained respondent's general demurrer, granted appellant ten days leave to amend as to respondent, but sustained the bank's general demurrer without leave to amend.

Thereafter, appellant filed his amended complaint (hereinafter referred to as the "complaint"), and in which pleading the bank was eliminated as a defendant. The demurrer of respondent to this complaint was sustained without leave to amend. One judgment was made and entered based upon the two orders sustaining the demurrers without leave to amend, of both respondent and the bank. While the notice of appeal is from such judgment, appellant has designated only June Paschall Howard as respondent, and we assume from a reading of his brief that he seeks only a reversal of the order sustaining the demurrer to the second or amended complaint without leave to amend, and that the order sustaining the demurrer of the bank to the original complaint, without leave to amend, is not here challenged.

The complaint now in question alleged that appellant and respondent have been husband and wife since on or about April 12, 1936; that on or about February 15, 1951, respondent was adjudicated an incompetent person and that letters of guardianship of her estate were duly issued to the bank. That at the time of the commencement of this action the bank was acting in such capacity. It was then alleged, "That prior to their marriage, Appellant and Respondent entered into an oral agreement (hereinafter referred to as the 'oral contract') by the terms of which Respondent agreed with Appellant that if he would give up the employment in which he was then engaged, and if he would perform such services with respect to her business affairs and property and in attendance upon her as she might call upon him from time to time during their marriage to perform, she would provide for his care, support and maintenance during the period commencing with the time of his giving up his employment and ending with the time of his death;

"IV. That upon said marriage, Appellant terminated his then employment; that Appellant has duly carried out all of his obligations under the oral contract, in every particular, and has done and performed everything by him to be performed thereunder; that the services theretofore performed by Appellant under the oral contract were accepted by Respondent; and that Appellant is ready, willing and able to continue to perform his obligations under the oral contract;

"V. That the following orders were made and entered by the Court in said guardianship proceeding: on or about October 3, 1951, an order directing the Bank to pay $250.00 per month to Appellant for his support and maintenance until the further order of the Court; on or about June 18, 1952, an order directing the Bank to pay the sum of $325.00 per month to Appellant for said purposes, for a period of fourteen months commencing with the month of June, 1952; and on or about September 1, 1953, an order directing the Bank to pay the sum of $325.00 per month to Appellant for said purposes, for a period of twelve months commencing with the month of July, 1953.

"VI. That there is a controversy between Appellant and Respondent and Appellant and the Bank in that Appellant contends that the oral contract was entered into by Appellant and Respondent as aforesaid, that said contract still exists, and that under its provisions Appellant is entitled, during the rest of his lifetime, to receive from Respondent or her estate reasonable care, including medical and dental care, and support and maintenance in accordance with the standard of living maintained by himself and Respondent during their marriage and prior to the time when Respondent became incompetent, whereas Respond-

ent disputes the existence of said oral contract and denies that she has any obligation whatsoever thereunder and that Appellant has any rights whatsoever thereunder, and the Bank disputes the existence of the oral contract and denies that it or Respondent has any obligation whatsoever thereunder and that Appellant has any rights whatsoever thereunder.

"VII. That Appellant has received nothing whatsoever from Respondent or her estate for his care, support or maintenance under the oral contract since Respondent's adjudication as an incompetent, but has received the amounts provided by said court orders to be paid to him to the date of the Complaint.

"VIII. That Appellant requires, and at all times since February 15, 1951, has required, the sum of $415.00 per month for his care, including medical and dental care, and for his support and maintenance in accordance with the standard of living maintained by Appellant and Respondent during their marriage and prior to Respondent's having become incompetent".

The complaint then alleges that since respondent was adjudicated an incompetent appellant has received nothing whatsoever under the alleged oral contract other than the amounts provided for by the foregoing probate court orders.

Judgment was prayed for as follows:

"1. Declaring and determining that the oral contract exists between Appellant and Respondent, and that it is valid in all respects.

"2. Declaring and determining Appellant's rights and obligations under the oral contract and the rights and obligations of Respondent and the guardian of her estate thereunder.

"3. For the sum of $4,980.00 per annum during the period of Appellant's lifetime remaining after February 15, 1951, payable in equal monthly installments, and for such additional sums as Appellant may require during said period for his reasonable care, including medical and dental care, and for his support and maintenance in accordance with the standard of living maintained by Appellant and Respondent during their marriage and prior to the time when Respondent became incompetent; and that against said sums there shall be credited the amounts paid to Appellant for said period pursuant to the order of the Court in said guardianship proceeding; or

"If it be determined that Appellant is entitled to judgment for sums required by him for his care, support and maintenance only until the time of the rendition of judgment, then for the sum of $415.00 per month during the period commencing with February 15, 1951, and ending with the time of the rendition of judgment, to be paid to him at the expiration of said period, and for such additional sums as he may require during said period for his reasonable care, including medical and dental care, and for his support and maintenance in accordance with the standard of living maintained by him and Respondent during their marriage and prior to the time when Respondent became incompetent; and that against said sums there shall be credited the amounts paid to Appellant for said period pursuant to the order of the court in said guardianship proceeding."

Respondent, through the bank as her guardian demurred to the complaint on the ground that the same does not state facts sufficient to constitute a cause of action, and said general demurrer was sustained without leave to amend.

[1] With reference to the sufficiency of a complaint for declaratory relief, our Supreme Court, in Columbia Pictures Corp. v. De Toth, 26 Cal.2d 753, 760, 161 P.2d 217, 220, 162 A.L.R. 747, said: "A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a contract and requests that these rights and duties be adjudged by the court."

Here, we are confronted with a complaint seeking declaratory relief, the allegations of which pleading set forth the execution of the foregoing oral contract. That appellant husband has fully performed his obligations under said contract and that

the services he performed under the contract were accepted by respondent, but that her obligations under the oral contract have been breached in that appellant has received nothing *under the contract* for his care, support or maintenance since respondent was adjudicated an incompetent person. That there is a controversy between appellant and respondent, and between the former and the bank as guardian of the latter relating to the *existence* of the oral contract, and to the respective rights and duties of appellant, respondent and the bank thereunder. The prayer is that the court adjudicate the existence of said oral contract and the rights and duties of the respective parties thereunder.

Respondent urges, and the court below determined, that declaratory relief was not available to *establish the existence of a contract,* but was intended only to determine the rights of the parties under an *existing* contract. The gist of the court's holding in this regard is found in the following language contained in the "memorandum ruling":

"* * * The very language of Section 1060, 'any person interested * * * under a contract', presupposes the existence of a contract and not the determination of whether a contract exists, but the cornerstone of the present action is the seeking of a judgment" declaring and determining that said oral agreement exists between plaintiff and defendant.

"Declaratory relief was made available for the interpretation of contract terms in instances of ambiguity, uncertainty or a controversy as to their effect, but plaintiff alleges the brief terms of this contract and does not allege any dispute as to their interpretation or effect, he merely alleges that the defendant denies she ever made the agreement. The 'actual controversy' alleged in the amended complaint is not as to the terms of the contract but whether there is a contract."

[2–4] We are persuaded that the holding of the trial court was erroneous. It is well established in our law that in declaratory relief actions the court may determine disputed questions of fact, R. G. Hamilton Corp., Ltd., v. Corum, 218 Cal. 92, 95, 21 P. 2d 413. In the instant case appellant alleges that an oral contract was executed under which he claimed some legal rights which he asked the court to determine and declare. We are impressed that if the court may determine disputed questions of fact, it has, as was stated in Zimmer v. Gorelnik, 42 Cal.App.2d 440, 447, 109 P.2d 34, 37, "* * * the power to take evidence of the existence of the contract upon which the asserted rights are based, and that, so far as our code section is concerned, it makes no difference whether such contract be written or oral." The view expressed by the court in the case just cited finds support in the cases of Columbia Pictures, Inc. v. De Toth, supra, 26 Cal.2d at page 760, 161 P.2d 217; R. G. Hamilton Corp., Ltd., v. Corum, supra, 218 Cal. at page 95, 21 P.2d 413; Corporation of America v. Durham, etc., Co., 50 Cal.App.2d 337, 342, 343, 123 P.2d 81; Tolle v. Struve, 124 Cal. App. 263, 266, 12 P.2d 61. We therefore hold that the court was in error in deciding that it was without power to determine the existence of the claimed and disputed contract between appellant and respondent.

We do not consider that the provisions of section 1061 of the Code of Civil Procedure are here involved. The "Memorandum ruling" of the trial court clearly indicates that the ruling made was not predicated upon the exercise of judicial discretion that declaratory relief should be denied because the determination sought was not necessary or proper at the time and under all the circumstances present, Code Civ. Proc. sec. 1061, but was based upon the conclusion that declaratory relief is not available when an oral contract is pleaded and its execution denied by the other party thereto.

[5] Having concluded that the complaint is not vulnerable to general demurrer, it becomes unnecessary to pass upon the grounds of special demurrer. It is erroneous for the trial court to sustain the demurrer without leave to amend because of defects in the form of pleading when the complaint is good as against a general demurrer. This decision is not intended as a holding that the complaint is not subject to spe-

cial demurrer. Upon the going down of the remittitur, the trial court may in its discretion require clarification of uncertainties and ambiguities or the correction of defects in the form of pleading.

For the foregoing reasons, the judgment is reversed as to defendant June Paschall Howard and affirmed as to defendant Bank of America National Trust and Savings Association as guardian of the Estate of June Paschall Howard.

DORAN and DRAPEAU, JJ., concur.



131 Cal.App.2d 445

Clendolyn C. BECHHOLD, Plaintiff-Respondent,

v.

Harold R. BURKHART, Walter G. Nellis, Defendants-Appellants.

Harold R. BURKHART, Plaintiff-Appellant,

v.

Clendolyn C. BECHHOLD, Defendant-Respondent.

Civ. 16265.

District Court of Appeal, First District, Division 1, California.

March 14, 1955.

Action by payee against maker and endorser of note for balance due on note. The maker set up by way of counterclaim certain loans allegedly made to payee. The maker also instituted action against payee for repayment of such loans. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgments in favor of payee and maker and endorser appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence supported finding that maker of note did not lend to payee any money and that no money was due from plaintiff to defendant.

Judgments affirmed.

Money Lent ⇐7(3)

In action by payee against maker and endorser of note for balance due on note, and on maker's counterclaim for loans allegedly made to payee by maker of note, evidence sustained finding that maker of note did not lend any money to payee and that no money was due from payee to maker.

Sherman, Peters, Elliott, Hutchins & Dixon, San Francisco, for appellant.

Davis & Colvin, San Francisco, for respondent.

FRED B. WOOD, Justice.

October 17, 1952, plaintiff Glendolyn C. Bechhold commenced an action against defendant Harold R. Burkhart as maker and defendant Walter G. Nellis as endorser of a promissory note for $15,000 alleging that $6,377 of the principal and 5 percent interest thereon from May 6, 1952, remained unpaid. The trial court found those allegations true and rendered judgment accordingly. Defendants, in behalf of their appeal, challenge the sufficiency of the evidence to support a finding against them upon their asserted counterclaim and a finding that the statute of limitations had run against the counterclaim.[1]

The counterclaim consisted of loans of money allegedly made by Burkhart to Bechhold evidenced by seven checks in various amounts executed and delivered during the period September 12, 1947, to De-

1. December 15, 1952, Burkhart filed a complaint against Bechhold (a) for compensation in the sum of $25,000 and (b) for repayment of loans he had made to her in the sum of $14,000, the same loan transaction as pleaded in his counterclaim in the other action.

Both actions were tried at the same time.

The trial court found that Burkhart was never employed by nor did he render services to Bechhold, nor did he ever make any loans to her; also, that both claims were barred by the statute of limitations.

Although Burkhart appealed from this judgment, he has not discussed his claim for compensation. At oral argument he indicated abandonment of that claim.

cember 19, 1949, in the aggregate sum of $11,004.01.

Mrs. Bechhold testified positively that these checks were not loans to her by Mr. Burkhart; that she never borrowed any money from him; that if she wanted to borrow any money, she went to banks.

Burkhart had no documentary evidence other than the checks themselves and they did not show what they were for. He was unable to recollect any conversation with Mrs. Bechhold concerning these alleged loans. He was unable to testify positively that they were in fact loans. For example, as to one of the checks which bore the designation "Account L" in the lower left-hand corner, he said "I imagine" that the designation meant the check was a loan from him to Mrs. Bechhold but he could not be sure that he had had any conversation with her in regard to it. Concerning another check, asked if it were a loan or not, he said "I don't know for sure, because I have no record on it except the check." As to another check, one in the amount of $1,000, he said the check was the only document he had and he could not possibly remember any of the circumstances which fixed in his mind the recollection that it was a loan. Asked if he could tell the circumstances surrounding it he said "I couldn't possibly. It would be a vague memory. I have no way of knowing." In response to similar questions concerning another check he said "My answer would be the same * * *; I have nothing other than the checks." Asked if there were any circumstances surrounding the issuance of that check which fixed it in his mind as a loan, he said "well, the only thing I know is she got the money, and that is all I would know about it"; that his knowledge of its being a loan was what he presumed from the circumstances.

There is evidence also that Burkhart never made any demand for repayment of any of these asserted loans, nor asserted any right of offset, until after Mrs. Bechhold instituted the present action for collection of the balance on his $15,000 promissory note, despite the fact that during 1950–52 he paid her $17,000 on account of loans from her to him aggregating $22,000. January 4, 1950, he signed a letter to her acknowledging receipt of $7,000 to be invested by him, the profits to be divided equally between them and the principal "to be returned intact to the lender" upon the termination of the agreement or the notice by her to him that she desires the return of "her principal." The $15,000 note was given and dated March 22, 1950. Upon this combined indebtedness of $22,000, Burkhart paid $17,000 by a series of $1,000 checks during the period July 15, 1950, to May 7, 1952. Mrs. Helen G. DeSpain, on behalf of Mrs. Bechhold, received from Mr. Burkhart fourteen of these checks and had various conversations with him during the period covered by those payments. Mrs. DeSpain testified that he never made any mention to her of an employment contract under which he claimed the sum of $25,000; she never heard of it, nor did she recall his ever mentioning any loans to her. Mr. Herbert Salinger represented Mrs. Bechhold in October or November, 1951, and subsequently, in attempting to collect from Burkhart payment of the promissory note in suit. In the course of his conversations with Mr. Burkhart the latter never claimed that there was money due and owing to him from Mrs. Bechhold. If his counterclaim were correct, he had the right during that period of an offset to the extent of $11,000, for his purported loans to her antedated her $22,000 loans to him, and he thus overpaid to the extent of $6,000. Such conduct upon Burkhart's part tends to indicate that the idea of loans from him to Mrs. Bechhold in the amount of $11,000 was an afterthought not founded in fact.

From this brief summary, it is apparent that there was evidence sufficient to support the finding of the trial court that defendant Burkhart did not lend to plaintiff Bechhold the sum of $11,000 or any sum whatever, and that there is no money due or owing from plaintiff to defendant; wherefore, the counterclaim fails, and there is no need to consider the question whether the statute of limitations did or

did not run against the alleged counterclaim.

Each of the judgments appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



131 Cal.App.2d 565

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Mike M. FERNANDEZ, Defendant and Appellant.

Cr. 5283.

District Court of Appeal, Second District, Division 2, California.

March 17, 1955.

Defendant was convicted in Superior Court of Los Angeles County of the unlawful sale of heroin and from an order denying a motion for new trial and from the judgment Mildred L. Lillie, J., the defendant appealed. The District Court of Appeal, Fox, J., held that the evidence sustained conviction and that the denial of the motion for new trial was not an abuse of discretion.

Judgment and order affirmed.

1. Poisons ⇐9

Evidence sustained conviction for selling heroin in violation of statute. Health and Safety Code, § 11500.

2. Poisons ⇐9

In prosecution for the unlawful sale of heroin, it is not essential to the people's case that contents of the capsule allegedly containing heroin be produced in court where chemist had examined contents and determined them to be heroin. Health and Safety Code, § 11500.

3. Criminal Law ⇐938(1)

In prosecution for the unlawful sale of heroin, denial of a new trial because of testimony of witness denying that any transaction involving the sale of narcotics took place on the occasion of the alleged commission of the offense, was not an abuse of discretion. Health and Safety Code, § 11500.

David C. Marcus, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was indicted and convicted of selling heroin in violation of section 11500 of the Health and Safety Code. He appeals from the ensuing judgment and the order denying his motion for a new trial.

On February 2, 1954, John Rubalcava, a police officer of the city of Los Angeles assigned to the narcotic detail, drove out to 1243 Mott Street, in San Fernando. He was with George Morales. Defendant, who was on the street, came over to the car and was introduced to Rubalcava by Morales. After exchanging greetings and some conversation, Rubalcava asked defendant to pass him "a cap" if he had any. Defendant replied, "Yes, I have some, but let's go around the block as I don't want that old lady to see us," indicating a lady next door. Defendant then got into the car and Rubalcava drove around the block and parked in front of 1211 Griffith. There defendant produced a green balloon from which he took a No. 5 gelatin capsule containing a grayish powder. Defendant handed this capsule to the officer and in return received a $5 bill from him. Rubalcava asked defendant, "Is the junk any good?" Defendant, addressing his question to Morales, replied, "Yes, I never burn any one, do I?" Morales then stated, "No, you have nothing to worry about. He never burnt anyone. He sells good stuff." Rubalcava marked the capsule with his initials, "J. R.," placed it in a manila envelope, put that envelope in a larger manila envelope, sealed the larger envelope and placed his thumb print on the seal. Jay A. Allen, an expert forensic chemist employed by the Los Angeles Police Department, received the envelope

and its contents from the City Property Clerk's Office on the following day. He opened the large envelope by cutting around the red sealing wax, found a smaller envelope, and inside the latter was a single capsule containing a powder which he examined and found to be a narcotic known as heroin. This capsule, which was empty and had been crushed, was identified by Rubalcava at the trial, by his initials thereon, as the one he had purchased from defendant.

[1, 2] Defendant contends that the evidence is insufficient to sustain the conviction. He argues that the People failed to prove that the powder in the capsule was heroin. The record does not support his position. It is certain that the crushed, empty capsule which was exhibited to Officer Rubalcava at the trial and which was a part of the grand jury exhibit about which the police chemist testified, was the same capsule that the officer purchased from defendant since the officer was able to make out his initials which he had written thereon. The chemist testified he examined the powder in the capsule in this exhibit and found it to be heroin. It is thus clear that the capsule and its contents were traced from the defendant to the officer, then to the chemist who analyzed the contents, and finally this same capsule, empty and crushed, was identified by the officer. The powder was no doubt destroyed and the capsule crushed when it was discovered the contents were contraband. It was not essential to the People's case that the contents of the capsule be produced in court since the chemist had examined it and determined it to be heroin. See People v. Candalaria, 121 Cal.App.2d 686, 689, 264 P.2d 71. From the foregoing it is manifest that the evidence amply sustains the conviction.

[3] On the hearing of the motion for a new trial the defense produced George Morales, who introduced defendant and Rubalcava and who remained in the front seat of the car between the officer and the defendant while the former drove around the block. Morales testified he did not see defendant hand the officer "a cap of heroin," and did not see the officer give the defendant $5. He denied that any transaction involving the sale of a narcotic took place on that occasion. Defendant contends that because of this testimony his motion for a new trial should have been granted. The trial court, however, may well not have believed Morales' testimony in view of the fact that he and the defendant had been friends since childhood. There was clearly no abuse of discretion in denying defendant's motion.

The judgment and order are affirmed.

MOORE, P. J., and McCOMB, J., concur.



131 Cal.App.2d 502

Sonia YABLON, Plaintiff-Appellant,

v.

Henry E. BURKE et al., Defendants,

Henry E. Burke, doing business as Henry E. Burke Co., and Wilshire-Cochran Properties, Inc., a corporation, Respondents.

Civ. 20324.

District Court of Appeal, Second District, Division 1, California.

March 15, 1955.

Action for specific performance of alleged contract for sale of real estate. The Superior Court, Los Angeles County, Ellsworth Meyer, J., sustained a demurrer and entered a judgment of dismissal, and plaintiff appealed. The District Court of Appeal, Doran, J., held that it was obvious the transaction had never been consummated.

Affirmed.

Specific Performance ⇐64

Receipt (1) reciting that payment was a deposit on account of purchase price of described property and reciting description of property and terms of sale but concluding with the statement that property was sold subject to approval of vendor and (2) signed by neither vendor nor purchaser

was not a contract for purchase and sale of real property, was not a specifically enforceable contract for purchase and sale of real property.

Low & Stone, Leonard Low, Beverly Hills, for appellant.

Gitelson, Ashton, Moore & Coyle, Los Angeles, Arthur S. Wolfe, Beverly Hills, Alfred Gitelson, Los Angeles, Leon M. Cooper, Beverly Hills, for respondents.

DORAN, Justice.

This is an appeal from the judgment following the sustaining of a demurrer to the fourth amended complaint without leave to amend.

The fourth amended complaint was an action for specific performance of an alleged contract to purchase real estate, for damages for breach of contract and for damages for fraud. Following the order sustaining the demurrer without leave to amend a judgment of dismissal was entered, from which judgment plaintiff appeals.

It is contended on appeal that the complaint stated a cause of action on all counts.

It is argued:

"(1) That a contract for the sale and conveyance of land to Plaintiff was signed by Lawrence on behalf of the owner-seller of the land.

"(2) That the identity of the owner-seller was not disclosed to Plaintiff when the contract was signed.

"(3) That in fact, the owner-seller is either Burke or the Wilshire-Cochran Corporation.

"(4) That the contract contains a provision that the sale is subject to the approval of the seller.

"(5) That Burke controls the Wilshire-Cochran Corporation, and that it is his *alter ego*.

"(6) That all Defendants are mutual agents.

"(7) That Plaintiff had no knowledge of whether Lawrence was authorized in writing or not, but that Defendants are estopped to deny the authority of any Defendant to execute the contract, if the said authorization is not in writing.

"(8) That Plaintiff has performed all conditions precedent and is ready, willing and able to carry out the terms of the contract, but that despite demand by Plaintiff, Defendants have refused to execute the conveyance.

"Plaintiff submits that these allegations establish the execution by Defendants of a valid and subsisting contract for the purchase and sale of the real property involved, and that Defendants should not be permitted by their own internal manipulations to take advantage of a statute of frauds defense, where Plaintiff has alleged facts to show that the signature of Lawrence is, in effect, the signature of the owner of the property involved.

* * * * * *

"In support her third cause of action, Plaintiff further alleges that Defendants made a series of misrepresentations after the contract was signed as follows:

"(a) That they wanted to and intended to carry out the contract evidenced by the deposit receipt.

"(b) That they were holding up the deal only because they were concerned with certain Internal Revenue Code provisions dealing with the application of the Capital Gains Tax Law to real property transactions, and that the deal would be consummated within a few days.

"(c) That the property was in the name of the corporation, whose name was not revealed at that time, but that said corporation was entirely controlled by Henry E. Burke, and that as soon as certain transactions involving transferring of title from the Corporation to Henry E. Burke personally were completed, the property would be sold.

"(d) That an escrow should be opened in which plaintiff could complete this transaction.

"(e) That when plaintiff went to open the escrow she was told that certain conditions were required in setting up the deal, such as a lease for six (6) months with an option to buy, would be incorporated in the deal only for the purposes of effecting con-

formity with the Capital Gains Provisions of the Internal Revenue Code, but that the deal was otherwise consummated as set forth in the contract evidenced by the deposit receipt."

The defendant Lawrence apparently was a real estate agent. The property in question was shown to appellant by Lawrence. Appellant decided to buy the property and gave Lawrence a check for $2,000 for which a receipt was given appellant. This receipt is the only record of the transaction. It is printed and is headed, "California Real Estate Association Standard Form Deposit Receipt". The receipt provides that the payment is, "A deposit on account of the purchase price of the following described property", etc. Then follows the description of the property and the terms of sale. The total price was $90,000. The usual conditions are included relating to Title Insurance, taxes, etc., and concludes with the statement, "That the property is sold subject to the approval of the seller". The receipt is signed "Henry E. Burke Co." by what appears to be E. L. Lawrence. There are no other signatures on the document.

Incidentally, the complaint alleges, "That plaintiff has no knowledge of whether defendant Lawrence was authorized in writing or not, and that defendants are estopped by virtue of their inter-relationship to deny the authority of any defendant to execute said contract, if said authorization is not in writing."

Obviously the transaction was never consummated. The receipt above referred to is not a contract upon which the within action could be based. It was not signed by either the vendor or the vendee. Actually it was not a contract for the purchase and sale of real property.

The law relating to such transactions is well settled and requires no citation of authority. That the trial court's action was correct, there can be no question.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

131 Cal.App.2d 416

Harry Conyres SNYDER, Evelyn Ruth Snyder, Plaintiffs and Respondents,

v.

REDDING MOTORS, a corporation, Cal-Union Agency, a corporation, Colonial Insurance Company of California, a corporation, C. C. Glesicke, and Redding Motors, a Partnership, Defendants,

Colonial Insurance Company of California, a corporation, Appellant.

Civ. 8490.

District Court of Appeal, Third District, California.

March 11, 1955.

Buyers of automobile brought action ex contractu against partnership, which sold the automobile, and which was an insurance agent of insurer and insurance agency, and against the agency and the insurer. The Superior Court of Shasta County, Albert F. Ross, J., entered judgment adverse to insurer, and insurer appealed. The District Court of Appeal, Schottky, J., held that where buyers of automobile applied to partnership for automobile liability policy and paid partnership amount of premium, and insurance company failed to issue policy or to return premium to buyers within reasonable time after receipt of application, and such delay misled buyers to their prejudice, and they were involved in accident, delay gave rise to implied acceptance of application and supported action ex contractu against insurance company even though same facts might allow recovery based on theory of negligence.

Judgment affirmed.

1. Insurance ⇐87

An insurance agent has such authority as his principal actually or ostensibly confers on him. West's Ann.Civ.Code, § 2315.

2. Insurance ⇐87

Generally, powers of an agent of an insurance company are governed by general law of agency. West's Ann.Civ.Code, § 2315.

3. Insurance ⇐88

An insurance agent, whether general or special, possesses such powers as have been conferred by insurance company, or as third persons have a right to assume that he possesses under the circumstances of the case. West's Ann.Civ.Code, § 2315.

4. Insurance ⇐87

Generally, powers of insurance agent as to those dealing with him are determined by the nature of the business entrusted to him and are prima facie coextensive with its requirements. West's Ann.Civ.Code, § 2315.

5. Insurance ⇐130(4)

Where buyers of automobile applied to partnership, which was the seller of the automobile, and which was insurance agent of insurer, for a liability policy and paid partnership amount of premium, and insurer failed to issue policy or to return premium within reasonable time, and such delay misled buyers to their prejudice, and they were involved in accident, delay gave rise to implied acceptance of application and supported action ex contractu against insurer, even though same facts might allow recovery based on theory of negligence. Insurance Code, § 1656.

6. Evidence ⇐20(1)

It is common knowledge that automobile liability policies issue as a matter of course unless there is some fraud or misrepresentation on part of applicant.

Low & Duryea, San Francisco, for appellant.

Kennedy & Caldwell, Redding, for respondents.

SCHOTTKY, Justice.

Respondents commenced an action against the above named defendants alleging in their complaint that defendants Giesicke and Redding Motors, a corporation, were the duly authorized agents of defendants Cal-Union Agency and Colonial Insurance Company of California; that respondents applied to Giesicke and Redding Motors for insurance against liability for personal injuries and property damage, and that they, as agents of Cal-Union Agency and Colonial Insurance Company, in consideration of $40.50, agreed to so insure respondents for one year from March 28, 1950, and to deliver a policy in the standard form to respondents; that part of the terms of said policy bound defendants to defend any action against respondents within the policy coverage.

The complaint alleged further that after such insurance was so made and the promise to execute and deliver a policy to respondents, respondents damaged property of Pacific Gas and Electric Company during said term of insurance coverage; that respondents fully performed conditions of said standard form policy of insurance and promptly notified defendants of the damage. That defendants failed and refused to deliver said policy of insurance to respondents in accordance with said agreement and denied any responsibility for the damage caused by respondents and refused to defend any action against the respondents; that thereafter Pacific Gas and Electric Company sued respondents and recovered judgment in the amount of $752.87; that respondents incurred attorney's fees of $500 in defense of said action. Respondents prayed for judgment in the sum of $1,341.77.

Defendants denied the material allegations of the complaint and the action proceeded to trial before the court sitting without a jury.

At the close of respondents' case defendant Colonial Insurance Company moved for a nonsuit, which motion was denied, and the case was then submitted without any evidence being offered by any of the defendants.

The trial court found that defendants C. C. Giesicke and Redding Motors were the agents of defendant Colonial Insurance Company of California; that defendants C. C. Giesicke and Redding Motors solicited and received from plaintiffs an application for a policy of property damage insurance to the extent of $5,000 for the term of one year, commencing upon March 28, 1950, said policy to be issued by the defendant Colonial Insurance Company of California in the standard and usual form issued by

said defendants, together with the total premium therefor in the amount of $40.50; and that in consideration of said application and the payment of said premium to defendants the defendants C. C. Giesicke and Redding Motors, as the agents of defendant Colonial Insurance Company of California, agreed to secure and place insurance as aforesaid; that in violation of said agreement defendant Colonial Insurance Company of California, upon receipt of said application failed and neglected to take any action whatsoever thereon, or to issue said policy, or to return said application or to cause said premium to be refunded. The court found further that as a result of an accident on June 24, 1950, respondents incurred liability and legal expenses in the total sum of $1,141.77 and awarded respondents judgment against defendant Colonial Insurance Company of California in that amount. Said defendant's motion for a new trial was denied and it has appealed from said judgment.

Appellant contends that no contract existed between it and respondents, that it did not agree to issue a policy of insurance, that if respondents had any right to recover it was on the ground of negligence and that neither the pleadings nor the evidence permit any such issue, and further that the court's findings are unsupported by the evidence. Before discussing these contentions we shall give a brief summary of the evidence as shown by the record.

On March 28, 1950, Mr. and Mrs. Harry Snyder, plaintiffs and respondents, entered into a conditional sales contract with defendant Redding Motors, a partnership, for the purchase of an automobile. The conditional sales contract showed what types of insurance the purchasers were applying for, namely, comprehensive, collision ($50 deductible). Listed under "Other Insurance" were the letters B. I. & P. D., which meant bodily injury and property damage. The comprehensive and the collision insurance were to be handled by the Bank of America affiliate, but opposite the provision for "Other Insurance" it stated "Redding Motors will place." The conditional sales contract was signed by the respondents and on behalf of Redding Motors by C. C. Giesicke, one of the partners. At the same time respondents filled out an application for bodily injury liability and property damage liability insurance, which application was received by the Colonial Insurance Company on April 3, 1950.

The application was entitled "Colonial Insurance Company"; it then set forth the name and address of the applicant, Harry C. Snyder. It set forth the policy period as extending from 3–28–50 to 3–28–51, with an instruction on the application that it not be back dated. It then set forth other items normally asked of an applicant for such insurance, as age, occupation, previous insurance carrier, employer and his address, name of mortgagor, if any, proposed use of the automobile and whether or not it was to be driven by minors. The schedule of coverages is then listed. Only two such coverages were filled in on Mr. Snyder's application, namely:

Then follows a description of the new car sold and the subject matter of the insurance and the signature of the agent; in this case the signature of C. C. Giesicke appears. On the reverse side appears the time and date stamp of the Colonial Insurance Company showing that the application was received by them at 1:56 p. m. on April 3, 1950.

"Coverages		Limit of Liability	Premium
"A–Bodily Injury Liability	Each Person 5,000 Each Accident 10,000		24.00
"B–Property Damage Liability — Each Accident		$5,000	16.50
.			
"Total Premiums			40.50"

Respondents paid the sum of $40.50 to Redding Motors as the premium for insurance coverage for one year from the date of the application. The application was never acted upon and no policy of insurance was ever issued to respondents. Colonial Insurance Company in its answer denied ever having received the application, but found it in its files just before the trial in this matter. The time and date stamp showed that it had been received by Colonial Insurance Company on the 3rd day of April, 1950, a short time after the purchase of the car. On March 28, 1950, Redding Motors was an agent of the Colonial Insurance Company and the Cal-Union Agency. Redding Motors was appointed and licensed under the provisions of Section 1656 of the Insurance Code.

Defendant Giesicke, called by respondents under Code of Civil Procedure, § 2055, testified that his authority was limited to taking applications for insurance and submitting them to the Colonial Insurance Company. He did not know whether or not the $40.50 received from respondents had been paid over to appellant, his principal, and there is no other evidence on this point.

On June 24, 1950, respondents' automobile damaged property of Pacific Gas and Electric Company to the extent of $752.87, as determined by the trial court in its judgment granted to Pacific Gas and Electric Company in its action against the respondents. Respondents were compelled to defend that action at their own expense, incurring attorney's fees of $325 and costs amounting to $63.90.

The trial judge filed a memorandum opinion which we believe correctly analyzes the facts and the law. We quote therefrom as follows:

"This action is based on a breach of contract, as is stated on the face of the complaint in the caption thereof, and not on any theory of negligence as in the Stark case, Stark v. Pioneer Casualty Co., 139 Cal.App. 577, 34 P.2d 731, which has been cited by both parties hereto. The complaint, in substance, charges an agreement to insure the plaintiffs against property damage liability and a failure to comply with said agreement which resulted in damage to plaintiffs when they incurred such a liability as a result of an accident.

"It has been proved that Redding Motors was an agent of defendant Colonial Insurance Company at the time in question. It has also been proved that Redding Motors, as a part of its sales contract with the plaintiffs for the purchase by plaintiffs of an automobile, accepted an application from plaintiffs for property damage and personal injury liability insurance with an agreement to place said application with the Colonial Insurance Company, and that the premium for said insurance was made a part of the sales contract and was duly paid by the plaintiffs, and remitted by Redding Motors to the Colonial Insurance Company, although the proof of this remission to the company depends on inferences and on lack of contradiction in this case.

"Redding Motors performed its part of its agreement with plaintiffs and transmitted the application to Colonial Insurance Company. For some reason, not explained at the trial, Colonial Insurance Company never accepted the application nor issued any policy of insurance thereon. No notice to anyone was given of this failure to accept the policy application and to issue the policy, and after a period of two or more months the plaintiffs incurred the property damage liability as a result of an accident and then learned for the first time that no policy of insurance had been issued. It is reasonable to assume that plaintiffs thought the insurance policy had been and would be returned to the Bank of America at Redding which was holding the sales contract and to which they were making their payments thereon.

"The Stark case, above referred to, states in part, 139 Cal.App. on page 580, 34 P.2d 731, 'An insurance company having solicited and obtained applications for insurance and having received payment of the fees or premium exacted, is bound, either to furnish the indemnity the state has authorized

them to furnish or decline to do so within such reasonable time as will enable them to act intelligently and advisedly thereon.' It is true that the Stark case further on states, 'Mere delay in passing upon an application cannot be construed as an acceptance which will support an action ex contractu; but the applicant will not be charged with the same degree of diligence as an insurer organized for profit, and the latter may be held liable for actual damage not exceeding the amount of insurance purchased if it be shown to have delayed notice of rejection, and may not complain of inexcusable delay because of its agent's dilatory conduct or inefficiency.' There is no question of the agent's negligence or delay in this case, but only in delay on the part of the company itself in either accepting or refusing the application and notifying the plaintiffs thereof. It would seem that this is both negligence and a breach of the contract of its agent to place the insurance and either obtain a policy within a reasonable time or notify the applicant that no policy would be issued.

"I therefore feel that the Colonial Insurance Company is responsible to plaintiffs in this case, on either or both theories of negligence and contract."

[1–4] We are satisfied that the evidence supports the finding that Redding Motors was the agent of appellant and that respondents paid the premium to the agent of appellant. An agent has such authority as his principal actually or ostensibly confers upon him. Civ. Code, § 2315. As stated in Frasch v. London & Lancashire Fire Insurance Company, 213 Cal. 219 at page 223, 2 P.2d 147 at page 148:

"As a general rule, the powers of an agent of an insurance company are governed by the general law of agency. His powers are varied by the character of the functions he is employed to perform. He may be a general agent with general powers, or his powers may be limited by the company; or he may be a special agent with authority limited to a specific transaction. In any event, an insurance agent, whether general or special, possesses such powers as have been conferred by the company, or as third persons have a right to assume that he possesses under the circumstances of the case; and as a general rule his powers, as to those dealing with him, are determined by the nature of the business intrusted to him and are *prima facie* coextensive with its requirements. Silverberg v. Phenix Ins. Co., 67 Cal. 36, 41, 7 P. 38; Marderosian v. National Casualty Co., 96 Cal. App. 295, 302, 273 P. 1093; 14 Cal.Jur. 454, §§ 32 and 33; 32 C.J. 1062, § 139."

And 213 Cal. at page 224, 2 P.2d at page 148:

"The case of Lauze v. New York Life Ins. Co., 74 N.H. 334, 68 A. 31, 33, states that 'it is not unreasonable to make the company responsible for any payments made by the person on account of the premium due at the inception of the contract to the party who acted in negotiating the contract, whether he so acted by previous arrangement with the company or was a mere volunteer.'"

Redding Motors had written authorization to act as agent for Colonial Insurance Company, and such authority had been filed with the California Insurance Commissioner pursuant to section 1656 of the Insurance Code. Such agency took applications and premiums from its customers and submitted them to its principal, the appellant. As shown on the application itself, there are no limiting provisions as do appear on application in several of the decisions on this issue; there is no provision in the application as to when the policy will become effective, except the item which shows that the policy period shall be from 3–28–50 to 3–28–51; there is no provision that the application must be accepted by the appellant, the principal, before the application shall ripen into a contract of insurance. The premium was paid by the applicant to the agent of the insurer. All that was left to be done was for the company to issue the

policy in accordance with the application or to reject the application and to have the premium returned to the applicant.

[5] Failure to issue the policy or reject the application and to return or have returned the premium to the respondents within a reasonable time after the receipt of the application, and which delay has misled the applicant to his prejudice, gives rise to an implied acceptance of the application, which will support an action ex contractu, even though these same facts may or would allow a recovery based on the theory of negligence, as under the Stark case, supra. Here the appellant failed to act and never did act on the application from the date it was received, April 3, 1950. This was almost three months before the damage was caused by respondents. Appellant refused to introduce any evidence on its behalf. There was no showing that the policy would not issue as a matter of course, no reason was shown that a standard type policy of the type sought and issued by appellant would not have issued to respondent Harry C. Snyder, and no showing was made as to appellant's failure and neglect to act on the application. The premium had been paid by respondents and not returned to them. Nothing was done to inform them that no policy of insurance would be issued to them. Being thus misled they operated their vehicle on the highways believing that they were protected in the event that damage occurred which would be covered by the policy.

To permit appellant insurance company to avoid responsibility upon the policy under the facts and circumstances of the instant case would be to justify it in avoiding responsibility after it had, through its agent, accepted the application and the premium and had led respondents to believe that they were insured.

[6] It is a matter of common knowledge that respondents proceeded to apply for the insurance policy in the same manner as is done by the great majority of automobile purchasers. And it is likewise a matter of common knowledge that such policies issue as a matter of course unless there is some fraud or misrepresentation on the part of the applicant. When an agent accepts an application and the premium therefor the average automobile purchaser feels justified in driving his newly acquired automobile in the belief that he is insured in accordance with the terms of the application. In the instant case there is no question as to the agency of Redding Motors and there is no question as to their acceptance of the application and mailing it together with the premium to the office of appellant insurance company.

Appellant contends also that if respondent had any right to recover against it it was on the ground of negligence and that neither the pleadings nor the evidence permit any such issue. We think there is no merit in this contention as it is clear from the complaint that respondents alleged facts that would permit recovery as stated by the trial court "on either or both theories of negligence and contract." All of the facts and circumstances were fully presented at the trial and we are satisfied that there is ample evidence to support the court's conclusion that there was an implied contractual duty on the part of appellant to either accept or reject the application within a reasonable time and to notify applicants of such action.

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

Frank DRAGNA, Plaintiff and Appellant,

v.

Lynn WHITE, W. A. Worton, H. E. Roberson (sued herein as Doe I) and B. D. Unland (sued herein as Doe II), Defendants,

Lynn White, H. E. Roberson and B. D. Unland, Respondents.

Civ. 20490.

District Court of Appeal, Second District, Division 2, California.

March 9, 1955.

Rehearing Denied March 29, 1955.

See 281 P.2d 566.

Hearing Granted May 4, 1955. *

Action against peace officers for false arrest and imprisonment. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment for defendants on pleadings for reason that complaint failed to state cause of action and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that complaint which alleged that officers arrested defendant because he was suspected of murder and of being member of criminal gang, that their belief had been confirmed by virtue of nine months surveillance, and which contained nothing that qualified powers of such peace officers to make arrest when they believed defendant to be guilty party, was insufficient to state cause of action.

Judgment affirmed.

1. Arrest ⇐63(4)

Police officers are peace officers who have duty to arrest suspect when felony has been committed and they have reasonable cause to believe him to be author of crime. Pen.Code, § 817.

2. False Imprisonment ⇐20(1)

Complaint charging peace officers with false arrest and imprisonment which alleged that officers arrested defendant because he was suspected of murder and of being member of criminal gang, that their belief had been confirmed by virtue of nine months' surveillance, and which contained nothing that qualified powers of such peace officers to make arrest when they believed defendant to be guilty party, was insufficient to state cause of action.

3. Municipal Corporations ⇐188

City peace officers are authorized to do any reasonable act which might properly constitute an aid in enforcement of law.

4. False Imprisonment ⇐22

Police officers who make arrest are immediately clothed with armor of presumption that they acted in performance of their duty. West's Ann.Code Civ.Proc. § 1963.

5. False Imprisonment ⇐7(3)

Filing of formal charge against person arrested by police officers is not necessary to successfully defend action against them for false arrest and imprisonment, if officers believed such person's arrest was their duty.

6. Arrest ⇐63(1)

So important to peace and security of society is apprehension of evildoers, that arrest by peace officers for felony without warrant is authorized.

7. Officers ⇐114

Peace officers and other public servants are immune from claims resulting from errors of judgment while acting in discharge of duty.

8. False Imprisonment ⇐7(3)

Not to grant immunity from civil liability to peace officer acting within scope of his authority for arrest and detention of person reasonably suspected of felony would be to place every honest law enforcement officer under unbearable handicap and would redound to detriment of body politic.

9. False Imprisonment ⇐7(3)

Public welfare requires that decision of peace officer to make arrest shall be free of all fear of personal liability.

10. Arrest ⇐63(1)

Great latitude must be allowed for misapprehension or mistake if arresting officer is sincerely serving welfare of state.

11. Arrest ⇐63(1)

Whether peace officer acted lawfully in making arrest is not to be determined by actual situation as later disclosed, but upon whether his knowledge at time of arrest was sufficient to persuade reasonable person to believe such knowledge was true.

* Opinion vacated 289 P.2d 428.

12. Pleading ⇐400

Fatal vice in pleading may be urged at any time. West's Ann.Code Civ.Proc. § 434.

13. Appeal and Error ⇐1039(2)

In action against peace officers for false arrest and imprisonment, action of court in sustaining defendants' objection to introduction of any evidence when case was called for trial, inasmuch as demurrer could have served same purpose, was not prejudicial to plaintiff. West's Ann.Code Civ.Proc. § 434.

William W. Shaw, Riverside, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., by Robert B. Burns, and Ralph J. Eubank, Deputy City Attys., Los Angeles, for respondents H. E. Roberson, B. D. Unland and Lynn White.

Reed & Kirtland, by Robert C. Packard, Los Angeles, for respondent Lynn White.

MOORE, Presiding Justice.

Does the complaint state a cause of action for damages for false arrest and imprisonment?

The allegations necessary to a consideration of this appeal are that about 10 p. m. February 13, 1950, defendants, police officers of Los Angeles, without a warrant, arrested and searched plaintiff and without his consent conveyed him in a police car to the offices of the police department; questioned him, locked him in a cell until 3 a. m. and without his consent and with intent to injure, humiliate and embarrass him, permitted a large number of news reporters and photographers into the room of his imprisonment to photograph him; knowing and intending that plaintiff's picture would be published throughout the United States as a criminal, held for the commission of a felony and that wide publicity would be given to his arrest and imprisonment; that defendants then removed plaintiff to a different part of the jail, had photographs and fingerprints taken for police records; took from him all his personal effects; lodged him in a tank with other prisoners; would not permit him to communicate with his mother or attorney or anyone else and kept him in said cell until February 16 when he was released.

No charges were ever filed against plaintiff accusing him of any offense but defendants, intending to injure plaintiff, caused wide publicity to be given in the newspapers throughout Los Angeles County and told the various news reporters that plaintiff had been and "was being held for suspicion of conspiracy to commit murder and/or for suspicion of conspiracy to commit a felony; and further stated that plaintiff was a member of a criminal gang, a mobster, and had been under police observation for the nine months immediately preceding his unlawful arrest and unlawful imprisonment, and that an arsenal of rifles, shot-guns and pistols were found by the police at the time of plaintiff's arrest in the home wherein plaintiff resided."

The complaint proceeds to deny the several charges made by defendants and that any firearms had been found in plaintiff's home; and if defendants had kept him under surveillance for any period of time they would have found no facts or evidence to sustain his arrest and imprisonment and their statements to the press. He is and has always been a law-abiding citizen, a native of Los Angeles where he was reared; was educated in the schools of Southern California and there enlisted in the United States Army; served in combat; lost an eye and was honorably discharged and never engaged in any unlawful activity and defendants knew all such facts. He demands damages in the sum of $250,000 and $100,000 punitive damages.

[1–4] When the case was called for trial after it had been dismissed as to all defendants who had not been served, on motion of defendants, White, Roberson and Unland, the court granted judgment on the pleadings for the reason that the complaint does not state a cause of action. The court was correct.

Respondents are peace officers. Penal Code, § 817; Los Angeles Charter, sec. 798. As such, it was their duty to arrest appellant when a felony had been committed and they had reasonable cause to believe him the

author of the crime. The complaint alleges that respondents arrested appellant because he was suspected of murder; of being a member of a criminal gang; that their belief had been confirmed by virtue of nine months' surveillance. There is nothing in the pleading that qualifies the power respondents had to make the arrest when they believed appellant to be the guilty party. White v. Towers, 37 Cal.2d 727, 734, 235 P.2d 209, 28 A.L.R.2d 636. They were authorized to do any reasonable act which might properly have constituted "an aid in the enforcement of the law." U. S. v. Birdsall, 233 U.S. 223, 235, 34 S.Ct. 512, 516, 58 L.Ed. 930. Having arrested appellant, respondents were immediately clothed with the armor of a presumption that they acted in the performance of their duty. Code Civ.Proc. § 1963; Cooper v. O'Connor, 69 App.D.C. 100, 99 F.2d 135, 140, 118 A.L.R. 1440.

[5, 6] The complaint alleges that respondents arrested appellant because he was charged with a felony. True, no complaint had been filed against him, but the filing of a formal charge was not necessary if the officers believed appellant's arrest was their duty. People v. Serrano, 123 Cal.App. 339, 341, 11 P.2d 81. So important to the peace and security of society is the apprehension of evildoers that an arrest by peace officers for a felony without a warrant is authorized. People v. Garnett, 129 Cal. 364, 366, 61 P. 1114. In fact, the officer is commanded by law to make an arrest for a felony where public security is imperiled by the freedom of the suspect.

[7–9] "When the duty to investigate crime and to institute criminal proceedings is lodged with any public officer, it is for the best interests of the community as a whole that he be protected from harassment in the performance of that duty." White v. Towers, supra, 37 Cal.2d 729, 235 P.2d 211. A thoughtful reading of White v. Towers discloses a consistently followed rule since our early beginnings to immunize peace officers in general for enforcing the law. It holds that by reason of the necessity of the case, public policy demands that a law-enforcing officer should be protected from the consequences of an erroneous judgment. To immunize peace officers and other public servants against claims resulting from errors of judgment while acting in the discharge of duty is now an elementary principle. White v. Brinkman, 23 Cal. App.2d 307, 317, 73 P.2d 254. The plaintiff had been twice unjustly accused by the defendant Towers; once for having deposited in state waters matter deleterious to fish and plant life; once for having violated a federal statute by polluting navigable waters. The first was dismissed; of the second he was acquitted. The issue was whether investigator Towers was immune against civil liability for malicious prosecution. In affirming judgment for the defendant, the court declared that it is for the best interests of the community as a whole to protect a peace officer from harassment in the investigation of crime and in initiating criminal proceedings. "The efficient functioning of our system of law enforcement is dependent largely upon the investigation of crime and the accusation of offenders by properly trained officers. A breakdown of this system at the investigative or accusatory level would wreak untold harm. 'Criminal law does not enforce itself. It demands the assistance of valid evidence and fearless officials to put it in execution. Because of their tendency to obstruct the administration of justice, it is the policy of the law to discourage actions for malicious prosecution.' Watts v. Gerking, 111 Or. 641, 669, 222 P. 318, 228 P. 135, 141, 34 A.L.R. 1489." White v. Towers, 37 Cal.2d 727, 730, 235 P. 2d 209, 211. Not to grant immunity against civil liability to a peace officer acting within the scope of his authority for the arrest and detention of a person reasonably suspected of a felony would be to "place every honest law enforcement officer under an unbearable handicap and would redound to the detriment of the body politic." Ibid, 37 Cal.2d at page 730, 235 P.2d at page 211. The public welfare requires that the decision of the peace officer to make an arrest shall be free of all fear of personal liability. Phelps v. Dawson, 8 Cir., 97 F.2d 339, 340, 116 A.L.R. 1343. In the case last cited, Dawson was deputy fire marshal and as such had the duty to investigate fires. It has also been held that a member of the Federal Bureau of Investigation is cloaked with immunity.

Cooper v. O'Connor, 69 App.D.C. 100, 99 F.2d 135, 140, 118 A.L.R. 1440. In the Cooper case it was said: "The administration of criminal justice would be impossible without the active participation of public officials."

Appellant contends that he stated a cause of action for false imprisonment by his allegation that his arrest was made without a warrant and that he was imprisoned to his damage, citing Hughes v. Oreb, 36 Cal.2d 854, 228 P.2d 550. Ordinarily such declarations would impose upon a defendant the burden of showing that the arrest was justified. In the pleading at bar, however, the justification for the arrest is alleged explicitly by the allegation that defendants had not only arrested and imprisoned him without warrant but had stated to news reporters that he was being held for suspicion of conspiracy to commit murder, that the plaintiff was a member of a criminal gang, a mobster, etc.

[10, 11] With such an allegation deemed to be true, how can it be said that there was not probable cause for the arrest? If defendants believed that appellant had conspired to do a murder; if they believed that he belonged to a criminal gang and if they believed that an arsenal of firearms had been found in his home, they would have been grossly derelict not to detain him under arrest until they had determined their finding was error, notwithstanding his protestations of innocence. Michel v. Smith, 188 Cal. 199, 208, 205 P. 113, 117. In that case, the arrest of Mr. Michel was grossly unjust, but the arresting officers were without malice. They were endeavoring to perform their duties as members of the "war squad" of the police department. "The law of the country imposed upon them a public duty, for public purposes. They were punishable for neglect of duty, if they neglected to act in a case where there was sufficient or probable cause for acting. * * * It is not only proper for the court, but by the wisdom of the sages of the law the courts are directed to give great latitude in the review of the acts of such officers." Great latitude must be allowed for misapprehension or mistakes if the arresting officer is sincerely serving the welfare of the state. Ibid. Such officer is not required first to have established the certainty of his information relative to a suspect before making an arrest. His justification depends primarily upon the nature and amount of the evidence in his possession when he acts. Whether he acted lawfully in making an arrest is not to be determined by the actual situation as later disclosed, but upon whether his knowledge at the time of the arrest was sufficient to persuade a reasonable person to believe such knowledge was true. People v. Kilvington, 104 Cal. 86, 93, 37 P. 799; Kerr v. O'Keefe, 138 Cal. 415, 422, 71 P. 447.

Appellant had gained the soubriquets of "mobster" and "member of a criminal gang" according to the information of respondents. Such epithets applied to any person imposes upon the law-enforcing agencies of any community where the suspect sojourns the duty of ascertaining the latter's status. If, in conducting an investigation of such a party, it be not determined that he is innocent, it is incumbent upon the investigating officers to continue their labors, even to the point of arresting the subject. Inasmuch as the primary function of government is to render security to its people, " 'any mischief menacing that security demands a remedy commensurate with the evil.' " Lanzetta v. New Jersey, 306 U.S. 451, 455, 59 S.Ct. 618, 620, 83 L.Ed. 888.

[12, 13] Appellant's assignment as prejudicial the action of the court in sustaining respondents' objection to the introduction of any evidence when the case was called for trial inasmuch as a demurrer could have served the same purpose is without merit. A fatal vice in a pleading may be urged at any time. Code Civ.Proc. § 434; Fried v. Municipal Court, 94 Cal.App.2d 376, 378, 210 P.2d 883.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

131 Cal.App.2d 515

Viola M. Kennedy BARNES, Plaintiff-Respondent,

v.

Florence PERSSON and Dorothy Newell, Defendants,

Paul Mintz, Defendant-Appellant.

Civ. 20211.

District Court of Appeal, Second District, Division 2, California.

March 15, 1955.

Action by purchaser against vendor, tenant, and realty broker for fraud regarding amount of rental income of the realty. The Superior Court, Los Angeles County, Frederick F. Houser, J., in trial before court without jury, entered judgment for purchaser, and broker appealed. The District Court of Appeal, McComb, J., held that realty broker's representation, which falsely stated that rental received for property sold to plaintiff was $625 per month, and which was made for purpose and intent of deceiving plaintiff who relied thereon, was, for purpose of establishing fraud, a misrepresentation of a material fact.

Affirmed.

1. Fraud ⇐18

Realty broker's representation, which falsely stated that rental received for property sold to plaintiff was $625 per month, and which was made for purpose and intent of deceiving plaintiff who relied thereon, was, for purpose of establishing fraud, a misrepresentation of a material fact.

2. Fraud ⇐58(4)

In action by purchaser against vendor, tenant, and realty broker for fraud regarding amount of rental income of the realty, evidence was sufficient to establish an inducing misrepresentation, on part of broker, concerning rent payable.

3. Fraud ⇐30

Where realty broker was personally guilty of overt acts which, as to purchaser of realty, constituted actionable fraud in regard to amount of rental income of the realty, fact that tenant was not broker's agent would not preclude recovery by purchaser against broker for such fraud.

4. Fraud ⇐58(1)

In action by purchaser against vendor, tenant, and realty broker for fraud regarding amount of rental income of the realty, evidence was sufficient to establish fraud on part of broker.

5. Fraud ⇐59(1)

Where realty broker's representation to purchaser concerning amount of rental income of realty purchased was false and induced purchaser to enter into contract of purchase, fact that exact amount of rent received from the realty was not found by trial court would not preclude recovery from broker by purchaser.

6. Trial ⇐397(5)

Where, in trial to court without jury, findings cover material issues raised by complaint and support judgment, it was immaterial that trial court failed to make findings on other issues.

7. Trial ⇐18

Where counsel for defendant and all other counsel agreed that matters should proceed without returning to the calendar department and, thereafter, broker was substituted in propria persona for his attorney after trial judge was satisfied that broker knew effect thereof, broker's constitutional rights to a fair trial were not violated.

S. L. Kurland, Los Angeles, for appellant.

Ezra Neff and William T. Brandlin, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for fraud and misrepresentation, defendant Mintz alone appeals.

Facts: Plaintiff purchased from defendant Florence Persson two pieces of real estate located in the City of Los Angeles, at 915–919 South Kingsley Drive, improved with eight and nine room houses respectively, and the furniture, fixtures and equipment located therein.

Plaintiff agreed to purchase all the property for $32,000. At the time the property was purchased it was leased to defendant Dorothy Newell. Defendant Paul Mintz was a real estate broker with whom the property was listed for sale.

The trial court found:

"VII. That it is true that during said negotiations and prior to said 8th day of December, 1950, defendants Florence Persson (now known as Florence Persson Gilbert), Paul Mintz and Dorothy Newell represented to the plaintiff that under the lease upon said premises hereinabove referred to, defendant Dorothy Newell, as lessee, was paying to defendant Florence Persson * * *, as lessor, and had been paying for many months prior to said date, the sum of $625 each month as rental and that at the time of said negotiations the income derived from said lease by said lessor was $625 per month and that said rent at the time of the sale by the defendant Florence Persson and immediately preceding said sale, was not delinquent.

"VIII. That it is true that each and all of the representations so made by said defendants Florence Persson * * *, Paul Mintz and Dorothy Newell to the plaintiff and particularly described in the foregoing paragraph hereof were false and untrue.

"XII. That each and all of said representations so made by said defendants Florence Persson * * *, Paul Mintz and Dorothy Newell and each and all of them, to the plaintiff, hereinabove found to have been made, were false and untrue and were known by said defendants so making them to be false and untrue at the time same were made and that said representations were so made to the plaintiff by the said defendants with the purpose and intention of deceiving the plaintiff and with the object of having her rely upon same and act upon same in the purchase of said real and personal property, including the lessor's interest in the above described lease hereinabove described as the subject of said sale, and plaintiff did, in fact rely upon said representations so made to her by said defendants and, in pursuance of her said reliance thereon, acted upon same and purchased said real and personal property as hereinabove found, and all of said representations so made to the plaintiff by said defendants were and are material to the transaction entered into by the plaintiff and defendant Florence Persson * * * and the sale so consummated as a result of said escrow hereinabove referred to and were intended by all of said defendants to induce the plaintiff to enter into said transaction and to facilitate the consummation of said sale."

Defendant Mintz contends:

First: *There was no fraud in fact for there was no misrepresentation of any material fact made by him to plaintiff.*

[1] This contention is devoid of merit. Finding XII, supra, expressly found that the representations that the rental received for the property which was sold was $625 per month was false and untrue; that said statement was made by Mr. Mintz with a knowledge that the same was not true and was made for the purpose and intent of deceiving plaintiff, and plaintiff in fact relied upon such statements and predicated upon such reliance entered into the agreement to purchase the property involved.

It needs no argument to support the theory that in view of such finding the statements were material to the transaction.

Second: *The only finding of fraud cannot be sustained because (a) there was no inducing misrepresentation concerning the rental payable by defendant Newell to Mrs. Barnes; and (b) defendant Mintz was not the agent of defendant Newell.*

This contention is likewise devoid of merit. Mrs. Barnes testified as follows:

"Q. Was there anything else said in this first interview or conversation with Mrs. Newell? A. Yes.

"Q. What was said? A. I said that it looks like it was a good business and she said yes, it was a good business.

"Q. Was anything else said? A. And I asked her if she would mind telling me how much rent she got for it, had to pay, and she said $625 a month.

"Q. Was there any other conversation? A. And I asked her then who took care of the keeping up of the two houses and

the expense of the interior and upkeep of the two houses, and she said that she had the upkeeping to do, and that I had, or whoever bought it would have three items to take care of which was the insurance, taxes, and the upkeep of the roof.

"Q. Was there anything else said at that time? A. I asked her then if she got a sufficient fund to take care of the expenses of both of these houses and still pay me if I bought it, $625 a month, and she said she got ample income from the property to take care of both of these places and pay $625 a month and still have plenty to take care of she and her children.

"Q. By Mr. Brandlin: Do you understand the question, Mrs. Barnes? A. Yes, I understand that. Shall I proceed?

"Q. If you would, please. A. Well, I went in and talked to Mr. Mintz and asked him to explain and tell me more about the operation of this child-mothers boarding, rooming house on Kingsley Drive, and he said he would be very happy to tell me. He told me he'd be very happy to tell me anything I wanted to know about it, and so I started in asking him questions as Mrs. Newell had told me, what the rents were. I had inquired of that since I was over there and had permission to do so. I inquired as much as I could about it because I wanted to really see what it was before I entered into the business part of it, and he told me that it was a good income, good lease and brought in $625 in rent, and also was sufficient income to take care of the interior and everything that Mrs. Newell was supposed to take care of in the lease which he showed me later. And he also told me that I was to take care of the three items; of taxes and insurance and the roofing and—

"Q. Was there anything else said at this time, Mrs. Barnes, with reference to the purchase and sale of this business? A. He told me that Mrs. Newell had been paying $625 a month rent, it had been reduced down to $625. It had been $700, and that I asked him then if he thought that if I bought the property that there would be any danger of this property not making $625 in rent and being able to pay all these expenses besides and he said no, there wasn't any chance of it. They had been in business for eight or ten years and that always it had been a paying business. He didn't think there was any chance of their ever falling through.

"Q. By Mr. Brandlin: Who was present at this conversation? A. Mr. Barnes and Mr. Mintz.

"Q. What was said at this conversation? A. Well, the business did bring in $625. I wanted him to assure me that that was proper, that it did bring in $625 to the owner above all expenses except what the owner had to pay on insurance and taxes and roofing, and he told me it was a good business, that he assure me 'it was a good lease, and everything connected to it was a good enterprise.' "

[2, 3] Clearly this testimony supported the trial court's finding that Mrs. Barnes was purchasing the property as income property and that she wanted to be assured that she would derive the income from it which they represented it was making. It is likewise evident that it is immaterial that defendant Newell was not the agent of defendant Mintz for the reason that the trial court found, supported by substantial evidence, that defendant Mintz was personally guilty of overt acts constituting actionable fraud.

Third: *The findings of fraud do not support the judgment against defendant Mintz.*

[4] This contention is not tenable. Defendant claims that there is not a single word in the transcript that defendant Mintz made the statement that the rental for the past several months received from defendant Newell was the sum of $625. The record discloses that defendant Mintz testified thus:

"Q. Did you tell Mrs. Barnes that the lessor was receiving $625 a month? A. Yes, I did.

"Q. And had been receiving that sum for several months; is that correct? A. Yes, I did.

"Q. And did you examine the books to determine that? A. No, I did not."

The foregoing testimony is of course directly contradictory of the statement in his brief.

Fourth: *The trial court failed to find on material issues raised by the complaint for the reason that there is no finding as to the exact amount of rent which was received under the lease.*

This contention is not sound because the issue was whether defendant Mintz had represented that the rental from the property was $625 per month when in fact it was not. The trial court met this issue squarely by its findings VII, VIII and XII, supra.

[5, 6] Since the representation was false and induced plaintiff to enter into the contract it is immaterial as to the exact amount of rent that was received from the rental of the premises. Since the findings cover the material issues raised by the complaint and support the judgment it is immaterial that the trial court failed to make findings upon other issues. (French v. Smith-Booth Usher Co., 56 Cal.App.2d 23, 26 [3].)

Fifth: *Defendant was deprived of his constitutional rights for a fair trial.*

[7] This objection is not well taken. At the inception of the trial defendant Mintz was represented by an attorney; the court advised counsel that on a certain date if the case was not concluded, the court would probably declare a mistrial. This was because the court acting to regulate its own calendar, demanded assurance that the case would be completed by a certain date. At such time the court inquired whether or not all counsel were willing to proceed or whether the case should be returned to the master calendar department for transfer to another judge. All counsel agreed that the matter should proceed without returning to the calendar department.

Thereafter defendant Mintz was substituted *in propria persona* for his attorney. After a lengthy discussion the trial judge was satisfied that Mr. Mintz knew the seriousness of proceeding without an attorney, and stated to said defendant, among other things, that the attorneys for Mrs. Barnes and Mrs. Newell would not protect his interest in the event there was a conflict in his interest and that of the other defendants. After this explanation defendant Mintz freely and voluntarily consented to the substitution.

From the foregoing it is clear that none of defendant's constitutional rights were violated.

Affirmed.

MOORE, P. J., and FOX, J., concur.



131 Cal.App.2d 343

Hilda S. LILIENTHAL, Plaintiff-Appellant,

v.

HASTINGS CLOTHING COMPANY, a corporation, American Building Maintenance Company, a copartnership, Theodore Rosenberg, individually and as a copartner thereof, American Building Maintenance Company, a corporation, et al., Defendants-Respondents.

Civ. 16235.

District Court of Appeal, First District, Division 1, California.

March 8, 1955.

As Modified on Denial of Rehearing April 7, 1955.

Hearing Denied May 4, 1955.

Action by customer against store owner and store owner's maintenance contractor for personal injuries suffered in fall on waxed floor in store. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., gave judgment for store owner and maintenance contractor. Customer appealed. The District Court of Appeal, Fred B. Wood, J., held that erroneous instructions that one assumes the risk when she knows or in the exercise of ordinary care would know that danger exists, and that a prerequisite of assumption of risk is that the person in question must have actual knowledge of the danger, or the condition must be such that she would have such knowledge if she exercised ordinary care, were not rendered harmless by subsequent instruction that if jury believed that customer freely, voluntarily and knowingly exposed herself to the danger she assumed the risk.

Judgment reversed.

See also 123 Cal.App.2d 91, 266 P.2d 56.

1. Trial ⇐296(6)

In action by customer against store and store's maintenance contractor for personal injuries suffered in fall on waxed floor in store, erroneous instructions that one can assume the risk without actual knowledge of the danger if ordinary care would disclose that a danger exists, were not rendered harmless by subsequent instruction.

2. Negligence ⇐141(3)

In action by customer against store owner and store's maintenance contractor for personal injuries suffered in fall on waxed floor in store, erroneous instruction on assumption of risk did not serve as instruction on contributory negligence as both negligence and proximate cause were questions of fact in the case, and instruction on assumption of risk did not cover issue of proximate cause.

3. Appeal and Error ⇐878(2)

Where store owner did not appeal from judgment in its favor in action by customer against store for personal injuries suffered in fall in store, store owner could not present, as an issue on appeal, trial court's refusal to grant store owner's request for instruction on contributory negligence.

4. Appeal and Error ⇐882(12)

In action by customer against store and store's maintenance contractor for personal injuries suffered in fall on waxed floor in store, request by customer for instruction defining actual and constructive notice was not an invitation of subsequent error in instructing that one assumes the risk when she knows, or, in the exercise of ordinary care, would know that a danger exists, and did not preclude customer from complaining of such erroneous instruction. West's Ann.Civ.Code, § 18.

5. Trial ⇐296(6)

In action by customer against store and store's maintenance contractor for personal injuries suffered in fall on waxed floor in store, instruction requested by customer that in the absence of reasonable grounds to think otherwise, customer could assume that persons owing her duty would perform that duty, did not bear on assumption of the risk, and did not nullify error in court's instructions on assumption of risk.

6. Trial ⇐296(6)

In action by customer against store and store's maintenance contractor for personal injuries suffered in fall on waxed floor in store, instruction requested by customer that if maintenance contractor was negligent, and such negligence was an efficient cause of the injury, verdict should be for customer even if negligence of some third person concurred to produce the injury, had no effect on court's erroneous instruction on assumption of the risk, and could not render such erroneous instruction harmless.

7. Appeal and Error ⇐1064(1)
Negligence ⇐138(2)

In action by customer against store and store's maintenance contractor for personal injuries suffered in fall on waxed floor in store, where evidence showed store owners had decided to change brand of wax used on floor because of complaints of slipperiness, instruction that failure to use a different brand of wax on floors of store would not impose liability unless it appeared that accident would not have happened had such brand been used, placed burden on customer to prove that accident would not have happened if a different brand wax had been used, and was prejudicial.

8. Negligence ⇐32(1)

A store owner does not discharge his full duty toward a business invitee by delegating care of the premises to an independent contractor.

9. Master and Servant ⇐332(4)

In action by customer against store and store's maintenance contractor for personal injuries suffered in fall on waxed floor in store, instruction that if a person does work for another as an independent contractor, then person for whom work was done is not responsible or liable for

any act done by such independent contractor was erroneous.

10. Appeal and Error ⇐1064(1)

In action by customer against store and store's maintenance contractor for personal injuries suffered in fall on waxed floor in store, that jury exonerated maintenance contractor did not render instruction that person for whom work was done by independent contractor is not responsible for any act done by independent contractor harmless, where jury could have exonerated maintenance contractor because they found customer assumed the risk, under another erroneous instruction.

11. Trial ⇐295(1)

On appeal from judgment in favor of store owner and store's maintenance contractor in action by customer for personal injuries suffered in fall in store, District Court of Appeal considered not only specific errors in instructions, but also cumulative effect of all errors, conflicts and confusion appearing in charge as a whole.

12. Trial ⇐296(3)

Where court erroneously instructed that person for whom work is done by an independent contractor is not responsible for any act done by such independent contractor, court's later instruction that store owner could not contract away any of its duties with reference to maintenance of the store's premises did not render erroneous instruction harmless.

Sloss & Eliot, Elmer P. Delany, San Francisco, for appellant.

Bronson, Bronson, & McKinnon, San Francisco (for Hastings Clothing).

Bledsoe, Smith & Cathcart, Dana, Bledsoe, Smith, San Francisco (for American Bldg. Maint. Co.).

FRED B. WOOD, Justice.

In this action for personal injuries sustained when plaintiff, an invitee at a retail store, slipped and fell on a waxed floor, verdict was for the defendants. Plaintiff-appellant claims reversible error in the giving of instructions and the admission of evidence.

(1) *Instructions on assumption of risk, given at the request of one of the defendants, included the text of Nos. 207 and 207–B of B.A.J.I., third revised edition, 1943.* As such, they informed the jury that one assumes a risk when she knows "or in the exercise of ordinary care would know" that a danger exists and voluntarily places herself or remains within the area of danger (No. 207) and that one of the two prerequisites to assumption of risk is that the person in question must have actual knowledge of the danger "or the conditions must be such that she would have such knowledge if she exercised ordinary care" (No. 207–B).

These instructions were in general use at the time of the trial, June, 1951. A few months later they were specifically disapproved by the Supreme Court in Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 384–385, 240 P.2d 580, holding the above-quoted portions improper upon the ground that the doctrine is based upon the theory of voluntary acceptance of risk, which requires actual knowledge of the risk and that "where it merely appears that a person could or should have discovered the danger by the exercise of ordinary care, the defense is not assumption of risk but contributory negligence." 38 Cal.2d at page 385, 240 P.2d at page 585; followed in Prescott v. Ralph's Grocery Co., 42 Cal.2d 158, 161–162, 265 P.2d 904; Erde v. City of Los Angeles, 116 Cal.App.2d 565, 568–569, 254 P.2d 110; Plotts v. Albert, 120 Cal.App.2d 105, 106–107, 260 P.2d 621.

[1] Defendant Hastings Clothing Company admits the error but claims it was not prejudicial. Instructions 207 and 207–B were immediately followed by three sentences on the subject, one of which told the jury that if it believed from the evidence that the plaintiff "freely, voluntarily and knowingly exposed herself to a danger," she is said to have asumed the risk. This use of the word "knowingly", says the defendant, told the jury that actual knowledge was required and wiped out the erroneous instruction or reduced its effect to a negligible quantity. We do not so view it. The word "knowingly", in the context of all the instructions given on

the subject, is consistent with, does not negative, the advice given in the forepart of these instructions that the doctrine applies if a person has "actual knowledge" or "would have such knowledge if she exercised ordinary care." Moreover, if the word "knowingly" denoted *actual* knowledge only, we would have two inconsistent instructions and no means of determining which one of them the jury followed. See Gillette v. City and County of San Francisco, 41 Cal.App.2d 758, 765, 107 P.2d 627. We have examined Loeb v. Kimmerle, 215 Cal. 143, 156, 9 P.2d 199, Wells v. Lloyd, 21 Cal.2d 452, 457–459, 132 P.2d 471 and Nickell v. Rosenfeld, 82 Cal.App. 369, 377, 255 P. 760, invoked by defendant, but do not deem them applicable here.

[2, 3] Defendant also argues that the erroneous parts of these instructions in effect presented the issue of contributory negligence to the jury. The answer is that the trial court refused defendant's request for, and gave no instructions on, contributory negligence. Defendant, not having appealed, is in no position to present that as an issue. See Hudgins v. Standard Oil Co., 136 Cal.App. 44, 48–49, 28 P.2d 433. Also, the instructions on assumption of risk could not have served as instructions on contributory negligence; e. g., they told the jury that assumption of risk will bar recovery "although it plays no part in causing the accident except merely to expose the person to the danger." In this connection, defendant suggests that here the element of proximate cause is supplied as a matter of law. It cites Lorry v. Englander Drayage etc. Co., 108 Cal.App. 116, 291 P. 467, and Reeves v. Lapinta, 25 Cal.App.2d 680, 78 P.2d 465, but those cases are not apt. They involve negligence as a matter of law, stemming from the violation of a statute or ordinance. Here both negligence and proximate cause are questions of fact.

[4] Defendant Hastings further claims that plaintiff invited the error by an instruction which she requested and the court gave. We are not persuaded. That instruction was couched in the terms of section 18 of the Civil Code defining actual and constructive notice and declaring that the latter is binding in the same manner as actual notice. Thereby, says the defendant, the "should have known" element was imported into the instructions as a whole and the jury told that "imputed" knowledge was sufficient for assumption of risk. That imputed knowledge instruction immediately followed an instruction which dealt with the defendants' liability for permitting a dangerous condition to continue if they knew or should have known of it. That imputed knowledge instruction, proper in its context, was not an invitation to error in the seven paragraphs of instructions, several pages later on, which dealt with assumption of risk.

[5, 6] Defendant speaks of two of plaintiff's instructions as having nullified the error. One of them was to the effect that "in the absence of reasonable grounds to think otherwise" plaintiff could assume that the persons owing her a duty would perform that duty. Defendant says that in offering this instruction plaintiff knew she might be chargeable with knowledge that the duties would not be performed. The quoted portion is an exception in a sentence dealing with negligence on the plaintiff's part; at most it would seem to bear upon one of the elements of contributory negligence, not assumption of risk. The other "nullifying" instruction was to the effect that if the building maintenance company was negligent and such negligence was an efficient cause of the injury, the verdict should be for the plaintiff, even if the negligence of some third person concurred to produce the injury. This instruction, says the defendant, allowed recovery even though plaintiff was not free from fault or from notice or knowledge concerning the condition of the floor; hence, it eliminated the possibility of prejudice to plaintiff from the "should have known" feature of the assumption of risk instruction. That is specious reasoning. The instruction invoked by defendant deals merely with the effect of the concurring negligence of a third person. It has no nullifying or other effect or bearing upon the 7 paragraphs of instructions on assumption of risk.

(2) *Plaintiff claims that certain instructions relative to the type of wax used on the floor were prejudicially erroneous.*

Sanilac was in use at this store, Hastings' Market Street store. There was evidence that the floor, so treated, had been the scene of numerous slips and falls; several of the store's executives had received complaints and had referred to it as a dangerous condition; decision to use Johnson's wax had been made and a supply of Johnson's wax had been delivered to the store; but Sanilac continued to be used.

[7] One of the instructions, given at the request of the defendant building maintenance company, told the jury that the mere fact of failure to use Johnson's wax would not impose liability "unless it appears * * * that the accident * * * would not have happened had such Johnson's wax been used." That improperly put upon plaintiff the burden of proving that the accident would not have happened if Johnson's wax had been used. See Stockwell v. Board of Trustees, 64 Cal.App.2d 197, 205–206, 148 P.2d 405; Lindsey v. De Vaux, 50 Cal.App.2d 445, 454–455, 123 P.2d 144; Rovegno v. San Jose Knights of Columbus Hall Ass'n, 108 Cal.App. 591, 596–597, 291 P. 848.

(3) *Plaintiff claims prejudicial error in the giving of the store owner's instruction concerning its liability if the maintenance work were done by an independent contractor.*

[8, 9] The questioned instruction included the following advice: "If a person does work for another, as an independent contractor, then under the law the person for whom the work was done is not responsible or liable for any act done by such independent contractor."

In many cases that would be a correct statement, but not in this case. A store owner does not discharge his full duty toward business invitees by delegating care of the premises to an independent contractor. "It is well settled that the possessor of land is answerable for the negligent failure of an independent contractor to put or maintain buildings and structures thereon in reasonably safe condition." Knell v. Morris, 39 Cal.2d 450, 456, 247 P.2d 352, 355. See also Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 260, 143 P.2d 929; McCordic v. Crawford, 23 Cal.2d 1, 142 P.2d 7; Restatement of the Law of Torts, § 422.

[10] Defendant says this was not prejudicial; that the jury exonerated the maintenance company and so impliedly held it non-negligent. We might so infer if there were no other question in the case. For aught we know the jury may have found that plaintiff assumed the risk, following the erroneous instruction upon that subject.

[11] In Brown v. George Pepperdine Foundation, supra, 23 Cal.2d 256, 260, 143 P.2d 929, 930, of an argument that similar erroneous instructions could not have been prejudicial because the jury exonerated the independent contractor, the court made this significant comment: "In considering the propriety of the court's action in granting a new trial we are to be governed, however, not alone by the error in instructions Nos. 49 and 56 but by the cumulative effect of all errors, conflicts and confusion that appear in the charge as a whole." That governing principle applies here.

[12] Later on, the court gave an instruction that the store owner could not contract away any of its duties with reference to maintenance of the premises. That, we think, did not cancel out the erroneous instruction. It presented the jury with the problem of which instruction to follow.

(4) *Plaintiff's remaining point relates to defendants' evidence of use of Sanilac floor wax in numerous other buildings in the San Francisco Bay area, with lack of reports of people slipping or falling.* That evidence went in during a day of the trial which is not reported, the reporter's notes thereof having been lost. Although an attempt has been made to reconstruct the record, the parties do not appear in complete agreement in every respect as to all the details of what happened. For that reason and for the reason also that our conclusions upon the other issues (un-

affected by the gap in the reporter's transcript) render a determination of this question unnecessary, it is well that we refrain and we do refrain from undertaking such a determination.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.



131 Cal.App.2d 448

Saragosa GARCIA, Plaintiff and Respondent,

v.

Kathleen B. WEBB, Defendant and Appellant.

Civ. 20492.

District Court of Appeal, Second District, Division 1, California.

March 14, 1955.

Action was brought against motorist by pedestrian, who jumped on running board of automobile to avoid being crushed between automobile and fence, to recover for injuries sustained in fall from running board when motorist came to a sudden stop. The Superior Court of Los Angeles County, Stanley Mosk, J., entered judgment for pedestrian, and motorist appealed. The District Court of Appeal, White, P. J., held that question whether pedestrian was contributorily negligent was for the trier of the facts.

Judgment affirmed.

Automobiles ⇐245(72)

In action against motorist by pedestrian, who jumped on running board of automobile to avoid being crushed between automobile and fence, to recover for injuries sustained in fall from running board, when motorist came to a sudden stop, question whether pedestrian was contributorily negligent in jumping onto running board was for trier of facts. Vehicle Code, §§ 596.4, 596.5; Pen.Code, § 26, subd. 6.

P. E. Cavaney, Los Angeles, for appellant.

Harry Gold, Hyman Gold, Santa Monica, for respondent.

WHITE, Presiding Justice.

Mrs. Kathleen B. Webb has appealed from a judgment against her for $1,500 general damages and $271 special damages awarded to plaintiff because of personal injuries sustained by him.

Briefly, the facts found by the court in support of the judgment are as follows: About noon on October 11, 1950, plaintiff Saragosa Garcia was walking in a westerly direction along Sage Lane Street near the south edge thereof. There was no sidewalk. Defendant drove her automobile also in a westerly direction on the south and left side of the street directly toward plaintiff so as to create an imminent peril to his safety and plaintiff jumped upon the running board of defendant's automobile to prevent being crushed between defendant's automobile and a fence on the south and left edge of Sage Lane Street. Defendant increased the speed of the car and drove at about 20 to 25 miles per hour for about 300 feet and then without warning suddenly applied the brakes causing plaintiff to be violently thrown from said automobile and hurled to the ground. Plaintiff was injured in the fall. Defendant was intoxicated at the time. Plaintiff acted with due care and prudence and without negligence on his part and his injuries were the direct and proximate result of the negligence of defendant.

Appellant urges that the judgment should be reversed for the reasons that the findings and judgment are not supported by the evidence; that plaintiff violated sections 596.4 and 596.5 of the Vehicle Code of California; and that his said violations of the Vehicle Code constituted contributory negligence upon his part as a matter of law.

There is no dispute as to plaintiff's injuries or the reasonableness of the amount of damages awarded to him.

Defendant has cited no evidence of any interference with her operation and control of her automobile in violation of Section 596.4 of the Vehicle Code.

Section 596.5 of the Vehicle Code provides: "No person shall ride * * * on any vehicle upon any portion thereof not designed or intended for the use of passengers. * * *" However, a person who does a prohibited act "through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence" is not guilty of violating the law. Penal Code, section 26(6).

According to the testimony of defendant, herself, she had had "two bourbons" before the accident and she had pleaded guilty to driving in an intoxicated condition at that time. The following is quoted from her testimony:

"Q. Did you crowd him against the fence at that time? A. There is a lot of shrubbery here, I mean weeds and things, not shrubbery, weeds.

"Q. Did you hear Mr. Garcia testify that you crowded him against the fence? A. I didn't crowd him against the fence.

"Q. How much room did he have between your automobile and the fence? A. Well, a couple of feet, anyway.

* * * * * *

"Q. What gear were you operating in at that time? A. I was in second; I might have gone in high. I don't remember. It is a long time ago. You have to start in second. It is an old car and it doesn't—

"Q. What did you do then when you arrived at your garage? A. I parked.

"Q. Did you stop your car? A. Yes.

"Q. Was Mr. Garcia on your car when you stopped it? A. Yes.

"Q. When did he get off, if he did, at any time? A. At the garage.

"Q. After you stopped or before you stopped? A. Well, when I stopped.

"Q. He got off? A. He fell off.

* * * * * *

"Q. Then when did he fall down? A. As I stopped.

"Q. Did you stop your car suddenly? A. Not any more than I usually do."

In the light of defendant's own testimony that her automobile was "a couple of feet" from the fence on the left side of the street, "possibly" in high gear, with a lot of weeds and the plaintiff then between the automobile and the fence, it appears most likely that plaintiff did not voluntarily get on, ride on, or get off the running board of her automobile. Indeed, it can scarcely be doubted that in the presence of imminent peril plaintiff took what seemed to him the least dangerous course.

"The violation of a statute or ordinance which proximately contributes to the injuries is presumptively an act of negligence unless the act or omission was justifiable or excusable under the circumstances. Mora v. Favilla, 186 Cal. 199–207, 199 P. 17; Shearman & Redfield on Negligence, 6th Ed., § 467." Scalf v. Eicher, 11 Cal.App.2d 44, 54, 53 P.2d 368, 373.

"* * * 'the issue as to whether the circumstances were such as to excuse violation' should be left to the trier of the fact." Where such violation results "'"from causes or things beyond the control of the person charged with the violation"',' such violation is not negligence as a matter of law. Ornales v. Wigger, 35 Cal.2d 474, 480, 218 P.2d 531, 535; Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 590, 177 P.2d 279.

Under the circumstances disclosed by the record on the appeal now engaging our attention, plaintiff's riding on the running board of defendant's automobile was not contributory negligence as a matter of law.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

131 Cal.App.2d 393

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Porfirio Gonzales CUEVAS and Gregory Arthur Villalva, Defendants,

Gregory Arthur Villalva, Appellant.

Cr. 5277.

District Court of Appeal, Second District, Division 2, California.

March 10, 1955.

Prosecution for illegal possession of marijuana. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction, and an accused appealed. The District Court of Appeal, Moore, P. J., held that testimony of arresting officer that when he entered room where accused and codefendant were found, accused was running his hands through marijuana plants was sufficient corroboration of admission of accused that he was helping codefendant manicure marijuana and get it ready to roll, to make such admission sufficient to support conviction.

Judgment affirmed.

1. Criminal Law ⇐409

Admissions retold on trial are of same character as confessions and require corroboration before they are sufficient to support conviction.

2. Criminal Law ⇐409

Corroborative evidence is sufficient to support conviction based upon admission if it touches the corpus delicti in the sense of the injury against whose occurrence the law is directed, and is of a type which goes to fortify the truthfulness of the confession.

3. Criminal Law ⇐409

Evidence of inculpatory participation need not be direct nor is it required to extend to every detail of the accused's crime to be corroborative of accused's admission.

4. Criminal Law ⇐409

Corroborative evidence need not be sufficient, aside from the admission sought to be introduced, to establish the corpus delicti, but it is necessary that the state introduce substantial independent evidence which tends to establish the trustworthiness of the admission before admission is sufficient to support conviction.

5. Criminal Law ⇐406(1)

In prosecution for illegal possession of marijuana, testimony of arresting officer that when he entered room where accused and codefendant were found, accused was running his hands through marijuana plants was sufficient corroboration of admission of accused that he was helping codefendant manicure marijuana and get it ready to roll, to make such admission competent.

6. Poisons ⇐4

To extent that a guest is to imbibe, smoke, or otherwise consume or use merchandise, the guest is a "possessor" of the commodity under statutes forbidding possession of such commodity. Health and Safety Code, § 11500.

See publication Words and Phrases, for other judicial constructions and definitions of "Possessor".

7. Poisons ⇐4

Where accused charged with illegal possession of marijuana, was found in another's room running his hands through marijuana plants, and admitted he was manicuring marijuana preparing it to roll, accused had physical control of marijuana, and was a possessor of it. Health and Safety Code, § 11500.

8. Poisons ⇐4

In prosecution for illegal possession of marijuana, where accused was found with marijuana in his hands, that marijuana was not found in accused's room, but was in another's room, and had been brought there by accused's codefendant was no defense. Health and Safety Code, § 11500.

9. Poisons ⇐4

Exclusive possession need not be shown where two or more parties are jointly charged with illegal possession of narcotics. Health and Safety Code, § 11500.

10. Poisons ⇐9

Conviction for illegal possession of narcotics, was supported by substantial evidence. Health and Safety Code, § 11500.

11. Criminal Law ⇐1159(2)

That evidence might also reasonably be reconciled with innocence of an accused will not justify a reversal.

Ernest Best, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

From a judgment convicting him of having violated the statute which forbids any person to possess a narcotic, Health and Safety Code, § 11500, except upon the written prescription of a person licensed to prescribe same, appellant brings his cause here for review. He maintains that the conclusion of the trial court is not justified by the evidence.

The Total Evidence.

Defendant Cuevas had for about a year operated a hotel of thirty rooms in Los Angeles. Gregory Villalva was a guest, and had been so for three months prior to the events here related. He worked in the daytime. On the day of his arrest, he arrived at his room about 4:30 p. m., bathed and dressed to go out for dinner. On leaving his room, he met Cuevas who told him they were "invited for a few drinks upstairs." They went to a room where three girls were serving whiskey. They drank the liquor as they listened to the radio. After having satisfied his bibulous thirst, Cuevas told his companion that he had found a shopping bag in the trash can in the alley with something green in it, something like grass and would like to know whether it could be marijuana. The reply was, "I don't know unless I look at it. I had a previous arrest and I might help if it is marijuana." After running his hands through it and taking "a handful out" of the bag, appellant told Cuevas it was marijuana. He testified: "As I was running my hands through it, the officer walked in; I was not using it; it was not in my possession; it was not my room. When I entered the room it was already there."

The drinking party was in room 16. It was registered to a girl named Mickey who with her sister Carmen and a third girl, stranger to appellant, served the liquor. The marijuana was in the shopping bag at all times so far as appellant knew. He scraped some of it out, smelled it, and told Cuevas what it was. As he dropped the sample into the bag "perhaps some of it fell to the floor." He told Cuevas it might not be good; might as well get rid of it. He did not smoke any of it. Just as appellant observed the rain and that he could not go out, one of the girls departed through the door and the officers entered.

Although there were cigarette papers in the shopping bag, appellant did not touch them.

The only witness from whose testimony the court could have inferred possession by appellant was Officer Cook who testified as follows: "The door was open; I walked in and over to Cuevas; took his cigarette out of his mouth; on the table were two packages of green leafy material; two piles of it. Villalva was seated beside the table which had the piles of green leafy material and a package of wheat straw papers * * * I searched Villalva's pockets. Cuevas stated that he had sole ownership of the narcotics. We took the group to the narcotics office where we questioned them further, separately." After giving the admissions of Cuevas which were proof of his own guilt, the officer related his conversation with appellant: "He stated he lived in the hotel; had come to the room along with Cuevas and the three girls; that Cuevas opened the package; that he (appellant) had had experience with it and recognized it as marijuana, and he was just helping Cuevas manicure it and get it ready to roll * * * The instant I entered the room Villalva was standing there; said it was not his."

While it is true that appellant never proclaimed his possession of the narcotic, never audibly asserted an interest in it, never had it on his person or in his own room, yet can it be concluded that the trial court was arbitrary in finding he was a possessor? When the officers entered room 16, appellant was standing by the table on which the

flowering tops lay, was running his hands through the weeds; had decided it was marijuana, but still lingered in its presence. From the situation that prevailed as the officers entered, it required no stretch of the imagination for the trial court to determine that appellant had ceased to play the role of expert advisor; had renounced his aim to uphold the law; had entered into the gaiety of the occasion and had succumbed to the appeal of the glowing festivities and had accepted the implied invitation of Cuevas to join him in "manicuring" the weed so that all might enjoy the find. The court apparently reasoned, and not without cause, that if appellant had no intention to join in the narcotic debauch arranged by Cuevas, he would hastily have removed himself from the environs of the contraband. Not having done so, he still loitered as though he were staying for a spell of enjoyment. The court was fortified in such logic by the declarations of appellant to Officer Cook, namely: "I recognized it as marijuana; I was helping Cuevas manicure it and get it ready to roll."

[1–3] The question naturally arises as to which is the primary proof of his possession, (1) his standing by the table with the narcotic before him, or (2) the officer's testimony of appellant's statement that he was manicuring the weed so that it could be rolled for smoking. It appears more reasonable to determine that a man's admission that he was manicuring the weed and getting it ready to roll would constitute the backbone of the proof, the substantial evidence of the crime. If that is true, we are confronted with the unavoidable query whether the author of such admission can be convicted solely upon the testimony of the officer? It is said that admissions retold at a trial are much like hearsay; that they have neither the compulsion of the oath nor the test of cross examination; that they are of the same character as confessions which require corroboration. Opper v. United States, 348 U.S. 84, 75 S.Ct. 158, 164, 99 L.Ed. 101. Corroborative evidence is sufficient "if it touches the corpus delicti 'in the sense of the injury against whose occurrence the law is directed', * * * and is of a type which goes to fortify the truthfulness of the confession." Ibid, 48 U.S. at pages 91, 92, 75 S.Ct. at pages 163, 164, 99 L.Ed. 108; Daeche v. United States, 2 Cir., 250 F. 566, 571. The friendly relationship of appellant and Cuevas; the availability of appellant to participate in the social celebrations of his landlord; their inclinations to drink together at the same fountain and to inhale the incense ascending to the same god are factors fairly to be considered by the trial court in its attempt to ascertain whether the admission has been corroborated. People v. Henderson, 34 Cal.2d 340, 343, 209 P.2d 785. The evidence of inculpatory participation need not be direct nor is it required to extend to every detail of the convict's crime. (Ibid.)

[4] However, corroborative evidence need not be sufficient, aside from the admission, to establish the corpus delicti; but it is necessary to require the State to introduce substantial, independent evidence which would tend to establish the trustworthiness of the admission. Opper v. United States, supra, 348 U.S. 92, 93, 94, 75 S.Ct. 164, 165, 99 L.Ed. 109.

[5, 6] That such independent evidence was presented cannot be denied. When the officer entered room 16, appellant "was running" his "hands through it * * *" His testimony justified the inference that he had joined Cuevas in the "possession" of the "flowering tops and leaves." To the extent that a guest is to imbibe, smoke or otherwise consume or use merchandise, the guest is a possessor of the commodity. If a man invites a friend to visit his home in prohibition territory where possession of whiskey is forbidden by statute, the guest is destined to be arraigned for "possession" if law-enforcing officers enter the house and find the guest holding a pint of the poison. See United States v. Dibella, 2 Cir., 28 F.2d 805, 806; De Gregorio v. United States, 2 Cir., 7 F.2d 295, 296. In People v. Williams, 125 Cal.App.2d 838, 271 P.2d 145, 146, Mrs. Miller was convicted of possession. She contended and her codefendant Williams stoutly maintained that the bag of 157 bindles of narcotic in his home belonged to him; that none of it belonged to her, "she was just * * * counting

them for me." He had told her he "was papering up heroin"; that she did not leave because he had taken the keys to her car; but that she had sat at the table where Williams was papering the heroin and had counted the papers into the bag. Mr. Justice Doran held that her contentions were not sustained. In People v. Lama, 129 Cal. App.2d 391, 276 P.2d 816, 817, one Holder was at Lama's home when the police arrived. As the officers rang, Holder threw a bindle of heroin into a tub under the bed. He testified that he had taken the powder to the defendant to learn whether it was heroin. He denied ownership at the time of the arrest. At the trial, Lama contended that there was no evidence from which it could reasonably be inferred that he had "'immediate and exclusive dominion and control over the narcotic.'" Mr. Presiding Justice Shinn held that both Holder and Lama could have had possession of the drug. "Manifestly the court did not believe Holder's testimony. * * * Both could have been guilty of possession."

[7–9] The testimony of appellant is of little value if the fact finder is not impressed thereby. Neither the declarations of his innocence to Officer Cook, nor his testimony in court have such sanctity as to require their acceptance as the ultimate fact. From the testimony, it is clear that appellant had physical control of the sack of marijuana or, at least, of a part of its contents, and his intention to exercise such control was reasonably inferable. People v. Rumley, 100 Cal.App.2d 6, 8, 222 P.2d 913. Appellant cannot escape conviction on the ground that the narcotic was not found in his room and was in room 16 and was brought there by Cuevas. Such argument was made by the appellant in People v. Rodrigues, 25 Cal.App.2d 393, 77 P.2d 503, 504, because his codefendant had "rented the room and must be deemed in possession of everything found there." But the court held that "*exclusive* possession need not be shown where two or more parties are jointly charged." (Emphasis added.)

It would be a harsh rule to hobble the law-enforcing officers by requiring them to prove "exclusive possession" of every partner in a narcotic feast. By such a policy complete immunity against the conviction of many bold criminals could be made certain. The court had not only the facts of the invitations by Cuevas, the presence and service of whiskey by the women, the sudden appearance of the police and Cuevas' confession that the narcotic was his, and appellant's admission that he was helping Cuevas get it ready to roll, but it could and did consider appellant's inaction in not leaving the premises as soon as he was aware of Cuevas' possession of the contraband. Also, the court had the privilege of rejecting all the testimony of appellant in view of his obvious interest and of his prior conviction of a felony.

[10, 11] The rule of People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780, is applicable. The court had some substantial evidence as above recited. From it the inference of a guilt was fairly deducible. At least, it may not be said that "upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." Because the evidence might also reasonably be reconciled with the innocence of appellant will not justify a reversal. (Ibid.)

Judgment affirmed.

FOX, J., concurs.

McCOMB, J., concurs in the judgment.

131 Cal.App.2d 314

Raymond N. PRIESTER, Plaintiff, Cross-Defendant, and Respondent,

v.

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES, a national banking association, and Amber Morrison, as co-executors of the Estate of William Ellis Lady, deceased, Defendants, Cross-Complainants, and Appellants.

Civ. 20615.

District Court of Appeal, Second District, Division 1, California.

March 7, 1955.

Action to rescind instruments by which an interest in property was transferred to the deceased and to quiet plaintiff's title to such property as against a claim of the executors. Defendants filed a cross-complaint. From a judgment of the Superior Court of Los Angeles County, John Gee Clark, J., the defendants appealed. The District Court of Appeal, White, P. J., held that the agreement was properly rescinded, that failure of plaintiff to deny new matter alleged in the cross-complaint did not require a reversal and that the trial court's holding that plaintiff was entitled to rescind without first returning to the estate everything of value received under the contract was not error.

Judgment affirmed.

1. Attorney and Client ⇐123(1)

A contract, conveyance or transfer during the existence of the attorney-client relationship by which the attorney secures any advantage is presumptively invalid for undue influence and lack of consideration, and when attacked by the client, the burden is cast upon the attorney to show that the transaction was fair and equitable and that no advantage was taken by the attorney. West's Ann.Civ.Code, § 2235.

2. Appeal and Error ⇐1010(2)

While, presumption of invalidity of transactions during the existence of the attorney-client relationship by which the attorney secures any advantage can be overcome by clear, convincing and satisfactory evidence, the questions of what constitutes such evidence and whether the presumption is overcome are addressed to the trial court and its decision will not be disturbed on appeal except where it is supported by no substantial evidence. West's Ann.Civ.Code, § 2235.

3. Attorney and Client ⇐143

In action to rescind instruments executed by plaintiff by which an interest in property was transferred to attorney now deceased, allegations in answer that plaintiff agreed to pay the attorney for his services in other cases the reasonable value thereof and that the reasonable value of such services was $7,500 were not supported by the evidence.

4. Attorney and Client ⇐124

In action to rescind instruments executed by plaintiff by which an interest in property was transferred to his attorney now deceased, finding that the attorney's services rendered in the action were reasonably worth $400 and no more was supported by the evidence.

5. Attorney and Client ⇐148(1)

Contract between attorney and client for the rendition of services construed as a whole, manifested the intent that one-fourth interest in all the properties described which were all the properties belonging to plaintiff would be the fee of the attorney if he were successful in defending plaintiff in an action brought against him by his mother to recover an apartment house.

6. Attorney and Client ⇐147

Evidence established that an agreement between attorney now deceased, and client by which attorney would receive one-fourth interest in all the properties belonging to plaintiff if the attorney were successful in defending plaintiff in an action brought against him by his mother was invalid on the ground that the fee charged was excessive so that the presumption that the agreement was entered into under undue influence was not rebutted.

7. Pleading ⇐182

New matter alleged in cross-complaint was deemed admitted by the cross-defendant where no answer was filed thereto. West's Ann.Code Civ.Proc. § 462.

8. Appeal and Error ⇐1039(14)

Where plaintiff's failure to answer allegations of cross-complaint constituted an admission thereof of new matter alleged therein, such failure did not require a reversal of a judgment for plaintiff where plaintiff notwithstanding the admissions would still be entitled to judgment. West's Ann.Code Civ.Proc. § 462.

9. Cancellation of Instruments ⇐59

Ordinarily upon rescission restoration of benefits received is ordered.

10. Cancellation of Instruments ⇐59

Action of the trial court in holding that client was entitled to rescind a contract for legal services with a deceased attorney without returning to the attorney's estate everything of value received by the client under the contract was not error where court properly concluded that client should not be required to pay for services rendered prior to making of the contract as a condition to rescission and that judgment should be rendered without prejudice to rights of recovery which the estate of the attorney might have against plaintiff by reason of the legal services rendered in other actions. West's Ann.Civ.Code, § 3408.

11. Contracts ⇐274

Equity is solicitous that the innocent party rescinding be not made to suffer but it exercises no such solicitude for the wrongdoer.

John W. Preston, Millsap & Schaumer, Los Angeles, for appellants.

Henry Merton, Fred Girard, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal from a judgment for plaintiff rescinding an agreement, deed, assignments, and other instruments executed by plaintiff, by which an undivided one-fourth interest in certain real and personal property worth in excess of $22,500 was transferred to his lawyer, the late William Ellis Lady, and quieting plaintiff's title to such property as against any claim of defendants, who are the executors of the Estate of Lady.

The complaint is in three counts, for rescission, reformation and quiet title, respectively. All the allegations of the first and third counts are found by the trial court to be true.

For many years prior to his death on February 26, 1951, Lady was engaged as attorney for plaintiff in various legal proceedings. During the period of several months immediately preceding the commencement of action No. 580,554, a matter involving rescission by plaintiff of a sale of real property to his brother was pending in Lady's office. Plaintiff had been actively engaged in business until 1947. He then suffered an illness which left him blind and extremely nervous.

In December, 1950, plaintiff's mother sued him to recover an apartment house of the net value, over and above the mortgage, of $85,000. She attached the real property, its furnishings, and plaintiff's bank account and two brokerage accounts. It was an undivided one-fourth interest in these properties which plaintiff had transferred to Lady. They constituted practically all of plaintiff's assets. The action by plaintiff's mother is herein referred to as No. 580,554. About, December 4, 1950, Lady commenced plaintiff's defense therein. In December 1950 and January 1951, Lady was consulted many times by plaintiff, conferred with several of his friends, assisted plaintiff's accountant in preparing statements and summarizing plaintiff's records, attended two sessions re depositions and one deposition contempt hearing, prepared plaintiff's answer and filed it on January 30, 1951.

On January 29, 1951, when decedent and plaintiff executed the agreement, and plaintiff made the deed and signed the other instruments sought to be rescinded and cancelled in the instant action, the relationship of attorney and client existed. The agreement, deed and other instruments were prepared in Lady's office. The agreement was read to plaintiff and he knew the purport of it and of the other instruments. At plaintiff's request, an attorney who was his distant relative and long time family friend, went with him to Lady's office, read the agreement to plaintiff and, in the presence of Lady, as plaintiff's friend and not as his

lawyer, told plaintiff that he felt "he was giving more than he should for the transaction"; Lady said he would not take care of the case on any other basis. Plaintiff "insisted on going ahead and signing the agreement". According to plaintiff's testimony, Lady had told him the deed would not be recorded and would be held by him as security for whatever fee should be fair when the work was finished; plaintiff believed Lady and trusted him; and he would not have signed the agreement or any of the other instruments if Lady had not made that promise. The deed was recorded by the appellants on June 5, 1951, about three months after Lady's death. On November 1, 1951, plaintiff first became aware of the recording of the deed. He repeatedly demanded reconveyance of his property and offered to pay the reasonable value of services rendered by Lady. Defendants refused to reconvey and refused to state what amount, if any, they claimed to be due by reason of any legal services rendered by Lady. Without legal assistance from anyone after Lady's death in February, plaintiff settled his differences with his mother and her dismissal with prejudice was filed in said action No. 580,554 on September 16, 1951.

Appellants urge as their first ground for reversal that "the trial court erred in holding that the contract between plaintiff and W. E. Lady * * * is void and unenforceable".

[1] A contract, conveyance, or transfer of any kind made by the client during the existence of the attorney-client relationship by which the attorney secures any advantage is presumptively invalid for undue influence and lack of consideration; and, when attacked by the client, the burden is cast upon the attorney to show that the transaction was fair and equitable and that no advantage was taken by him. Civil Code, § 2235; Bonifacio v. Stuart, 52 Cal.App. 487, 489, 199 P. 69; Clark v. Millsap, 197 Cal. 765, 783, 242 P. 918; United States Oil & Land Co. v. Bell, 153 Cal. 781, 876, 96 P. 901.

[2] While, in cases of this kind, the presumption can be overcome by clear, convincing and satisfactory evidence, the questions of what constitutes such evidence and whether the presumption is overcome are addressed to the trial court, and its decision will not be disturbed on appeal except in cases where it is supported by no substantial evidence. Roberts v. Wachter, 104 Cal. App.2d 271, 279, 231 P.2d 534.

[3] Appellants insist that Lady did not take any advantage of plaintiff and that the fee provided for in the contract "was not excessive or unconscionable", for the reason that the property (valued in excess of $22,500) was also to cover Lady's services rendered in cases other than No. 580,554, including the Liebenguth, Ajax, Beard and Crebs cases, in which some years before Lady had represented plaintiff and his mother. In their answer and cross-complaint, appellants allege upon information and belief that plaintiff agreed to pay Lady for his services in such other cases the reasonable value thereof, and that the reasonable value of such services was $7,500. These allegations of the Answer were found to be untrue, and the finding is supported by the evidence. Appellants failed to produce any of decedent's books of account, contracts, letters, or any other convincing evidence to prove that Lady had not been paid in full for all services rendered by him for plaintiff in any of those cases. Plaintiff denied that he owed Lady for any past services and testified that he had been told by Lady, and by appellant, Amber Morrison, who was then Lady's secretary, that he owed nothing on account of such services and that the cash payments made by him from time to time and the optical goods and services furnished by him at Lady's request had fully paid for them.

[4] The court found that Lady's services rendered in action No. 580,554 were reasonably worth $400 and no more; that friends sought to bring about a reconciliation between plaintiff and his mother; but that Lady sought to and did prevent such reconciliation; and that the services were of no value to plaintiff under the circumstances. These findings also find support in the evidence.

Thornley v. Jones, 96 Cal.App. 219, 274 P. 93, was an action by the executrix of the

client's estate to recover the client's property from her attorney. Judgment for defendant attorney was reversed. The court, 96 Cal.App. at page 227, 274 P. at page 97, held that, even where the trial court had found that defendant had made no false or untrue representations to his 82 year old client who had transferred to him securities worth $2,500 in payment for legal services worth about $300, "proof of mere negative conduct on the part of an attorney dealing with his client is not sufficient 'to overcome the presumption of fraud and unfair dealing which is automatically raised by the law as a protection to a client.' Estate of Witt, supra [198 Cal. 407, 245 P. 197]. The attorney must go further and show that his client was given the information which, under similar circumstances, a disinterested legal adviser would have given."

The contract cancelled and rescinded by the judgment from which the instant appeal was taken, was in the form of a letter from Lady to plaintiff, with plaintiff's agreement at the end to be bound by the terms set forth. It reads in part, "* * * I am willing to undertake the defense of the action your mother brought against you * * * on the following basis: You are now to convey to me: * * *" Here follows a full description of the property, an undivided one-fourth interest in an apartment house, its furnishings and equipment, its rents, issues and profits after February 1, 1951, a bank account and two brokerage accounts. Then follows one of the provisions most relied upon by appellants, to wit: "If we are not successful in the defense of this action, then you will be under no obligation to me for any services I may have rendered at your request for the benefit of your mother in defending the action of Liebenguth as assignee of the Bank of America and the Beard and Crebs action". The letter agreement also contains an option to plaintiff until one year after final judgment to repurchase said property for $25,000. It provides that costs are to be paid by plaintiff, but if the litigation is successful they are to be borne three-fourths by plaintiff and one-fourth by Lady. Plaintiff is to render such assistance as is within his power. Then follows the provision that "This agreement will, of course, cover the matter of compensation whether the case shall be tried and judgment rendered, or the matter settled without going to trial, but if any compromise is agreed upon, such compromise shall, of course, be approved by both of us." Another pertinent provision of said letter agreement is that "In case of my inability to proceed with the defense of said action No. 580,554, then my interest in the property aforesaid shall be reduced proportionately to the services rendered, and proper reconveyances executed."

[5, 6] Considering the contract as a whole, it seems clear that Lady meant by it that the one-fourth interest in all the properties described, which were all the properties belonging to plaintiff, would be his fee if he were successful in defending plaintiff in action No. 580,554. From the testimony of the parties and their witnesses it is plain that, if the defense was unsuccessful, plaintiff's mother would own the apartment house and plaintiff would be unable to pay a fee even for his defense of said action. The agreement does not provide that any fees for any past services shall be considered paid in the event of the successful defense of action No. 580,554. Consequently, by the provision that "if we are not successful" plaintiff would "be under no obligation" to pay Lady for any services he "may have rendered * * * for the benefit of" plaintiff's mother, Lady was releasing nothing, even if he was still unpaid for services of great value. According to the written contract between plaintiff and Lady the transfer of properties valued in excess of $22,500 was the consideration for Lady's agreement to "do all I can in the defense" of said action No. 580,554. The trial court did not err in finding the fee charged by Lady to be excessive and unconscionable.

In the instant action, as in Magee v. Brenneman, 188 Cal. 562, 571, 206 P. 37, 40, "appellant failed to show that the transaction was fair and regular, or that the agreement was for a reasonable amount. Thus the presumption that it was entered into under undue influence was not re-

butted. Under these circumstances the contract was voidable at the instance of respondents."

The agreement involved on this appeal being invalid for the reasons hereinbefore stated, it is not necessary for this court to consider whether or not Lady's defense of plaintiff in action No. 580,554 would have required that Lady violate any confidence which might have been given him when he previously acted as attorney for plaintiff's mother in other litigation.

Appellants argue that the trial court erred in denying defendants any relief under their answer and cross-complaint. Authorities are cited to the effect that where no answer to a cross-complaint has been filed all its allegations must be deemed true. Here the complaint sets out as exhibits the agreement and deed sought to be rescinded. The answer admits the execution of the documents and denies all allegations in the complaint which constitute plaintiff's grounds for rescission and quiet title.

A brief review of the facts first pleaded by the cross-complaint follows. Plaintiff remained in possession of the real and personal property described in the agreement; he received and retained all rents, issues and profits thereof; defendants demanded that plaintiff deliver to them one-fourth of the personal property and of the rents, issues and profits; and plaintiff refused to comply with their demand; the bank and brokerage accounts so withheld were worth $37,000. The allegations of the complaint itself either coincide with or negative all other allegations of the cross-complaint.

[7] The new matter so alleged in the cross-complaint is deemed admitted and the court found some of it to be true; but the court further found in accordance with the complaint and the evidence "that the defendants were not, and are not, entitled to be rendered an accounting by the plaintiff, and also the defendants were not and are not entitled to receive any sums whatever from plaintiff".

[8] The court did find however, contrary to the allegation of the cross-complaint, that the bank and brokerage accounts were worth not $37,000 but only $11,005.16. Further, the court found that plaintiff rightfully retained possession thereof; and that plaintiff's refusal to account to defendants for his profits and his refusal to deliver to them one-fourth or any portion of the furniture, cash in bank and brokerage accounts was justified under the circumstances.

Neither Section 462 of the Code of Civil Procedure, nor any of the cases relied upon by appellants, authorizes reversal of the judgment from which this appeal is taken on the ground that the cross-complaint was not answered. Here, the finding that the bank and brokerage accounts are worth less than their value as alleged in the unanswered cross-complaint could not have affected the court's judgment adversely to appellants. The larger value of these items would simply increase the already excessive and unconscionable amount of the fee charged under the agreement rescinded.

As said in Lubarsky v. Chavis, 99 Cal. App. 610, 616, 279 P. 205, 207: "The plaintiff's confession by default of the allegations of the cross-complaint did not, therefore, negative his cause of action set out in his complaint. Defendant was not entitled to judgment upon the pleadings because the issues made by the complaint and answer thereto, if decided in favor of plaintiff, would entitle plaintiff to judgment notwithstanding all the allegations of the cross-complaint be true."

[9] Appellants next contend that the trial court erred in holding that plaintiff is entitled to rescind the contract without first returning to Lady's Estate everything of value received by plaintiff under the contract. It is conceded that ordinarily, upon rescission, restoration of benefits received is ordered. However, we have examined all cases cited in this connection and none seems controlling on the facts now before us.

[10] In Magee v. Brenneman, supra, 188 Cal. at page 571, 206 P. at page 40, it is said: "Thus the presumption that it was entered into under undue influence was not rebutted. Under these cimcumstances the

contract was voidable at the instance of respondents. Hence, the court could have found, as it did, what was a reasonable fee for the services performed. The finding is that *an amount equal to such a fee had already been paid.* It follows there was nothing more due to him, and the conclusion and judgment in favor of respondents must therefore be upheld." (Emphasis added.)

Shahabian v. Najarian, 14 Cal.App.2d 435, 58 P.2d 396, was an action against an attorney for damages in the amount by which his collections for the account of his client exceeded fair compensation for his services. Judgment for that amount was affirmed on appeal. Neither rescission nor restoration was involved.

Clark v. Millsap, 197 Cal. 765, 242 P. 918, was an action in accounting and to recover a client's properties from her attorney. The defendant was allowed to retain a $7,500 fee. He contended on appeal that he was entitled to a credit of $20,000 for his fee. At page 785 of 197 Cal., at page 926 of 242 P., the court said:

"The burden of showing that his dealings with his client in all respects were fair was upon appellant, and he failed to satisfy the court of the justness of his claim. It is to be observed in this connection that *a court may refuse to allow an attorney any sum as an attorney's fee, if his relations with his client are tainted with fraud.* 'Fraud or unfairness on the part of the attorney will prevent him from recovering for services rendered; as will acts in violation or excess of authority, and acts of impropriety, inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties.' 6 Corp.Jur. 722, 723. *But as opposing counsel did not object to the allowance of the sum of $7,500 as an attorney's fee, and the court awarded that amount in full of all services performed, the order in that respect will be regarded as final.*" (Emphasis added.)

In the case of Lady v. Worthingham, 57 Cal.App.2d 557, 135 P.2d 205, plaintiff filed an action on a promissory note in the sum of $2,000. The trial court found no consideration for the note, but gave judgment for plaintiff for the amount of the probate fee allowed by statute for the work done for defendant. In affirming the judgment, the court said, 57 Cal.App.2d at page 562, 135 P.2d at page 208: *"Since neither party is urging that it was error for the trial judge to give judgment in favor of plaintiff for $361.37,* while finding that there was not any consideration for the note upon which the action was founded, *it is unnecessary for us to determine whether such judgment was proper in this proceeding, which was solely one to enforce payment for a promissory note."* (Emphasis added.)

In each of the other cases cited by appellant in support of appellants' contention that the judgment should be reversed for the reason that plaintiff was not required to make restoration by payment of a reasonable fee for work done under the invalid agreement, the fees charged by the attorneys were expressly found to be fair and reasonable.

From the foregoing, it appears that under circumstances somewhat similar to those involved in the instant action attorneys have been given judgment for the reasonable value of their services. Magee v. Brenneman, supra; Clark v. Millsap, supra; Lady v. Worthingham, supra. However, in each instance the fee had been previously paid by the client or awarded by the trial court without objection.

While the record on the appeal now engaging our attention shows plaintiff's prayer that the deed and contract be delivered up and cancelled upon his payment to defendants of "such sums as in equity and good conscience is found to be payable by him", it also shows that defendants failed and refused to plead, prove or pray for the reasonable value of any services rendered.

[11] As said in Utemark v. Samuel, 118 Cal.App.2d 313, 317, 257 P.2d 656, 659, "Equity is solicitous that the innocent party who rescinds be not made to suffer. It exercises no such solicitude for the wrongdoer * * *."

"On adjudging the rescission of a contract, the Court *may* require the party to whom such relief is granted to make any compensation to the other which justice may require." Section 3408, Civil Code. (Emphasis added.)

Under all the facts and circumstances surrounding the instant action, the trial court properly concluded that plaintiff should not be required to pay for any services rendered prior to the making of the contract as a condition to its rescission, and that the judgment in this action should be rendered "without prejudice to rights of recovery which the estate may have against plaintiff by reason of legal services rendered in other actions".

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



131 Cal.App.2d 475

BEARD LAND AND INVESTMENT CO., a corporation, Plaintiff and Respondent,

v.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION, James G. Bryant, Director of Employment, Defendant and Appellant.

Civ. 8533.

District Court of Appeal, Third District, California.

March 14, 1955.

Hearing Denied May 11, 1955.

Action to recover taxes allegedly erroneously assessed and collected under Unemployment Insurance Act, General Laws, Act 8780d, § 1 et seq. The Superior Court, Sacramento County, Malcolm C. Glenn, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Schottky, J., held that where directors of corporation subject to Federal Unemployment Tax Act received a per diem of more than $20 for attending meetings of board of directors, such earnings were taxable under Unemployment Insurance Act.

Judgment reversed with directions to enter judgment for defendant.

1. Taxation ⇐111.8

Where directors of corporation subject to Federal Unemployment Tax Act received a per diem of more than $20 for attending meetings of board of directors, such earnings were taxable under State Unemployment Insurance Act. West's Ann.Code Civ.Proc. §§ 1858, 1859; Gen. Laws, Act 8780d, §§ 1 et seq., 7(j); Federal Unemployment Tax Act, 26 U.S.C.A. § 1601 et seq.

2. Constitutional Law ⇐70(3)

Public policy is a matter for determination by the Legislature without interference by the courts, provided no constitutional right or guaranty is infringed upon.

Edmund G. Brown, Atty. Gen., William L. Shaw, Deputy Atty. Gen., for appellant.

Hoover & Lacy, Francis O. Hoover, Modesto, for respondent.

SCHOTTKY, Justice.

Respondent, a California corporation engaged in various activities including transactions in real estate and in the securities of other corporations, was subject to the California Unemployment Insurance Act and also to the Federal Unemployment Tax Act (formerly Title IX of the Social Security Act), 26 U.S.C.A. § 1601 et seq., during the period in question. The Department of Employment levied an assessment upon respondent in the amount of $140.66 and interest for the period of July 1, 1942, to September 30, 1944. The additional assessment was based entirely upon amounts paid to the directors of the respondent corporation. During the period involved in this action the seven directors of the respondent met on an average of once a month. At these meetings the financial statements of the respondent were discussed, matters of policy were decided, and all purchases and contracts involving expenditures in excess of a certain amount were authorized before being placed into effect. The directors

each received fees of $40 per meeting. Several of the directors also served as officers of the corporation without additional compensation.

The issue of tax liability of respondent for this additional assessment was tried before the statutory referee of the Department of Employment and subsequent thereto the decision of the California Unemployment Insurance Appeals Board issued denying respondent's claim for a refund.

Respondent then commenced an action pursuant to section 45.11(b) of the Unemployment Insurance Act to recover the amount of the payments which were based on the fees paid to the directors of the respondent corporation for their services as directors.

The trial court concluded that the fees or compensation of $40 a month paid by respondent to its directors was not subject to assessments under the California Unemployment Insurance Act, "for the reason that they are not wages or salaries paid to employees of the plaintiff corporation, and the said directors are not employees of the said corporation; that compensation paid to the directors of a corporation for services rendered to the corporation as directors thereof are not wages, as the term 'wages' is defined by and used in the Unemployment Insurance Act of the State of California; the services rendered by directors of a corporation as such to the corporation and for the corporation of which they are directors, for attending meetings of the boards of directors of such corporations, or in otherwise discharging the duties ordinarily and properly appertaining to the functions, duties, and authority of directors as such, are not and do not constitute employment, as the word 'employment' is defined and used in the Unemployment Insurance Act of the State of California; a corporation, in its relation to its directors as such, is not an employer as the word 'employer' is used in the Unemployment Insurance Act of the State of California; no employer contributions are required by the Unemployment Insurance Act of the State of California, of or from corporations, on account of compensation paid by such corporations to their directors for services rendered by such directors in their capacity as directors of such corporations; and no employee contributions are required to be paid by directors of a corporation, or to be deducted from compensation paid to such directors, for services rendered by them in their capacity or in the exercise of their office or authority or the discharge of their functions or duties as directors of such corporations."

Judgment was entered in favor of respondent, appellant's motion for a new trial was denied and this appeal is from the judgment.

Appellant contends that the trial court was in error in that it failed to apply section 7(j) of the Unemployment Insurance Act, which appellant asserts specifically covers the situation here presented and brings such compensation paid to directors within the Act.

Section 7(j) of the Unemployment Insurance Act, in effect at all times here involved, provides:

> "§ 7. The term 'employment' does not include: * * *
>
> "(j) Service performed by directors of a corporation or association receiving a per diem of not more than twenty dollars for attending meetings of the board of directors, with or without a reasonable mileage for going to and from meetings of the board and other reasonable expenses incidental to attending such meetings where the corporation or association is not subject to a tax under Title IX of the Social Security Act."

Statutes of 1939, Chap. 628, Deering's General Laws, Act 8780d, amended by Stats.1945, Ch. 793, p. 1484, where the only change was to insert the figures "($20)" after the words "twenty dollars" and to insert the words "Federal Unemployment Tax Act" in place of "Title IX of the Social Security Act." The section is now Section 637 of the Unemployment Insurance Code.

Appellant argues that it is apparent from the language of the statute above set forth that the compensation paid to directors of a corporation are only exempt from the

provisions of the California Unemployment Insurance tax if (1) the director's compensation for attending such meeting be less than $20, and (2) the corporation is *not* subject to the Federal Unemployment Tax Act. Appellant argues further that if these requirements are not fulfilled then such directors are regarded as employees of the corporation for the purposes of unemployment insurance tax, and that the stipulated facts in the instant case show that the compensation was $40, well in excess of the statutory limit, and also that the corporation was subject to the Federal Unemployment Tax Act.

Respondent in reply contends that the subject of the legislation is employment and that directors are not employees of corporations and that services of a director are not included within the definition of employment in the Act. Respondent does not attempt to analyze the quoted language of the Act but states:

> "Of course lawyers make mistakes and many legislators and reformers and accountants are not even lawyers.
>
> "It seems that about as well as we can do will be to avoid any effort to assign any dignified justification for the inclusion of this provision in the statute and simply say that it was put there by someone who didn't know any better and passed without notice.
>
> * * * * * *
>
> "We conclude that Section 7(j) of the Act simply was included in this intricate legislative plan, gotten together and enacted under pressure for time, without having received any mature consideration one way or another."

Respondent does not contend that the legislature was without power to provide that directors of a corporation who receive in excess of $20 for attending a meeting of the board of directors should be regarded as employees for the purpose of the unemployment insurance tax, but in effect argues that section 7(j) is meaningless and of no significance. However, we must bear in mind the language of section 1858 of the Code of Civil Procedure which provides that "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted;" and that section 1859 provides that "In the construction of a statute the intention of the legislature * * * is to be pursued, if possible."

[1] We think it is clear that the legislature in enacting section 7(j) in 1939 intended to provide that where, as in the instant case, a director receives a per diem of more than $20 for attending meetings of the board of directors, such earnings are taxable under the Unemployment Insurance Act. That the legislature had the power to so provide cannot be doubted. Respondent makes a cogent and forceful argument against the logic and wisdom of such a provision, but such argument merely goes to the wisdom and policy of such legislation and would be more appropriately addressed to a legislative committee considering the legislation than to a court which is construing it. It is not without significance that said section 7(j) was adopted in 1939 and was later incorporated without change in the Unemployment Insurance Code as section 637, and also that there have been seven regular sessions of the legislature since section 7(j) was originally enacted. Bearing in mind that the legislature has the advice and assistance of a highly trained and very efficient Legislative Counsel Bureau, we may safely assume that if said section did not express the intention of the legislature in adopting it, it would have long since been amended or repealed.

[2] Public policy is a matter for determination by the legislature and courts have no right to interfere with such determination by the legislature so long as no constitutional right or guaranty has been infringed upon. As was well said by that great jurist, Justice Stephen J. Field, in the early California case of Ex parte Newman, 9 Cal. 502, at page 520: "It is not for the judiciary to assume a wisdom which it denies to the Legislature, and exercise a supervision over the discretion of the latter. It is not the province of the judiciary to

pass upon the wisdom and policy of legislation; and when it does so, it usurps a power never conferred by the Constitution."

In view of the foregoing we conclude that the trial court erred in holding that the fees or compensation of $40 per month paid by respondent to its directors was not subject to assessments under the California Unemployment Insurance Act.

The judgment is reversed with directions to the trial court to enter judgment in favor of appellant.

VAN DYKE, P. J., and PEEK, J., concur.



131 Cal.App.2d 542

A. S. MENICK, as Trustee of the Estate of Samuel Goldy, Bankrupt, Plaintiff and Respondent,

v.

Edith Allen GOLDY, Globe Indemnity Company, a corporation, Charles E. Cowpland and Sallye J. Cowpland, Defendants.

Edith Allen Goldy, Appellant.

Civ. 20397.

District Court of Appeal, Second District, Division 3, California.

March 16, 1955.

Action by plaintiff, as trustee in bankruptcy, to recover from minor daughter of bankrupt an automobile allegedly purchased with funds of the bankrupt while he was insolvent. The Superior Court, Los Angeles County, J. F. Moroney, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to support trial court's finding that bankrupt, while insolvent, purchased automobile with his own funds, and without consideration and with intent to defraud his creditors placed automobile in name of his daughter, using fictitious name for that purpose.

Affirmed.

1. Fraudulent Conveyances ⇐278(1)

Voluntary conveyance made by debtor to member of his family while insolvent or in contemplation of insolvency is conclusively presumed to be fraudulent as to existing creditors. West's Ann.Civ.Code, § 3439.04.

2. Fraudulent Conveyances ⇐107, 181(1)

Conveyance to his daughter by debtor who furnishes consideration for conveyance and directs it to be made to her by seller, with intent to delay or defraud his own creditors, will be set aside and property will be applied in satisfaction of creditors' claims. West's Ann.Civ.Code, § 3439.04.

3. Fraudulent Conveyances ⇐107

Relationship of parent and child, when coupled with other suspicious circumstances, may be sufficient to raise inference of fraud in conveyance to such child with intent to delay or defraud parent's creditors. West's Ann.Civ.Code, § 3439.04.

4. Fraudulent Conveyances ⇐278(3)

Any relation which gives rise to confidence strengthens presumption that may arise from other circumstances, and serves to elucidate, explain or give color to transaction allegedly made in fraud of creditors, and wherever this confidential relation is shown to exist, parties are held to fuller and stricter proof of consideration, and of fairness of transaction.

5. Bankruptcy ⇐303(1)

Trustee in bankruptcy suing to recover from minor daughter of bankrupt automobile allegedly purchased with funds of bankrupt while he was insolvent must establish that there had been transfer of automobile in question. West's Ann.Civ.Code, §§ 3439.01, 3439.04.

6. Fraudulent Conveyances ⇐271(1)

Where real intent of parties and facts of fraudulent transaction are peculiarly within knowledge of those sought to be charged with fraud, making direct proof of transfer and of fraudulent intent often an impossibility, proof indicative of transfer and fraud may come by inference from circumstances surrounding transaction, relationship, and interest of parties.

7. Bankruptcy ⇐303(5)

In action by plaintiff, as trustee in bankruptcy, to recover from minor daughter

of bankrupt an automobile allegedly purchased with funds of bankrupt while he was insolvent, evidence was sufficient to support trial court's finding that bankrupt, while insolvent, purchased automobile with his own funds, and without consideration and with intent to defraud his creditors placed automobile in name of his daughter, using fictitious name for that purpose. West's Ann. Civ.Code, §§ 3439.01, 3439.04.

Mason & Howard and C. Loy Mason, Los Angeles, for appellant.

Russell B. Seymour, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from part of a judgment in favor of plaintiff in an action brought by plaintiff as trustee in bankruptcy of Samuel Goldy to recover from defendant, the minor daughter of the bankrupt, an automobile allegedly purchased with funds of the bankrupt while he was insolvent.

In August 1950 the bankrupt, referred to as Goldy, received approximately $30,000 as part payment from the sale of real property. He converted the proceeds into a $25,000 cashier's check and $5,000 in cash and spent some of it for various bills. On September 9, 1950 he and his wife left for Europe with the $25,000 cashier's check and "a few thousand dollars."

Sometime around November 1950 when Goldy was in Rome, Italy, he exchanged the $25,000 cashier's check for three letters of credit, two for $10,000 each and one for $4,000, and $1,000 cash. Goldy and his wife were in Europe about ten months. In the meantime, on January 12, 1951, a judgment was obtained by the Cowplands against Goldy for approximately $13,000.

Goldy and his wife returned to the United States with the intention to disembark and complete their trip in San Francisco. Instead, they left the ship in San Diego. Goldy testified that when he arrived in San Diego he had on his person the two letters of credit for $10,000 each, the letter of credit for $4,000 against which $2,000 had been drawn, and approximately $150 or $200 in cash. He immediately telephoned defendant in Los Angeles and informed her of their arrival. Defendant then went to San Diego. Before defendant met them in San Diego, a friend took Goldy and his wife to a Cadillac agency. Goldy told the salesman that "his daughter was coming down the following day and was interested in getting a car for herself and he looked over the cars * * * to see if there was anything she might be interested in."

Defendant was seventeen years of age on June 6, 1951. She testified that before she left for San Diego she met her grandmother in downtown Los Angeles in a small cafe and that her grandmother gave her an envelope with $2,568 in cash in it; she counted the money. She then went to San Diego by bus and met her parents aboard ship. After she arrived she told them she wanted to look at cars, but she did not tell them the "specific type of car." The following morning, June 7, defendant and her parents went to the Cadillac agency and her father introduced her to the salesman. Both defendant and her father negotiated with the salesman over the purchase of a 1948 Cadillac, Fleetwood style; they would step to one side and discuss the car. Defendant made the actual offer of $2,400, her father advising her. Defendant gave the salesman $200 as a deposit, stating she did not have the balance of the money with her at the time. The salesman made the sales order out in the name of Edith Allen Goldy and defendant signed "Edith Allen Goldy" on the slip, but she told him she wished to have the car registered in the name of Edith Allen and the name "Goldy" was crossed out on the sales order. Defendant took delivery of the Cadillac in the morning of June 8th at which time she paid the balance of $2,221 in currency, mostly $100 bills, taking the money from her purse. Goldy then told the salesman he wanted to get some cash. The latter drove Goldy to a bank and Goldy drew against one of the letters of credit. Goldy testified that between the time he arrived in San Diego and the time defendant paid for the automobile he had not received any additional sums of cash from any source, and that he did not give any part of the $150 or $200 to defendant to help pay for the car.

In June 1951 defendant had only a temporary driver's permit which had expired. During the discussions with the automobile salesman, Goldy asked him to drive the automobile and accompany defendant to San Pedro where the ship that he and his wife were traveling on would dock. However, instead, Goldy and his wife drove with defendant to Los Angeles, defendant driving the car away from the Cadillac agency.

On June 12 Goldy saw Cowpland in the waiting room of Warner Brothers Studio in Burbank. Goldy told Cowpland, "I just drove some friends out here *in my new car* * * *." (Italics added.) It may be inferred that the car was the Cadillac. He did not say where or when he had purchased the automobile.

On June 13 Goldy and his wife drove to San Francisco in the Cadillac, having missed the ship. Goldy testified they went to San Francisco to meet Joseph Bernstein pursuant to an alleged arrangement they made while they were in Paris in January 1951. On June 14 Goldy met Bernstein. The next day the Cadillac was attached. Goldy testified this was the first time he knew of Cowplands' judgment against him. Goldy informed Bernstein that the automobile had been attached and that he wanted to pay him what he owed from a $25,000 loan Bernstein made to him in 1946. Goldy testified he had received the $25,000 in cash and had not deposited it in any bank but had disbursed the money in cash to various people and that any records thereof had been lost. Although Goldy had issued numerous financial statements after 1946, he never listed Bernstein as a creditor. Saturday morning, June 16th, Goldy went to a bank, cashed the letters of credit, and received mostly $1,000 bills. He testified he gave $21,500 and a two-and-a-half carat diamond ring to Bernstein and retained only $150; and that Bernstein gave him his note back and he tore it up.

On August 17, 1951 Goldy was adjudicated bankrupt.

Defendant testified that she bought the 1948 Cadillac with her own money and not with her father's. She said the $2,568 she received from her grandmother was what she had saved since she was six years old from various part-time jobs and gifts from her grandmother, some of which were as large as $100. She had given the moneys to her grandmother to keep for her. When she was 13 or 14 years old, she asked her grandmother how much money she had saved for her and her grandmother said she had about $1,000. Since then, she had not asked how much money her grandmother was holding for her. She further testified that she had not kept a record of how much money she had given her grandmother.

The grandmother, Carrie Clause, testified variously as to where she had kept defendant's money: with Citizens National Bank; in 1948 she withdrew $2,000 from Security-First National Bank; on several occasions she had put the money in a bank and had withdrawn it and kept it at home; and that she never put any of the money into a bank, but kept it with her. She further testified she did not keep any account of the money that defendant gave her and did not keep it separate from her own money.

The grandmother has never earned enough money to file an income tax return; since 1940, her earnings were less than $500 a year. In November 1951 she had a severe operation. She testified that within the two years preceding April 17, 1952, she had not borrowed any money. Twenty-one bank books belonging to the grandmother were introduced in evidence covering the period from 1923 to June 6, 1951. The following balances were revealed:

July 1, 1950	$ 407.77
Jan. 1, 1951	2,924.10
June 6, 1951	3,278.00

She testified that prior to August 1950 Goldy repaid her the sum of $5,000 which he had borrowed in September 1948; she received $3,000 from an escrow in August 1950; on July 18, 1951 she had approximately $800 in cash at home and $4,098.99 in two Federal Savings accounts. On October 23 and 24, 1951, she opened three new accounts at three banks with total deposits of $6,559 and deposited $1,000 in one of the Federal Savings accounts. The deposits were primarily in multiples of

$1,000.[1] The sum of the deposits was $7,559, which when added to the assets as of July 18, 1951 totaled $11,676.28 as of February 7, 1952. When questioned as to where she had the $7,559 on October 22, 1951, she said she had it at home in a trunk and that it was there on the date defendant bought the car. She also stated she had always kept large sums of money at home.

About January 19, 1952 the grandmother purchased an automobile for $1,825 for Goldy. On February 1 and 7, 1952, she withdrew $4,320.28 from the two Federal Savings accounts and $6,359 from two of her bank accounts—a total of $10,679.28. Goldy and the grandmother testified that after February 7, 1952 she loaned Goldy $14,000, mostly in the form of $1,000 bills. Thus she gave Goldy $15,825 as against a total of $4,898.99 she had on July 18, 1952, and as against a total of not over $11,676.28 she had on February 7, 1952.

The court found: (1) On June 8, 1951 Goldy was insolvent. (2) On June 8, 1951 Goldy transferred the sum of $2,400 from his own funds to defendant; there was no consideration for the transfer; the transfer was made by Goldy for the purpose of hindering, delaying, and defrauding his creditors, and with the intent that defendant would purchase with the $2,400 the 1948 Cadillac, and with the further intent and purpose that defendant would take title to the car in her own name and hold the title secretly for and on behalf of Goldy. Judgment was, in part, that plaintiff is the owner of the automobile and that defendant deliver it to plaintiff. Other parts of the judgment are not in controversy. Defendant appeals.

The specification of error is that there is no evidence to support the finding that Goldy transferred the $2,400 to defendant.

[1] "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Civ.Code, § 3439.04. A conveyance includes "every payment of money". Civ.Code, § 3439.01. A voluntary conveyance made by a debtor to a member of his family while insolvent or in contemplation of insolvency, is conclusively presumed to be fraudulent as to existing creditors. Adams v. Prather, 176 Cal. 33, 167 P. 534; Carter v. Carter, 55 Cal.App.2d 13, 130 P.2d 186.

[2] A conveyance to his daugther by a debtor who furnishes the consideration for the conveyance and directs it to be made to her by the seller, with the intent to delay or defraud his own creditors, will be set aside and the property will be applied in satisfaction of the creditors' claims. Lander v. Beers, 48 Cal. 546; Clifton v. Herrick, 16 Cal.App. 484, 117 P. 622.

[3, 4] The relationship of parent and child, when coupled with other suspicious circumstances, may be sufficient to raise an inference of fraud in the conveyance. 12 Cal.Jur. 974, § 15. "'Any relation which gives rise to confidence, * * * strengthens the presumption that may arise from other circumstances, and serves to elucidate, explain, or give color to the transaction. * * * Wherever this confidential relation is shown to exist, the parties are held to a fuller and stricter proof of the consideration, and of the fairness of the transaction.'" Cioli v. Kenourgios, 59 Cal.App. 690, 696–697, 211 P. 838, 841; Walker v. Laugharn, 44 Cal.App.2d 469, 474, 112 P.2d 695.

[5, 6] To make out the case alleged it was necessary that plaintiff establish that

1. On October 23, 1951, the grandmother opened Account No. 109976 in the Bank of America, Main Office, Los Angeles, and deposited therein two items of $1,000.00 each, and on October 24, 1951, an additional sum of $300.00.

On October 24, 1951, she deposited $1,000.00 in the Los Angeles Federal Savings, Account No. 18677.

On October 24, 1951, she opened a new account at Bank of America, Florence-Vermont Branch, of $4,000.00 and $59.00, being Account No. 8379.

On October 24, 1951, she opened a new account at Security-First National Bank of Los Angeles, No. 622136, with a deposit of $200.00.

there had been a transfer of the property. Scholle v. Finnell, 173 Cal. 372, 376–377, 159 P. 1179. The real intent of the parties and the facts of a fraudulent transaction are peculiarly within the knowledge of those sought to be charged with fraud. Direct proof of a transfer and of a fraudulent intent is often an impossibility. Hence proof indicative of a transfer and of fraud may come by inference from circumstances surrounding the transaction, the relationship and interest of the parties. Taylor v. Osborne-Fitzpatrick Finance Co., 57 Cal. App.2d 656, 661, 135 P.2d 598; Burns v. Radoicich, 77 Cal.App.2d 697, 702, 176 P.2d 77.

[7] Goldy testified that he and his wife did not want defendant to purchase an automobile until they returned from their trip because they would worry about her. They intended to disembark in San Francisco. However, the day their ship docked at San Diego—the first entry the ship made into the United States—they went to a Cadillac dealer in San Diego about an automobile. They telephoned to defendant. She went to San Diego immediately by bus and, so she says, with $2,658 in her pocketbook. Goldy and his wife with defendant forthwith went back to the same Cadillac dealer. Defendant gave the Cadillac salesman $200 in cash, saying she did not have the balance when, if she received the money from her grandmother, she did. The next day she gave him $2,221 in currency, mostly in $100 bills, taking the money from her purse. Defendant asked that the car be registered in the name of Edith Allen, and not in that of Edith Allen Goldy. A 17-year-old employed child buys a Cadillac, pays for it with cash, and has it registered in a fictitious name.

The money used to pay for the car was not traced to any bank account. Defendant claims that her grandmother had kept the money for her and that she never was concerned as to the exact amount of money she had given her grandmother or how much her grandmother held for her. Neither one kept any records. The grandmother's testimony was conflicting as to where she kept defendant's money, whether in a bank account or in a trunk at home. She mingled it with her own money.

The car was driven to Los Angeles, which was Goldy's home. Goldy drove the car to Burbank. Goldy and his wife then left defendant in Los Angeles and drove the car to San Francisco purportedly to see Bernstein, where it was attached. In talking to Cowpland, Goldy referred to the car as "my new car."

When the automobile was purchased on June 8, defendant knew her father's financial plight and that his liabilities were greater than his assets. Goldy was insolvent and was seeking to circumvent his creditors. It may be reasonably inferred that the money used to pay for the car, if in fact Goldy did not and the grandmother did give it to defendant, was Goldy's.

We think it patent the reasonable inferences which may be drawn from the evidence amply warranted the trial court in concluding that Goldy, while insolvent, purchased the car with his own funds, and without consideration and with intent to defraud his creditors placed the car in the name of his daughter, using a fictitious name for that purpose. Badal v. Adams, 16 Cal.2d 127, 104 P.2d 1023.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

131 Cal.App.2d 485

Sarah Belle ROBERTS, Plaintiff and Appellant,

v.

Ulys Green ROBERTS, Defendant and Respondent.

Civ. 4918.

District Court of Appeal, Fourth District, California.

March 14, 1955.

Wife's action for divorce. Decree for wife incorporated property settlement agreement of parties providing that wife was to receive certain real and personal property, and pay husband $5500 in installments, such indebtedness to be secured by trust deed on realty received by wife. Husband and trustee commenced action to foreclose trust deed four years after decree, and wife filed application in divorce action to restrain husband and trustee from foreclosing trust deed. The Superior Court, Fresno County, George M. DeWolf, J., dismissed application. Wife appealed. The District Court of Appeal, Barnard, P. J., held that although such property settlement agreement became part of divorce decree, court had no jurisdiction to grant relief sought by wife in divorce action, as there was nothing to modify or adjudicate in the divorce proceeding.

Order affirmed.

1. Divorce ⇐270

Where divorce decree included property settlement agreement of parties providing that wife was to receive certain real and personal property and pay husband $5,500 in installments, such indebtedness to be secured by a trust deed on realty received by wife, wife could not apply in divorce action for injunction to restrain husband and trustee from enforcing trust deed as there remained nothing to modify or adjudicate in divorce proceeding. West's Ann.Code Civ. Proc. §§ 526, 527.

2. Judgment ⇐203

Only one judgment can be rendered in a civil action.

3. Injunction ⇐1

An injunction cannot be granted in a particular action after judgment therein has become final. West's Ann.Code Civ. Proc. §§ 526, 527.

Ralph Robinson, Fresno, for appellant.

Matt Goldstein, William A. Quinlan, Fresno, for respondent.

BARNARD, Presiding Justice.

This is a divorce action in which an interlocutory decree of divorce was entered in favor of the plaintiff on August 10, 1949, and a final decree of divorce was entered in her favor on August 21, 1950. Each of these decrees incorporated, by reference, a property settlement agreement dated June 22, 1949, and ordered performance of the terms of the agreement by the respective parties.

The property settlement agreement provided that the defendant should receive certain personal property; that the plaintiff should receive certain personal property, including certain equipment and livestock on a parcel of real property; that the defendant should convey this real property to the plaintiff, and she should take possession on June 25, 1949; and that the plaintiff was to pay the defendant $5,500, payable in installments, the last one being due on July 1, 1953, this indebtedness to be secured by a deed of trust on this real property.

On August 31, 1953, the plaintiff filed in the divorce action an application for an order restraining the defendant and the Home Title Company from foreclosing or attempting to foreclose the trust deed which had been given to the defendant in compliance with the divorce decree; and for an order requiring the defendant to pay the plaintiff's attorneys' fees to enable her to prosecute that matter. In support of that application the plaintiff filed an affidavit alleging that the property settlement agreement was made a part of the interlocutory decree of divorce and the performance of its terms was ordered by that decree; that as a part of the property settlement agreement and decree she was to receive certain items of personal property; that when she took

possession of the ranch she found portions of these items were not there; that she had certain other claims against the defendant, including one which arose from another action in which she had appeared as guardian for certain minors; that the final payment on the trust deed, under which the Home Title Company was trustee, was due on July 1, 1953; and that on that date she advised the defendant that she was offsetting the amounts referred to in her affidavit against the balance due on the trust deed. She asked that any foreclosure of the trust deed be restrained until a hearing was had and it was determined which of the parties to the action was indebted to the other.

The court issued an order requiring the defendant and the Home Title Company to show cause why they should not be enjoined from foreclosing or attempting to foreclose this deed of trust; ordering the defendant to show cause why he should not pay the plaintiff a reasonable sum for attorney's fees in this proceeding; and temporarily restraining the defendant and the Home Title Company from taking any steps toward foreclosing this deed of trust until the further order of the court. At the hearing the defendant raised the objection that the court was without jurisdiction to grant the plaintiff the relief thus sought. The court entered an order denying the plaintiff any relief based upon her affidavit and the order to show cause which had been issued; dismissing that proceeding; vacating the temporary restraining order which had been issued; and denying this application for attorneys' fees. The plaintiff has appealed from this order.

The appellant contends that the property settlement agreement was made a part of the divorce decree and the respondent was ordered to comply with it; that under the reasoning in the case of Flynn v. Flynn, 42 Cal.2d 55, 265 P.2d 865, compliance with that decree by the respondent could be enforced by an order to show cause in this action; that the case of Hauger v. Gates, 42 Cal.2d 752, 269 P.2d 609, holds that a trustor under a deed of trust is entitled to offset money owing to him or her by the beneficiary against the amount secured by the trust deed; that the opinion in that case suggests that the most prompt procedure would be an action seeking to enjoin the trustee's sale; that this is exactly what the appellant did, in applying for the order to show cause; and that numerous cases hold that a court has the inherent power to carry out the terms of its decree.

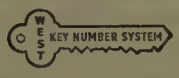
The cases cited do not support the contentions made as applicable to the facts here. It may be conceded that this property settlement agreement became a part of the divorce decree. The parties to the divorce action divided the property, or pretended to do so, in accordance with the terms of the settlement agreement and the decree. More than four years later, when the final payment on the trust deed became due, the appellant claimed to have discovered, on taking possession, that a shortage existed in the number of cows and chickens on the ranch, and with respect to certain other items. Claiming the right to an offset or counterclaim she sought relief in the divorce action, as against both the respondent and the trustee under the trust deed, the latter not being a party to the action. While she was entitled to such an offset, if she could establish the necessary facts, it does not follow that she could do so in the manner here attempted, and nothing in the case of Hauger v. Gates, supra, would tend to so indicate. That was an action brought for the purpose of setting aside a sale made under a trust deed. It was there suggested that a more prompt procedure would have been by way of an action seeking to enjoin the trustee's sale. Instead of following either of those procedures the appellant here sought to reopen the old litigation long after the judgment had become final, with the necessity for another hearing involving the decision of many new issues, and with a new and different party involved.

[1–3] There remained nothing to modify or adjudicate in the divorce proceeding, and no reservation of jurisdiction was made by the trial court in the interlocutory or in the final decree of divorce. There is nothing in this case to bring it within the recognized exceptions which permit a continuing jurisdiction for some purposes, such as modifying orders with respect to alimony or with respect to minor children. The usual

rule is that only one judgment can be rendered in a civil action and this case does not come within any of the recognized exceptions. Moreover, the main relief asked for by the appellant was the issuance of an injunction. Sections 526 and 527 of the Code of Civil Procedure provide for the issuance of an injunction in a pending action or in one brought for that purpose, when certain things appear, and that an injunction may be granted at any time before judgment. We know of no authority for the granting of an injunction in a particular action long after the judgment therein has become final. Conceding that the appellant might have been entitled to relief upon a sufficient showing in a proper action, we think the trial court had no jurisdiction to hear and determine the issues here sought to be raised in the old divorce action.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



131 Cal.App.2d 549

Ruthella SCHANCE, Plaintiff and Respondent,

v.

H. O. ADAMS TILE COMPANY, H. O. Adams, Edgar W. Lucio, individually and as copartners doing business under the fictitious firm name and style of H. O. Adams Tile Company, Merle Leslie and Kenneth Leslie, Defendants and Appellants.

Civ. 8498.

District Court of Appeal, Third District, California.

March 16, 1955.

Rehearing Denied April 14, 1955.

Hearing Denied May 11, 1955.

Action for personal injuries to a housewife falling on tar paper placed on floors in her home by defendant tile company's employees replacing tiles in plaintiff's bathroom. From a judgment of the Superior Court, Sacramento County, John Quincy Brown, J., on a jury's verdict for plaintiff, defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence substantially supported the jury's finding that defendants were negligent in using slippery tar paper on the floors and the jury's implied finding that plaintiff was not contributorily negligent in walking on such paper with recent knowledge that it was slippery.

Judgment affirmed.

1. Negligence ⇐124(3), 136(14)

Evidence of employees' adherence to trade practice or custom in doing their work may be considered in determination of their negligence and is admissible for such purpose, but such evidence though undisputed, does not absolve them from charge of negligence as matter of law.

2. Negligence ⇐134(5)

In action for injuries to housewife falling on slippery tar paper, placed on floors of her home by defendant tile company's co-defendant employees replacing tiles in bathroom thereof, evidence substantially supported jury's finding that defendants were negligent in using such paper on floors.

3. Negligence ⇐136(27)

A housewife, injured as result of fall on slippery tar paper, placed on floors of her home by tile company's employees replacing tiles in bathroom, while walking from bathroom to kitchen, without recollecting her recent previous slipping on paper or having its slippery condition in mind, after inspecting tile, was not contributorily negligent as matter of law in walking on paper without proper precaution.

4. Negligence ⇐66(2)

A lapse of memory, to excuse forgetfulness of known danger, need not, as general rule, be induced by sudden disturbing cause in sense of some startling event momentarily driving memory from mind and causing forgetfulness.

5. Negligence ⇐136(27)

Generally, question whether lapse of memory excuses forgetfulness of known

danger must be resolved by jury as matter of fact.

6. Negligence ⇐66(2)

A person's forgetfulness of known danger will not always prevent recovery of damages by him for resulting injuries, as forgetfulness is not negligence, unless it shows want of ordinary care.

7. Negligence ⇐136(26)

A person's mere abstraction of mind does not constitute contributory negligence barring his recovery of damages for ensuing injuries as matter of law.

8. Negligence ⇐136(27)

Whether housewife's momentary forgetfulness of danger of slipping on tar paper, placed on floors of her home by tile company's employees replacing tile in bathroom, was negligence barring her recovery of damages for injuries sustained as result of slipping and falling on such paper, on which she had previously slipped slightly and knew that one of such employees had also slipped, was question for jury.

9. Negligence ⇐66(2), 105

A person's knowledge that danger exists is not knowledge of amount of danger, necessary to charge him with negligence in assuming risk caused thereby, but doing of act with appreciation of amount of danger thereof, in addition to mere appreciation of such danger, is necessary to constitute negligence as matter of law.

10. Negligence ⇐135(4)

In action for injuries to housewife, falling on slippery tar paper placed on floors of her home by tile company's employees replacing tile in bathroom, evidence supported jury's implied finding that plaintiff was not contributorily negligent in walking on paper soon after she and one of such employees slipped thereon.

11. Negligence ⇐138(3)

In action for injuries to housewife falling on slippery tar paper placed on floors of her home to protect them while tile company's employees replaced tiles in bathroom, evidence justified instruction to jury that if defendant's conduct is such that reasonable man would recognize that it involves risk of harm to another, risk is unreasonable and conduct is negligent, if risk is of such magnitude as to outweigh usefulness of conduct or particular manner thereof, and that in measuring such usefulness against magnitude of risk, extent of chance that defendant's interest can be adequately advanced or protected by another course of conduct must be considered.

12. Trial ⇐241

A court's opinion must be read in connection with facts of case in which it is given, so that it is not always proper to give jury an instruction on principal of law couched in language taken from opinion in reports.

13. Appeal and Error ⇐1064(1)
Negligence ⇐141(3)

In action for injuries to housewife falling on slippery tar paper, placed on floors of her home to protect them while tile company's employees replaced tiles in bathroom, instruction to jury that it is matter of common knowledge that people walk about their homes with such sense of familiarity as to justify some relaxation from care reasonably required when walking in strange places, and that fact that plaintiff was walking in her home at time of accident was circumstance to be considered in determining whether she was guilty of contributory negligence, was mainly correct and innocuous so far as improper.

Russell A. Harris, by Donald McGregor, Sacramento, for appellants.

C. Ray Robinson by Ronald C. Cameron & Lynne Kelly, Auburn, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment entered upon the jury's verdict in an action to recover damages for personal injuries suffered by respondent when she fell while walking along a strip of tar paper which appellants had placed upon the floors in her home in order to protect the floors while they were doing work for which they had been hired.

There is no dispute as to the following facts: The appellants Leslie were the employees of H. O. Adams Tile Company which was a partnership composed of H. O. Adams and Edward W. Lucio. The Leslies were engaged as such employees in replacing tile in a shower in appellant's home. They had placed strips of tar paper on the floors extending from the service porch to the bathroom where they were working at the time of plaintiff's accident. The strips of paper had been in use for some time. Earlier in the day than the time at which she fell and sustained her injuries the respondent had slipped while walking on the paper and there was comment between her and one of the Leslies that the paper was slippery. Respondent made no request that the appellants use different paper or other floor protection, but went about her household duties without, as she testified, giving any particular thought to the condition of the floors or the tar paper which appellants permitted to remain and continued to use. During the afternoon, appellants, having completed their work in the bathroom, called respondent to inspect it. Having done so, she proceeded to return to her kitchen where she had been working. She walked along the strip of paper and at a point where she started to turn in the direction of the sink she suddenly fell to the floor and received the injuries for which she recovered damages in this action. Appellants contend that there is no evidence to justify either the verdict or the giving of two instructions requested by respondent.

[1, 2] There was evidence that in using the paper the Leslies were complying with custom governing the trade and appellants argue that this being so they could not be negligent in so doing. However, adherence to the practice of a trade does not necessarily absolve from a charge of negligence. Adherence to custom, when proven, may be considered as a factor in the determination of negligence and is admissible for that purpose. But proof of such adherence, though undisputed, does not as a matter of law void the charge of negligence. Neel v. Mannings, Inc., 19 Cal.2d. 647, 655, 122 P.2d 576; Polk v. City of Los Angeles, 26 Cal.2d 519, 529, 159 P.2d 931. Samples of the tar paper used by appellants were introduced in evidence and inspected by the jury. As stated, there was evidence that the Leslies knew the paper was slippery and that, having discovered it by slipping thereon, appellant Kenneth Leslie thereafter walked carefully because of that slippery condition. He also said he warned respondent. The evidence substantially supports the finding of the jury that appellants were negligent in using that paper upon that floor.

[3] Appellants next contend that respondent was guilty of contributory negligence as a matter of law because she had knowledge, and recent knowledge, that the paper was slippery, and that she must, therefore, be held guilty of such contributory negligence in that she walked on the paper without proper precaution. It cannot be said as a matter of law that respondent was contributorily negligent. She testified that, although she had slipped slightly in the morning and therefore knew that the paper was slippery, yet that fact did not, as she put it, "make too big an impression" on her; that when, during the following afternoon, she walked on the paper, she did so forgetting its slippery condition, and with her mind occupied with her household tasks. She said that when she was called into the bathroom to inspect the tile she was thinking about that, and as she returned she did not recollect her previous slipping or have the slippery condition of the paper in mind. Appellants press upon our attention certain language in the opinion in Markwell v. Swift and Company, 126 Cal.App.2d 245, 272 P.2d 47, 51, wherein the court said:

> "* * * to excuse one's failure to avoid a known peril because of momentary forgetfulness, such forgetfulness must be induced by some sudden and adequate disturbing cause. A lapse of memory in the presence of known danger, in order to relieve a plaintiff from contributory negligence, must be occasioned by a reasonable cause and not from mere inattention. In other words, it must be induced by some sudden and adequate disturbing

cause, and where, as here, there was a transitory or short-lived period of oblivion to a known danger, not induced by some sudden and inadvertent disturbing cause, such oblivion and forgetfulness is negligence as a matter of law, Henry J. Kaiser Co. v. Industrial Accident Comm., 81 Cal.App.2d 818, 827, 828, 185 P.2d 353; 38 Amer.Juris, sec. 187, p. 863."

[4–7] We think it cannot be said, by way of a general rule, that a lapse of memory to excuse forgetfulness of a known danger must be induced by some sudden, disturbing cause, if by that is meant some startling event which momentarily drives memory from the mind and causes forgetfulness. Generally, it is held that the question with which we are here concerned is one to be resolved by the jury as a matter of fact. As said in Andre v. Allynn, 84 Cal.App.2d 347, 354, 190 P.2d 949, 953, where a student slipped and fell when stepping upon a slippery place on a ramp, which he knew to exist:

"Whether plaintiff's failure here to be aware of the danger was due to forgetfulness, or abstraction in thinking about his desire to be accepted in the choir, is immaterial as the rule is the same in both instances. 'Even forgetfulness of a known danger will not always operate to prevent a recovery, for to forget is not negligence unless it shows a want of ordinary care. [Citing cases] And it has been repeatedly held that mere abstraction on the part of the injured person does not constitute contributory negligence as a matter of law. [Citing case] The question of contributory negligence was, therefore, properly submitted to the jury.' McStay v. Citizens Nat. Trust & Savings Bank, 5 Cal.App.2d 595, 600, 43 P.2d 560, 562.

" 'Even though appellant's testimony was susceptible of the one construction that prior to the accident she did observe the unevenness of said platform, which it is claimed constituted the element of danger, there would still be the question for the determination of the jury as to whether or not it was a want of ordinary care on the part of appellant not to have kept in mind such element of danger while arising from the stool and leaving the platform. Hayward v. Downer, 65 Cal.App. 450, 224 P. 265; Meindersee v. Meyers, 188 Cal. 498, 205 P. 1078.' "

In Meindersee v. Meyers, 188 Cal. 498, 205 P. 1078, it was held that notwithstanding knowledge and means of knowledge, it was for the jury to determine whether it was a want of ordinary care for the injured not to have the source of danger in mind.

[8, 9] In this case, though plaintiff had slipped slightly on the paper in the morning and knew that Kenneth Leslie had also slipped, nevertheless these workmen left the paper there and continued using it through the day as they passed to and from their work of setting tile. It was for the jury to say whether it was reasonable to conclude from all the circumstances that the momentary forgetfulness of the danger was negligence or, on the contrary, such conduct as might have been pursued by a person of ordinary care. In this we are fortified by these further considerations:

"* * * Knowledge that danger exists is not knowledge of the amount of danger necessary to charge a person with negligence in assuming the risk caused by such danger. The doing of an act with appreciation of the *amount* of danger in addition to mere appreciation of the danger is necessary in order to say as a matter of law that a person is negligent." Ridge v. Boulder Creek, etc., School District, 60 Cal.App.2d 453, 460, 140 P.2d 990, 993.

[10] Respondent slipped slightly on the paper in the morning. Kenneth Leslie also slipped; and that the paper was slippery was the subject of comment between them. But it was for the jury to say whether or not these happenings acquainted respondent sufficiently with the extent or amount of danger in walking upon the paper so that any walking on the paper at all was negligence on her part. We

hold that the evidence supports the implied finding of the jury that the respondent was not guilty of contributory negligence.

[11] Appellants complain of an instruction given at the request of respondent and reading as follows:

"If a defendant's conduct is such that a reasonable man would recognize that it involved a risk of harm to another person, the risk is unreasonable and the conduct is negligent if the risk is of such magnitude as to outweigh what the law regards as the usefulness of the conduct or the particular manner in which it is done. In measuring the usefulness of the conduct as against the magnitude of the risk involved in it, the extent of the chance that defendant's interest can be adequately advanced or protected by another course of conduct must be considered."

Substantially this instruction was taken from 2 Restatement, Torts, Sections 290, 291. The rules laid down therein were referred to with approval in Crane v. Smith, 23 Cal.2d 288, 298, 144 P.2d 356. In this case there was testimony by appellants to the effect that it was customary to protect floors by the use of strips of paper; that there were various materials which could be so used; that there were differences in the slipperiness of such materials and that this particular material was available for the tile setting job and hence was used. This state of the evidence rendered the instruction appropriate and there was no error in giving it.

[12, 13] Appellants complain of another instruction given at the request of respondent and reading as follows:

"It is a matter of common knowledge that people walk about their homes with such a sense of familiarity as to justify some relaxation from the care reasonably required when walking in strange places. In determining whether or not the plaintiff, Ruthella Schance, was guilty of contributory negligence at the time of this accident, the fact that she was walking in her own home is one of the circumstances to be considered, together with all the other circumstances surrounding the accident."

This instruction was taken almost word for word from the opinion in Negra v. L. Lion & Sons Co., 102 Cal.App.2d 453, 460, 227 P.2d 916, and the situation created by its giving makes applicable the warning so often contained in court opinions, such as that stated in Pearce v. Boggs, 99 Cal. 340, 343–344, 33 P. 906, 907, as follows:

"* * * It by no means follows, however, that the language which a court may use in its opinion, where it is seeking to apply principles of law to the facts of a given case, would be proper to give to a jury in another case, where the same principles are inapplicable, or the facts are different. There is no rule better settled than that the opinion of a court is always to be read in connection with the facts of the case in which it is given, and it may often occur that in its opinion it will use expressions, either by way of argument or illustration, which are correct in their application to the case before it, but would be inapplicable in many other cases. For this reason it is not always proper to give to a jury an instruction upon a principle of law couched in language taken from an opinion in the reports."

Considered as a draft of an appropriate instruction to a jury in the general run of negligence cases, such, for instance, as those in BAJI, the instruction here given can be criticised. While in the main correct, nevertheless one engaged in drafting an instruction for general use would not state that just because a person is walking about his home he is justified in relaxing from the care required when walking in strange places. Such an absolute statement as justification for relaxation would hardly be made if one were drafting an instruction for general use, for in each particular case, whether the familiarity of the surroundings justified any relaxation of care whatever, would be a matter for the jury itself to determine in that particular case. However, the

instruction as given in this case is mainly correct and, in so far as improper, innocuous, for the jury were told that in determining whether respondent was in fact guilty of contributory negligence they could consider as one of the circumstances the fact that she was walking in her own home.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



131 Cal.App.2d 511

Lillian E. KAUPE, Plaintiff-Appellant,

v.

Herman E. KAUPE, Defendant-Respondent.

Civ. 20489.

District Court of Appeal, Second District, Division 1, California.

March 15, 1955.

Wife brought action against husband to partition realty, which had been acquired by husband and wife as joint tenants. The Superior Court of Los Angeles County, Otto J. Emme, J., entered judgment adverse to wife, and wife appealed. The District Court of Appeal, White, P. J., held that recording of purported abandonment of homestead, signed by wife alone, did not affect homestead character of realty, and that fact that homestead was no longer occupied by wife and that husband alone had occupied it did not terminate the homestead, and that wife, by placing on record her declaration of homestead, exempted realty from forced sale in action for partition and waived her right as joint tenant to have her interest severed from that of her husband.

Judgment affirmed.

1. Husband and Wife ⇐14(3)

A "joint tenancy" is one estate, and, in it, rights of spouses are identical and coextensive.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Tenancy".

2. Joint Tenancy ⇐4

In absence of waiver, joint tenant is entitled, as a matter of right, to have his interest severed from that of his cotenant.

3. Husband and Wife ⇐249

Wife's undivided one-half interest in realty, owned in joint tenancy with husband, was separate property of wife.

4. Homestead ⇐166

Recording of purported abandonment of homestead, signed by wife alone, did not affect homestead character of property. West's Ann.Civ.Code, §§ 1239, 1243.

5. Homestead ⇐157

Fact that homestead was no longer occupied by wife and that husband alone occupied it did not terminate the homestead. West's Ann.Civ.Code, §§ 1239, 1243.

6. Partition ⇐12(3)

Wife, by placing on record her declaration of homestead, not only exempted homestead premises from liability to forced sale to satisfy debts of husband and wife, but also thereby exempted property from forced sale in action by wife for partition. West's Ann.Civ.Code, §§ 1239, 1240, 1241, 1243.

7. Partition ⇐12(3)

Wife, by homesteading realty, waived her right as a joint tenant to have her interest severed from that of her husband as cotenant. West's Ann.Civ.Code, §§ 1239, 1240, 1241, 1243.

Richard C. Fildew, Los Angeles, for appellant.

E. O. Berry, Inglewood, for respondent.

WHITE, Presiding Justice.

Plaintiff wife appeals from a judgment for defendant husband in an action to partition real property.

The property is a dwelling and garage upon one lot in Los Angeles. It cannot be partitioned in kind. It was acquired by plaintiff and defendant about a year

after their marriage, by deed to them as joint tenants dated May 19, 1942. On June 29, 1942, plaintiff signed, verified and caused to be recorded her Declaration of Homestead on said property for the benefit of herself and her husband.

Plaintiff and defendant lived together on the premises from 1942 until July 1951, when plaintiff left and commenced an action for divorce. Defendant cross-complained for divorce. The Superior Court granted a divorce to neither. Plaintiff executed and recorded an "Abandonment of Homestead" on September 2, 1953. It was not signed by the defendant. The court in the instant action found that each of the parties "is the owner in fee of an undivided one-half interest in the property", and from its findings, it concluded that "said joint tenancy real property * * * is subject to a valid homestead for the benefit of the defendant husband * * *"; and for that reason it "is not subject to partition by the plaintiff wife while plaintiff and defendant are husband and wife".

Appellant contends that the court erred in concluding that the property was not subject to partition because of the homestead which she had filed thereon. Respondent states that "plaintiff wife * * * may not destroy the homestead rights vested in the defendant husband by forcing a sale of said real property by action of partition", and relies upon the decision in Walton v. Walton, 59 Cal.App.2d 26, 138 P.2d 54.

[1] "A joint tenancy is one estate, and in it the rights of the spouses are identical and coextensive." Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003, 1005; Tomaier v. Tomaier, 50 Cal.App.2d 516, 519, 123 P.2d 548.

[2] "It is well settled that in the absence of a waiver a joint tenant is entitled as a matter of right to have his interest severed from that of his cotenant." Lazzarevich v. Lazzarevich, 39 Cal.2d 48, 50, 244 P.2d 1, 2.

[3] Appellant's undivided one-half interest, owned in joint tenancy with her husband, was her separate property. It was selected as part of the homestead "by her making * * * the declaration of homestead", as required by Section 1239 of the Civil Code.

[4, 5] The recording of the purported abandonment signed by wife alone did not affect the homestead character of the property. The fact that the homestead is no longer occupied by plaintiff wife and that the husband alone has occupied it since July 4, 1951 does not terminate the homestead. "A homestead can be abandoned *only* by a declaration of abandonment, or a grant thereof * * * executed and acknowledged * * * by the husband and wife, jointly or by separate instruments, if the claimant is married * * *." (Emphasis added.) Section 1243, Civil Code.

Where the whole family had removed from the California homestead to Montana "'with the intention of remaining there and residing there permanently,'" it was held that "'The homestead having once been regularly created out of a parcel of land in accordance with the statute, the estate so created continues to exist until put an end to in the mode pointed out by the statute. * * * Under our law we know of no abandonment of the homestead except in the statutory mode.'" Tipton v. Martin, 71 Cal. 325, 328, 12 P. 244.

"The homestead is exempt from execution or *forced sale,* except * * * in satisfaction of judgments obtained (1) before the declaration of homestead * * * (2) on debts secured by mechanics * * * (3) on debts secured by encumbrances on the premises executed and acknowledged by husband and wife * * * [and] (4) on debts secured by encumbrances * * * recorded before the declaration of homestead was filed for record." (Emphasis added.) Sections 1240, 1241, Civil Code.

The instant action in partition is one to enforce a sale of the premises and a division of the proceeds. It is an attempt to bring about a "forced sale", in the same sense as would be a mortgage foreclosure, a trustee's sale, or a sale under execution.

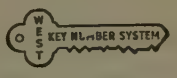
[6, 7] By placing on record her declaration of homestead, plaintiff wife not

only exempted the homestead premises from liability to forced sale to satisfy the debts of the owners, but she also thereby exempted the property from forced sale in an action for partition. By homesteading said real property, plaintiff wife waived her right as a joint tenant to have her interest severed from that of her cotenant.

See Walton v. Walton, 59 Cal.App.2d 26, 138 P.2d 54, where judgment against a plaintiff husband in favor of a defendant wife, in an action for partition under like circumstances, was affirmed.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



131 Cal.App.2d 498

Troy D. CHENOWETH, Petitioner and Appellant,

v.

OFFICE OF the CITY CLERK OF the CITY OF LOS ANGELES, Walter C. Peterson, City Clerk, Board of Civil Service Commissioners of the City of Los Angeles, and the Commissioners Thereof, Dan O. Hoye, City Controller, Defendants and Respondents.

Civ. 20310.

District Court of Appeal, Second District, Division 1, California.

March 15, 1955.

Rehearing Denied April 11, 1955.

Hearing Denied May 11, 1955.

Action for mandamus to require city to reinstate petitioner in his former position as city employee. The Superior Court, Los Angeles County, Frank G. Swain, J., denied petition, and petitioner appealed. The District Court of Appeal, Drapeau, J., held that evidence whether officer, who had made charges against other officials and employees, had been guilty of insubordination in refusing to obey an order of his superior to tell, at hearing, facts to support his charges, was sufficient to sustain his discharge for insubordination, conduct harmful to city's service, and refusal, failure, and neglect to perform his duties.

Judgment affirmed.

1. Appeal and Error ⇐671(1)

It is a general rule that matters not shown by record will not be considered on appeal.

2. Appeal and Error ⇐671(3)

In absence of a reporter's transcript, a reviewing court is confined to determination whether pleadings state a cause of action, whether findings are within issues, whether judgment is supported by findings, and whether reversible error appears upon face of record.

3. Administrative Law and Procedure ⇐781, 791

Chief issues in review of a determination of fact by an administrative board are whether person has been accorded a hearing, and whether there is substantial evidence to support determination.

4. Administrative Law and Procedure ⇐788

On review of a determination of fact by an administrative board, evidence contrary to that supporting board's conclusions should be disregarded.

5. Appeal and Error ⇐1010(1)

Reviewing courts will not interfere with trial court's conclusion if there is any substantial evidentiary support for it.

6. Mandamus ⇐168(4)

In proceeding by discharged officer for mandamus to require city to reinstate him, evidence whether officer, who had made charges against other officials and employees, had been guilty of insubordination in refusing to obey an order of his superior to tell, at hearing, facts to support his charges was sufficient to sustain his discharge for insubordination, conduct harmful to city's service, and refusal, failure, and neglect to perform his duties. St.1925, p. 1054, § 63(2).

Wirin, Rissman & Okrand and Hugh R. Manes, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Alan G. Campbell, Asst. City Attys.,

and George William Adams, Deputy City Atty., Los Angeles, for respondents.

DRAPEAU, Justice.

Troy D. Chenoweth was an employee of the City of Los Angeles for more than eighteen years. His last position in the city's service was assistant chief, License and Sales Tax Division, Office of the City Clerk.

Mr. Chenoweth became convinced that certain of his associates in the City Clerk's office were guilty of corrupt misconduct in the administration of the law, and in the collection of license, use, and sales taxes. So he wrote several letters to the Mayor of the city, making these charges.

The Mayor decided to hold a hearing to investigate the charges, and notified Mr. Chenoweth to be present and substantiate them. Section 63(2), City Charter, Stats. 1925, p. 1054. But at the hearing when the Mayor called upon Mr. Chenoweth to be sworn and to state the facts upon which his charges were based, he refused to be sworn, or to make any statement.

His chief, the City Clerk, who was also present at the Mayor's hearing, directed Mr. Chenoweth to be sworn, and to state the facts upon which he based his charges. Mr. Chenoweth still refused.

The Mayor continued the hearing for two days, when Mr. Chenoweth was again directed to be sworn and to state his charges. This time he gave as a reason for his continued refusal that he had advised the grand jury of his charges, and would talk to that body only.

The City Clerk then discharged Mr. Chenoweth for insubordination, conduct harmful to the city's service, and refusal, failure, and neglect to perform the duties of his position.

Mr. Chenoweth applied to the Board of Civil Service Commissioners of the city for reinstatement. The Board held an extensive hearing, and voted to sustain Mr. Chenoweth's discharge.

Mr. Chenoweth then petitioned the Superior Court for a writ of mandate, directing the City to reinstate him in his former position, and to pay him his salary for the time he had been excluded from it. He appeals to this Court from the judgment denying his petition.

[1, 2] At the threshold of consideration of this case, this Court is met with an incomplete record. No reporter's transcript of the hearing in the Superior Court has been furnished. The general rule is that matters not shown by the record will not be considered on appeal. 3 Cal.Jur.2d 782. And in the absence of a reporter's transcript a reviewing court is confined to a determination whether the pleadings state a cause of action, whether the findings are within the issues, whether the judgment is supported by the findings, and whether reversible error appears upon the face of the record. Montaldo v. Hires Bottling Co., 59 Cal.App.2d 642, 139 P.2d 666.

However, this Court has sent for the file and exhibits in the Superior Court. There, as an exhibit, is to be found a reporter's transcript of the hearing before the Board of Civil Service Commissioners.

A review of that record shows that there was ample evidence before the Board to sustain the charges of insubordination, and conduct harmful to the City's service.

In a memorandum for counsel the trial judge said:

"In the hearing before the Civil Service Commission, the facts outlined above make it very clear that petitioner was discharged for wilfully refusing to obey the order of the City Clerk to tell, at the hearings before the Mayor, any facts to support the very serious charges which he had made against city officials and employees. The hearing was long and difficult because petitioner, in his defense, attempted to prove that his charges were true. This was outside the then issues because the City Attorney had made no attempt to prove the charges were false and the evidence of insubordination was undisputed. This insubordination also proves charge No. 2, i. e., conduct harmful to the city's service."

Referring to Mr. Chenoweth's contention that he had been given insufficient notice of the hearing, the trial court further said:

"This, of course, is no valid reason for refusing to tell what facts he then knew, especially in view of the statement in his letter of January 29, 'I have briefed the situation from numerous notes that I have made' and in view of the fact that on February 4 the Mayor had asked him to make definite charges in writing to be used as a basis for the hearing and to outline some of the evidence."

[3, 4] The chief issues in a review of a determination of fact by an administrative board are whether the person has been accorded a hearing, and whether there is substantial evidence to support the determination of the board. And evidence contrary to that supporting the conclusions of the Board should be disregarded. La Prade v. Department of Water & Power, 27 Cal.2d 47, 162 P.2d 13; Pratt v. Los Angeles County Civil Service Commission, 108 Cal.App.2d 114, 238 P.2d 3; Nunes v. Board of Civil Service Commissioners, 88 Cal.App.2d 632, 199 P.2d 311.

[5] The ultimate power of decision in such cases rests with the judge of the trial court. Appellate courts will not interfere with the conclusion of the trial court if there is any substantial evidentiary support for it. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20.

Application of the foregoing principles answers Mr. Chenoweth's contention that the reasons for his discharge were not supported by the evidence.

Mr. Chenoweth contends that he was kept out of his office, and denied access to his files, by the City Clerk between the time of the first and second Mayor's hearings, and was therefore unable to get the information together necessary for him to testify. He states it was for that reason he communicated with the grand jury. This contention was presented to the Board of Civil Service Commissioners and to the trial court, and it was for them to pass upon its merits. And the record shows that Mr. Chenoweth had access to his office and files during working hours.

[6] No error appears in the exclusion of portions of Mr. Chenoweth's letters to the Mayor in the hearing before the Board, or the admission of the transcript of the Mayor's hearing, or the refusal to subpoena and admit into evidence before the Board testimony and documents which it is claimed would have supported Mr. Chenoweth's charges. He was discharged for refusing to be sworn and support his charges when he was called upon to do so by the Mayor, and the City Clerk.

Having come to the conclusions stated, it is unnecessary to consider arguments in the briefs as to laches or estoppel, or to pass upon either of those issues in the case.

The judgment is affirmed.

DORAN, Acting P. J.,

WHITE, P. J., did not participate in the decision in this case.



131 Cal.App.2d 480

Etta S. MITCHELL, Plaintiff and Appellant,

v.

Will W. TIBBETTS, as Executor of the Last Will and Testament of Augusta T. Laughlin, Deceased, Defendant and Respondent.

Civ. 8535.

District Court of Appeal. Third District. California.

March 14, 1955.

Action against executor to recover under alleged oral agreement with decedent. The Superior Court, Sonoma County, Charles J. McGoldrick, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that husband who had entered oral pre-marital agreement that wife's future earnings should be separate property was not disqualified as a witness in wife's action to recover against executor under alleged oral agreement with dece[illegible]

that wife should be compensated for services rendered decedent.

Judgment reversed.

1. Executors and Administrators ⇐221(2)

Where person who had rendered services to decedent was not a relative and was under no legal or moral duty to render any services, inference that both parties expected that person would be paid was warrantable.

2. Witnesses ⇐159(9)

In action against executor to recover under alleged oral agreement that plaintiff's services to decedent were to be compensated, plaintiff was disqualified as a witness. West's Ann.Code Civ.Proc. § 1880, subd. 3.

3. Parent and Child ⇐14

A husband is not responsible for support of wife's children by prior marriage.

4. Husband and Wife ⇐266

A husband and wife may, before marriage, agree, either with or without consideration, that their future earnings should be separate property.

5. Witnesses ⇐140(9)

Husband who had entered oral premarital agreement that wife's future earnings should be separate property was not disqualified as a witness in wife's action to recover against executor under alleged oral agreement with decedent that wife should be compensated for services rendered decedent.

6. Appeal and Error ⇐205

Where trial court, in action against executor to recover under alleged oral agreement with decedent, clearly and conclusively ruled that it would not entertain any testimony by plaintiff's husband as to any matter or fact occurring prior to decedent's death, offer of proof would have been useless and failure to make offer of proof did not preclude reviewing court from reversing judgment for error in exclusion of husband's testimony.

Edward T. Koford, Santa Rosa, for appellant.

Barrett & McConnell, William H. McConnell, Santa Rosa, for respondent.

VAN DYKE, Presiding Justice.

Appellant brought this action against the respondent executor of the last will and testament of his deceased sister, Augusta T. Laughlin. The action was based on a rejected claim for the reasonable value of personal services alleged to have been performed by appellant for the decedent pursuant to an oral agreement that appellant would be compensated for such services. This appeal is from the judgment of the trial court that appellant take nothing. Appellant alleges insufficiency of the evidence to support the findings that appellant did not perform any services for the testatrix pursuant to an agreement that she would be paid therefor. Appellant claims further that the trial court erred in holding that under Section 1880 of the Code of Civil Procedure appellant's husband was disqualified from testifying as to any matter or fact occurring before the death of respondent's testatrix.

[1] Appellant and the deceased were not related nor were they members of the same household. They were, however, friends of long standing. There was uncontradicted testimony that from no later than December 9, 1944, and until October 22, 1951, on which latter date the testatrix died at the age of 82, the appellant frequently visited her, took her driving and shopping, accompanied her on business errands, assisted her in packing and moving, performed household and gardening tasks for her and often acted as a companion. There was a conflict in the evidence as to the nature and extent of such services and since there was no testimony as to an express contract for compensation it was for the trial court to determine whether these services were merely rendered gratuitously out of friendship or were so extensive and of such nature as to raise an implied contract for payment. The only testimonial evidence as to any understanding or intention of the deceased to reimburse the appellant was the testimony of appellant's daughter concerning declarations of decedent with respect to

the things which appellant had done and was doing for her. She testified that decedent told her "that she was glad that Mother was taking care of her and she didn't want to go to the hospital and didn't want any strangers around and she said she didn't know how she could repay my mother for everything that she had done for her, always mentioned that she couldn't repay her, those were her words." The witness further said, "every time that I saw her, she made some reference to it but I wouldn't be able to say what time that was, the exact conversation, I mean. That time I do remember specifically. She has mentioned how fond she was of her and that is all I can remember." She further said: "She [decedent] was glad of my mother's companionship because she was lonesome and didn't seem to have too many friends that were around her a lot." For the purpose of this appeal we may assume that since appellant was under no legal or moral duty to render any services whatsoever to her friend, the inference that both parties expected that she would be paid would be warrantable. Moore v. Spremo, 72 Cal.App.2d 324, 330, 331, 164 P.2d 540. On this point we quote from Wainwright Trust Co. v. Kinder, 69 Ind.App. 88, 120 N.E. 419, 420–421:

> "* * * The intention to pay and the expectation of compensation may be inferred from conduct where equity and justice require compensation, * * *. * * * [T]he elements of intention to pay on the one hand, and expectation of compensation on the other, must be found to exist; but such elements, like other ultimate facts, may be inferred from the relation and situation of the parties, the nature and character of the services rendered, and any other facts or circumstances which may reasonably be said to throw any light upon the question at issue."

It cannot be held, however, as a matter of law that upon this record the trial court was compelled to find the appellant had performed services for decedent under such conditions that a promise to pay must be implied. The evidence from which such inference could be drawn was most meager and if the sufficiency of the evidence to sustain the trial court's finding that there was no agreement on the part of decedent, express or implied, to pay for the services of appellant were the only issue on this appeal we would affirm the trial court's judgment.

[2–5] Appellant was herself obviously disqualified as a witness and had to depend upon the testimony of others to establish her cause. We have referred to the testimony of appellant's daughter and have characterized it as meager. But appellant placed her husband upon the stand and attempted to elicit from him testimony concerning the issues, particularly those regarding the existence of an express or implied contract for compensation, extent and character of services rendered, and the like. She was met promptly with objection that since the witness was her husband and admittedly had been such from a time prior to the rendition of the services sued upon he was disqualified as a witness under subdivision 3 of section 1880 of the Code of Civil Procedure providing that the following persons cannot be witnesses:

> "3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

To meet the objection there was received in evidence the following testimony of the husband:

> "Q. And is Etta Mitchell your wife? A. Yes.
>
> "Q. And when were you married? A. January 4, 1944.
>
> "Q. Now, prior to the time of your marriage to Etta Mitchell, did you and your wife have an agreement with reference to property? A. Yes.
>
> "Q. Will you tell the court just what that was? A. My wife was working at the time and we had separate bank accounts and she had two children.

"Q. She had two children? A. I had no children, and we agreed that anything that she earned was to be her separate property and she had her own bank account at that time. * *

"Q. * * * Was that agreement that you made prior to marriage with reference to any future earnings that your wife may make?

"The Court: * * * Was that a written agreement?

"The Witness: A verbal agreement, prior to marriage, a verbal agreement. * * *

"Q. Since your marriage, from that day on, have you had any control over your wife's separate property? A. No."

Having gone thus far, the witness was asked if, after the date of his marriage to appellant and up until the time when decedent died, his wife had visited the home of decedent in Santa Rosa. Objection was again made that the witness was disqualified under "the dead man's statute" and the court sustained the objection. A careful examination of the record discloses that the ruling of the court was not based upon a disbelief of the husband's testimony as being unworthy of credence when viewed in opposition to the statutory presumption that the claim sued upon, being for services of the wife during marriage, was community property. As stated by the court, the ruling was that appellant had not brought the witness within "the provisions of the Roy v. Salisbury case in 21 Cal.2d [176, 130 P.2d 706], I cite that as my authority, that is, * * * there is not evidence before this court upon which this court *could* rule that this witness had relinquished his right to the community earnings of the wife." (Italics ours.) We think the court erred in excluding the husband's testimony upon the ground stated. The witness had said flatly that he and his wife had agreed prior to marriage that during the marriage her earnings were to be separate property and had given the reasons why that agreement had been made, that is, that she had two children by a former marriage and, in effect, she wanted her earnings to be hers alone. The apparent purpose was that they were needed for the support of her children for whose support, of course, the husband-to-be would not be responsible since the children were not his. That it is competent for a husband and wife to so agree either with or without consideration has been held so frequently that the citation of a few cases so holding is sufficient. See In re Estate of Patterson, 46 Cal.App. 415, 419–420, 189 P. 483; Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 719, 103 P. 190; Cullen v. Bisbee, 168 Cal. 695, 697–699, 144 P. 968; Roy v. Salisbury, 21 Cal.2d 176, 185–186, 130 P.2d 706. We hold that the testimony of the witness concerning the antenuptial agreement between himself and his wife as to her future earnings was sufficient if accepted by the court as truthful to qualify him as a witness on appellant's behalf concerning the transactions between herself and decedent upon which she based her action.

[6] It is argued by respondent that appellant failed to make an offer of proof as to what her husband's testimony would be upon the issue of whether or not she was to be paid for her services to decedent and for that reason the judgment cannot be reversed for error in preventing the husband's testimony. Ordinarily the point is good, but it is not good when it is apparent from the record that an offer of proof would have availed nothing. That is the situation here. The trial court had clearly and conclusively ruled that it would not entertain any testimony on the husband's part as to any matter or fact occurring prior to the death of the testatrix. In that situation it would have been useless to have made an offer of proof and we cannot assume on appeal that evidence material to appellant's cause of action would not have been forthcoming. Heimann v. City of Los Angeles, 30 Cal.2d 746, 757–758, 185 P.2d 597.

For error in excluding the testimony of appellant's husband, the judgment is reversed.

PEEK, J., and SCHOTTKY, JJ., concur.

131 Cal.App.2d 367

Edward G. McGRATH, Plaintiff and Appellant,

v.

William J. BURKHARD, Superintendent of Sacramento City Unified School District and Secretary of the Board of Education of the Sacramento City Unified School District; The Board of Education of the Sacramento City Unified School District; Mrs. J. F. Didion, Mrs. P. D. Bevil, James D. Harvey, Wilbur H. Haines, and John E. Kennedy, as Members thereof; Malcolm P. Murphy, Principal of Sacramento Senior High School, Defendants and Respondents.

Civ. 8468.

District Court of Appeal, Third District, California.

March 8, 1955.

Action for declarations of plaintiff's rights and duties under his contract of employment as a city senior high school teacher and determinations that non-classroom work assigned to him was not within the scope of his employment, that he should not be assigned duties requiring more than eight hours work per day on teaching days, and that no duties should be assigned to him on days for which he was not paid. From an adverse judgment of the Superior Court, Sacramento County, Malcolm C. Glenn, J., plaintiff appealed. The District Court of Appeal, Schottky, J., held that the trial court correctly determined that respondent city unified school district Board of Education had the right to assign plaintiff to assist in supervision of any athletic or social activities conducted under the name or auspices of the high school or any class or organization thereof, where such assignments were made impartially and without discrimination against plaintiff with relation to other teachers in such school.

Judgment affirmed.

1. Schools and School Districts ⇐136

The provisions of Education Code, requiring school district governing board to prescribe rules for government of schools under its jurisdiction and duties of all persons in public school service in district and stating certain general duties required of all teachers in public schools, and sections of State Board of Education Administrative Code respecting duties of school principals and teachers, showed that assignment of male teacher in city senior high school to supervision of school football and basketball games was within contemplation of parties to his employment contract. Education Code, §§ 2204, 13201, 13228–13230.

2. Schools and School Districts ⇐147

The State Board of Education Administrative Code section, requiring school principals to provide for teachers' supervision of school playgrounds and providing for direct supervision of all public school athletic or social activities by school district authorities, authorizes city school district board of education to assign supervision of such city high school activities to high school teachers, though teachers are not mentioned in sentence of section respecting such activities and booklet of district board's rules and regulations does not expressly set forth rule requiring teachers to fulfill such assignments.

3. Schools and School Districts ⇐59

Generally, there is no necessity that all rules, orders and regulations for discipline, government and management of schools be made matter of record by school board, or that every act, order or direction affecting conduct of such schools shall be authorized or confirmed by formal vote of board.

4. Schools and School Districts ⇐147

Duties performed by male teachers in city senior high school under assignments by city school district board of education to supervise school football and basketball games were not unreasonable or outside scope of their teaching duties as in nature of police work, unprofessional, and foreign to field of instruction, in view of evidence that teachers so assigned had no authority to act as police officers and that such duties did not relate to physical strength, though women teachers were not assigned thereto. Education Code, §§ 13228–13230.

5. Schools and School Districts ⇐147

A city school district board of education's assignment of male teacher in city

senior high school to supervision of six school football and basketball games for periods of three to four evening hours, including Saturdays and legal holidays, for which he was not paid anything in addition to his annual salary, were not beyond scope of his employment contract as unreasonable in respect to either number or hours of such assignments. Education Code, §§ 2204, 13201, 13228–13230.

6. Schools and School Districts ⇐147

In city senior high school teacher's action for declaration of his rights and duties under his employment contract, superior court correctly determined that respondent city school district board of education had right to assign plaintiff to assist in supervision of any and all athletic or social activities conducted under name or auspices of such high school or any class or organization thereof, where such assignments were made impartially and without discrimination against plaintiff with relation to other teachers in such school. Education Code, §§ 2204, 13201, 13228–13230.

7. Schools and School Districts ⇐20

The public schools were created and are supported for benefit of pupils therein, their parents, and community at large, not teachers therein, and all legislation regulating educational machinery is based primarily on consideration of children's welfare and best interests, which must be considered by courts in construing such legislation.

8. Evidence ⇐83(2)

The District Court of Appeal must presume that authorities of city unified school district acted for what they considered best interest of students in city senior high school and people of district in assigning teacher in such school to supervision of football and basketball games conducted under school's name and auspices.

9. Schools and School Districts ⇐20

The courts will not lightly interfere with exercise of functions intrusted by law to school authorities.

Charles F. Gray, Jr., Sacramento, for appellant.

J. Francis O'Shea, Dist. Atty., by William A. Green, Asst. Dist. Atty., & John B. Heinrich, Deputy Dist. Atty., Sacramento, for respondents.

Joseph Genser, Richmond, amicus curiae.

SCHOTTKY, Justice.

Plaintiff, a teacher in the Sacramento Senior High School, commenced an action for declaratory relief against defendant Superintendent of Sacramento City Unified School District, the Board of Education of said district and the individual members of said board, and the principal of the Sacramento Senior High School. Plaintiff sought declaratory relief on the ground that the non-classroom assignments, as hereinafter detailed, did not fall within the scope of his duties as a teacher under the terms of his contract of employment, and that such duties were unprofessional in nature. Plaintiff asked the court to declare the rights and duties under the contract of employment; that the non-classroom work was not within the scope of employment; that plaintiff should not be assigned duties on a teaching day which required more than eight hours per day to perform competently; that if more than eight hours may be assigned the court should declare the number of hours per day plaintiff is obligated to perform under the contract; that no duties be assigned on days for which he is not paid, i. e., Saturdays, holidays and most non-teaching days.

Defendants denied the material allegations of the complaint and following a trial the trial court concluded (1) that the respondent board has the right to assign to appellant any teaching duties within the scope of his credential, provided that such assignment does not reduce the rank and grade of his position below the rank and grade of the position held by him during his probationary service with the Sacramento City Unified School District, (2) that the board has the right to assign appellant to assist in the supervision of athletic and social activities conducted under the name or auspices of the Sacramento Senior High

School, provided the assignments are made impartially and without discrimination, and (3) that since appellant's employment is professional in nature the services cannot be arbitrarily measured, but depend upon the reasonable needs of the school program; however, the hours of such services must be reasonable.

Plaintiff has appealed from the judgment entered in accordance with said conclusions. Before discussing the contentions made by plaintiff and appellant we shall summarize the factual situation which is not in substantial dispute.

Appellant is a teacher in the Sacramento Senior High School. From 1942 to 1945 he was employed as a long term substitute teacher; from July, 1945, to July, 1948, he was employed as a probationary teacher and from July, 1948, to the date of this action he was employed as a permanent teacher. He achieved the status of tenure in 1948.

At all times appellant has been employed under a written contract, which incorporates the rules of the respondent Board of Education.

During his course of employment by respondents, appellant and other male teachers have been required to attend certain non-classroom activities and act in a supervisory capacity. The activities are school football and basketball games, which are under the auspices and control of the school authorities. These games may be held at places other than on the school grounds. Six of these athletic assignments are made to each male member of the faculty during each school year, three football games and three basketball games. At the beginning of the school year each male teacher selects the three football games at which he would prefer to supervise; at the end of such season he then selects the three basketball games at which he would prefer to attend in a supervisory capacity. To the extent possible the requests of the teachers are complied with in the scheduling of these assignments, but at times a teacher receives an assignment on a date other than the one he had selected. The teachers are selected impartially and without discrimination. For many years past this administrative practice of assigning the male teachers to supervise at the school athletic contests in football and basketball has been carried out to protect the welfare of the students. The teachers have no authority to act as police officers, but policemen are present at the games to handle any situation in which their authority is needed. Appellant testified that the teacher's duties at these games consisted of maintaining order in the student section of the stands, sitting in the student section, reporting disturbances to the police, preventing spectators from going on the playing field, clearing the way for the band or drill teams, guarding seats saved for the band and drill team members, checking credentials at the press box, patrolling under the bleachers at basketball games, controlling conduct of the students, preventing smoking in the gymnasium by students or adults and preventing spectators from entering the gymnasium with soft drinks, candy or other food. The female teachers of the school are given assignments to supervision of non-classroom activities, but of a different nature, as supervising in the cafeteria, variety shows and dances.

Appellant did not object to these assignments during the time he served as a long term substitute teacher or during the three years he served as a probationary teacher, but after he attained the status of permanent teacher appellant objected to these assignments and failed to cooperate in the performance of such duties. Effective July 1, 1950, the respondent Board of Education transferred appellant from Chairman of the Social Studies Department to a full time teacher of English. In lieu of the non-classroom assignments appellant was assigned an extra class to teach, so that he and an industrial arts teacher are the only ones who teach six class hours per day. This is in accordance with a rule of the school and apparently is the first time in several years that it has been used. Since this time appellant has not received any athletic assignments.

[1] Appellant first contends that he is under no contractual obligation in regard to the athletic assignments and that if so

obligated, the required duties are unreasonable and not within the scope of teaching duties. He states that such obligation is nowhere set forth in the contract, the rules of the Board of Education, nor in the laws of the state of California. While it is true that this specific duty is not set forth, a study of the evidence and the provisions set forth in the Education Code and the Administrative Code reveals that the assignment complained of by appellant is and was within the contemplation of the parties when the contract of employment was entered into. Relevant portions of each are set out below:

> Education Code, section 2204. "The governing board of any school district shall: (a) Prescribe and enforce rules not inconsistent with law or with the rules prescribed by the State Board of Education, for its own government, and for the government of the schools under its jurisdiction."
>
> Education Code, section 13201. "The governing board of each school district shall fix and prescribe the duties to be performed by all persons in public school service in the school district."

These sections provide for the delegation of rule making authority, so that the correct body can prescribe exactly what the duties are. In connection with this, certain rules promulgated by the State Board of Education must be considered. The following excerpts are taken from the California Administrative Code, Title 5, Article 3, which is entitled "Duties of Principals and Teachers."

> "Section 16. Responsibility of Principal. The principal is responsible for the supervision and administration of his school."
>
> "Section 18. Playground supervision. Where playground supervision is not otherwise provided, the principal of each school shall provide for the supervision, by teachers, of the conduct and direction of the play of the pupils of the school or on the school grounds during recesses and other intermissions and before and after school. All athletic or social activities, wherever held, when conducted under the name or auspices of any public school, or any class or organization thereof, shall be under the direct supervision of the authorities of the district."
>
> "Section 24. Moral supervision. Principals and teachers shall exercise careful supervision over the moral conditions in their respective schools. Gambling, immorality, profanity, frequenting public pool rooms, the use of tobacco, narcotics and intoxicating liquors on the school grounds, or elsewhere on the part of pupils shall not be tolerated."

The Education Code also sets forth certain general duties required of all teachers in the public schools, as section 13228 which requires enforcement of the course of study, the use of legally authorized textbooks, and the rules and regulations prescribed for schools; section 13229 which requires that pupils be held to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess; and section 13230 which requires instruction and teaching in the principles of morality, truth, justice and patriotism, "and to train them up to a true comprehension of the rights, duties, and dignity of American citizenship." These provisions relate to all teachers in the public school system. Of course, the State Board of Education has expressed other duties which are required of teachers, as shown in the above excerpts from the Administrative Code. The local governing board has power delegated to it to make the necessary rules and regulations which its district requires. Ed.Code, secs. 2204, 13201. And finally, the principal has the necessary power which is inherent in his office to properly administer and supervise his school.

Appellant's contract expressly set forth that it was subject to the laws of California, the rules of the State Board of Education and of the local governing board. The trial court found that the rule of the Sacramento City Unified School District with reference to the athletic assignments was a part of appellant's contract. The code provisions relating to the duties of teachers do not set forth the particular

duty which is the subject of this controversy. The rules promulgated by the State Board of Education do not set forth such specific duty. However, the rules in Article 3 of Title 5 of the Administrative Code do show that the principals and teachers are charged with certain duties, for example, sections 16, 18 and 24, quoted supra.

[2] Appellant contends that the title of section 18 shows that the intent was to provide supervision for play activities of young children on the school playground. He also contends that the second sentence of said section referring to the athletic and social activities does not relate to teachers, his reason being that because the first sentence of the section expressly refers to teachers and the second sentence does not mention teachers it necessarily follows that they are not included in such sentence. We do not agree with this contention as said section 18 is included in the article which is entitled "Duties of Principals and Teachers." This section places playground supervision not otherwise provided for under the direction of the principal and also makes the authorities of the school district responsible for the direct supervision of all athletic or social activities conducted in the name or under the auspices of the school regardless of where they are held. To carry out this responsibility, respondent Board requires teachers to attend certain athletic and social activities in a supervisory capacity. The athletic games, to which appellant complains of his assignments, are conducted under the name auspices of the Sacramento Senior High School. Sometimes they are held off of the school grounds, as generally the home football games are conducted at the local stadium. Section 18 clearly places upon the authorities of the district the duty to supervise these activities. This section does not expressly place the particular duty in controversy upon the teachers, but such duty is placed upon the district authorities who in turn have properly delegated it to their representatives and agents. One of the published rules by respondent board in regard to matters of supervision requires teachers to cooperate with their superiors. This is absolutely necessary to carry out the proper administration of the district.

While it is true that the rule requiring teachers to fulfill the athletic assignments is not expressly set forth in the printed booklet of rules and regulations of the Board of Education of the Sacramento City Unified School District, it is also true that none of the non-classroom duties required of the teachers are set forth therein, and yet the teachers are fully aware of such duties as cafeteria assignments, variety shows, club sponsors and duties at commencements, etc. All of these duties are supervisory in nature and a minute detailing of them is quite unnecessary, notwithstanding appellant's contention that they should be specifically set forth. These duties are so interrelated with the other duties of the teacher and his position that it is not necessary that each one of them be specifically stated. The booklet of rules and regulations does state that "In matters of supervision teachers shall work cooperatively with special supervisors, the Principal of the school and the Assistant Superintendent in charge." And it is clear from the evidence that appellant was fully aware of the rule and practice as to these athletic assignments when he entered into the contract with the respondent district, and that it was within the contemplation of the parties to the contract.

[3] Furthermore, the general rule is, as stated in 24 Ruling Case Law, at page 574:

> "There is no necessity that all the rules, orders and regulations for the discipline, government and management of the schools shall be made a matter of record by the school board, or that every act, order or direction affecting the conduct of such schools shall be authorized or confirmed by a formal vote."

[4] Appellant's next major contention is that even though the Board has the authority to make the athletic assignments, the specific duties performed by the teachers at the games are unreasonable and not within the scope of their teaching duties. Appellant cites the case of Parrish

v. Moss, 200 Misc. 375, 106 N.Y.S.2d 577, 580, in support of this contention, and the same case is cited and relied upon by respondents. In that case some teachers were seeking to set aside a board regulation which stated that: "* * * 1. Every teacher is required to give service outside of regular classroom instruction in the performance of functions which are the essential duties of every teacher. 2. There is an area of teacher service which is important to the well rounded educational program of the students, but in which teachers participate in varied ways according to their interests, capabilities and school programs. The principal has the responsibility and duty to see to it that these activities are carried on. The principal may assign a teacher to reasonable amounts of such service beyond the specified hours of classroom instruction, and the teacher is required to render such service. * * *" One ground of attack was that this unlawfully delegated to the principals the power to fix the duties and hours of the teachers without providing for adequate protection of the teachers. The court held that such position was not tenable, and upheld the regulation as valid. In its decision the court quoted from language used by the commissioner in a prior controversy which involved a ruling of the New York City Board of Education that required teachers to obtain a 1951 Red Cross first-aid certificate, in which the commissioner stated that any teaching duty within the scope of the teacher's license may properly be imposed, but the required hours of extra-curricular activities must be reasonable and the required duty must not be foreign to the field of instruction, as teachers may not be required "to perform janitor service, police service (traffic duty), school bus driving service, etc. * * *". The court also said in the course of its opinion, 106 N.Y.S. 2d at page 584:

> "The hours established in any case must be reasonable. 'The broad grant of authority to fix "duties" of teachers is not restricted to classroom instruction. Any teaching duty within the scope of the license held by a teacher may properly be imposed. The day in which the concept was held that teaching duty was limited to classroom instruction has long since passed. Children are being trained for citizenship and the inspiration and leadership in such training is the teacher. Of course, it is recognized that any bylaw of a board outlining teachers' duties must stand the test of reasonableness.'"

Appellant seeks to apply the language of Parrish v. Moss, supra, to the instant case and asserts that the trial court should be reversed since the duties at the athletic contests were (1) in the nature of police work, (2) unprofessional, (3) foreign to the field of instruction, and (4) imposed unreasonable hours, and therefore were not within the scope of the teaching duties required by the contract. However, the record does not sustain appellant's contention in this regard. The teachers have no authority to act as police officers; in fact, they are expressly informed that their duties are supervisory only. At no time is a teacher to exert police powers. The teachers are to act in a supervisory capacity, much as they do at school assembly meetings, etc. They are acting to protect the welfare of the students. Appellant asserts that he has received no training for this type of work and that the evidence suggests, since women are not assigned this type of duty, that physical strength is a requisite and that the motivating reason for the assignments is to quell and put down disturbances, which is in the nature of police duty. The record refutes appellant's statement. From the deposition of Dr. Murphy, the principal at Sacramento Senior High School, it appears that he was asked questions directly on this point and he replied that the duties did not relate to physical strength or power and stated that he thought many of the female teachers could perform the duties at the games. He stated that he thought that a man's presence at the games was more effectual on the students than a woman's and that it just seemed to be more of a man's job. In explaining this he stated that the work in cafeteria supervision seemed to be more

in line with a woman's presence than a man's. Appellant states that the duties were degrading, humiliating and unprofessional. Certain instances are cited. Dr. Murphy admitted that the duty was disagreeable to some, but he felt that it was the same with some women with the cafeteria assignments, or with anyone when they have to perform a task which they do not like, and apparently this is especially so with some teachers when they are faced with these types of supervisory duties. All public school teachers have general duties as expressed by the Education Code, sections 13228, 13229 and 13230, supra, relating to the control of the conduct of pupils, endorsement of rules and the training of them to be good American citizens. Coupled with these are the rules of the State Board of Education in Article 3 of Title 5 of the Administrative Code, which relate to certain duties, and section 24 in particular, quoted supra, which requires principals and teachers to exercise careful supervision of moral conditions in the schools and not to tolerate participation by students in gambling, profanity, the use of intoxicating liquors, etc., on or off the schoolgrounds. Teachers are expected to perform these obligations. It is of great importance that the association of teacher and pupil should tend to inculcate in the latter principles of justice, fair-play, good sportsmanship, good citizenship and respect for rules and authority. Viewing the duties at the games in light of the above, it is apparent that they are not of an unprofessional nature. For as stated in the case of Parrish v. Moss, supra, so strongly relied upon by appellant, "The day in which the concept was held that teaching duty was limited to classroom instruction has long since passed."

[5] Appellant's final contention is that the duties here involved impose unreasonable hours. The record shows that six of these assignments are made in a school year from September to the following June. Generally, the hours are evening ones, from about six or seven o'clock to ten o'clock. Some assignments fall on Saturday evenings or on Thanksgiving Day. Appellant also claims that the Saturday or legal holiday on which an assignment occasionally occurs is a day of duty for which he is not paid. However, appellant is not paid on a basis of so much per hour worked. Teachers are engaged in a professional employment. Their salaries and hours of employment are fixed with due regard to their professional status and are not fixed upon the same basis as those of day laborers. The worth of a teacher is not measured in terms of a specific sum of money per hour. A teacher expects to and does perform a service. If that service from time to time requires additional hours of work, a teacher expects to and does perform it. If that service from time to time requires additional hours of work, a teacher expects to and does put in the extra hours, without thought of measuring his or her compensation in terms of a given sum of money per hour. A teacher's duties and obligations to students and the community are not satisfied by closing the classroom door at the conclusion of a class. The direction and supervision of extracurricular activities are an important part of his duties. All of his duties are taken into consideration in his contract for employment at the annual salary. All of this is, of course, subject to the test of reasonableness. It does not appear that six of these athletic assignments in an entire school year are unreasonable, nor that the hours of such assignments are unreasonable under the circumstances. What is reasonable must necessarily depend upon the facts of the situation and the teachers are protected in that regard by the appropriate administrative and judicial procedure. Supervising the students and being present to protect their welfare at school athletic and social activities, conducted under the name and auspices of the school, is within the scope of the contract and such assignments are proper so long as they are distributed impartially, they are reasonable in number and hours of duty and each teacher has his share of such duty.

[6, 7] In view of the foregoing we are convinced that the court correctly determined that respondent school board had "the right to assign Plaintiff to assist in the supervision of any and all athletic or

social activities, wherever held, when conducted under the name or auspices of the Sacramento Senior High School, or any class or organization thereof, provided such assignment is made impartially and without discrimination against Plaintiff with relation to the other teachers employed at said Sacramento Senior High School." It must be borne in mind that the respondent school authorities are entrusted with the responsibility of administering the affairs of the school district and that as stated in Bates v. Board of Education, 139 Cal. 145, at page 148, 72 P. 907, at page 908:

> "The public schools were not created, nor are they supported, for the benefit of the teachers therein, as implied by the contention of the appellant, but for the benefit of the pupils and the resulting benefit to their parents and the community at large."

And as stated in Knickerbocker v. Redlands High School District, 49 Cal.App. 2d 722, at page 727, 122 P.2d 289, at page 291:

> "The whole system of legislation regulating the educational machinery is based upon the consideration of the welfare and best interests of the children. The proper regulation of tenure in office and other rights of teachers were also properly considered and regulated, but the fundamental purpose and primary object of the legislature was the consideration of the welfare of the children. This fundamental purpose must not be lost sight of by courts in the construction of legislation dealing with our educational system."

We believe that respondent school authorities had the right under the law and the contract with appellant to assign appellant to attend and assist in supervising these athletic contests. We believe that the presence of teachers at such contests should be helpful not only to the students but should be of benefit to the teachers themselves. We believe that the school authorities had the right to determine that such duties should be performed by the teachers assigned thereto. As stated by the learned trial judge in his memorandum opinion, "Have the parents not the right to expect, and, indeed, to demand, that all such school activities be under the supervision of the school authorities? If not, then who is to be in control? The answers to these questions seem obvious."

[8, 9] We find nothing unreasonable in the assignments objected to by appellant. We must presume that the school authorities were acting for what they considered the best interest of the students and the people of the district. To quote again from Parrish v. Moss, supra [200 Misc. 375, 106 N.Y.S.2d 585]: "Our courts have repeatedly enunciated the principle that they will not lightly interfere with the exercise of the functions intrusted by law to the school authorities."

The judgment is affirmed.

VAN DYKE, P. J., concurs.

PEEK, J., concurs in the judgment.



131 Cal.App.2d 424

Elma CONE, Plaintiff, Cross-Defendant and Appellant,

v.

Don C. CONE, Defendant, Cross-Complainant and Respondent.

Civ. 8525.

District Court of Appeal, Third District, California.

March 11, 1955.

Wife's action for divorce, wherein husband counterclaimed for divorce. The Superior Court, Butte County, Dudley G. McGregor, J., rendered an interlocutory decree of divorce upon the husband's supplemental cross complaint and awarded to him as his separate property the major portion of the parties' realty and personalty, and the wife appealed. The District Court of Appeal, Van Dyke, P. J., held that the evidence sustained the trial court's findings

that the husband had not been guilty of the cruelty with which charged and that the husband's allegations as to the wife's cruelty toward him were true.

Affirmed.

1. Divorce ⇐130

In wife's action for divorce, wherein husband filed counterclaim for divorce, evidence sustained trial court's findings that husband had not been guilty of the cruelty with which charged and that the husband's allegations as to the wife's cruelty toward him were true.

2. Divorce ⇐127(4)

In wife's action for divorce, wherein husband counterclaimed for divorce and parties contested every vital issue posed by pleadings, corroboration of the husband's testimony as to wife's extreme cruelty was sufficient, although slight, to sustain grant of divorce to husband.

3. Divorce ⇐127(4)

Slight corroboration of divorce complainant's testimony is sufficient where there is no danger or claim of collusion.

4. Husband and Wife ⇐257, 262(1)

Where income of husband and wife is produced by use of husband's separate property which was his before marriage, and by his management thereof, that part of income which is due to personal character, energy, ability and capacity of husband is community and the rest is separate, and in absence of circumstances showing different result, it is to be presumed that some of profits were justly due to capital invested.

5. Husband and Wife ⇐257

Where husband who was engaged in business through use of his own property married and continued his business and devoted his time, ability, experience and industry thereto, a part of his gross income after marriage was community property and part was separate.

6. Husband and Wife ⇐264

In wife's action for divorce, wherein husband counterclaimed for divorce, evidence sustained trial court's findings that all but $6,500 was separate property of husband, who had owned about as much property prior to marriage as at time of divorce, taking into account increase of value due to inflation, and who had produced income from some of such property during marriage.

7. Divorce ⇐253

In wife's action for divorce, wherein husband counterclaimed for divorce, and trial court found that all but $6,500 in value of property owned by parties was husband's separate property, it was not necessary that trial court find and fix specific value and character of each item of property.

8. Husband and Wife ⇐249

Where community interest is inconsiderable in amount as compared with property with which it has been intermingled, community will not draw to itself the separate estate.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Chico, for appellant.

Laughlin, McKalson & Crable, Chico, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment granting the respondent husband an interlocutory decree of divorce upon his supplemental cross-complaint, and awarding to him as his separate property the major portion of the parties' realty and personalty. Appellant contends that there is a lack of evidentiary support for the trial court's findings that: 1. She was guilty of extreme cruelty; and, 2. That all but $6,500 in value of the property owned by the parties was respondent's separate property.

The parties married in 1941, at which time appellant wife was about 28 years of age and had a three year old son by her former husband from whom she was divorced. Respondent husband was a 50 year old widower without issue. He was, and for some time before the marriage had been, engaged in the implement business in Gridley, running what he described as a "one man concern". He also was the owner of a small house in which, after the marriage, he and his new wife lived until 1947, when

he sold it for $4,000 and moved his family into a new home built on lots purchased by him in 1944 for $500. In 1943 a son was born to the marriage. In 1950 appellant left respondent and filed this suit for divorce. However, during February of 1951 the parties became reconciled, although the pending divorce action was not dismissed. Appellant again separated from respondent on July 7, 1952 and filed a supplemental complaint herein. Respondent interposed a supplemental cross-complaint and by the last two pleadings issues were joined as to the alleged extreme cruelty of each spouse toward the other and as to the nature and extent of their property.

[1–3] The evidence on the issue of cruelty was in conflict. The trial court found that respondent had not been guilty of the cruelty with which appellant charged him and that respondent's allegations as to appellant's cruelty toward him were true. We hold that the evidence was sufficient to sustain these findings. Since both are challenged herein, we will relate, as briefly as may be, the evidence which, in our opinion, substantially supports the trial court's findings. Almost, if not all, of the acts which appellant and her witnesses gave in evidence in proof of appellant's charges against her husband occurred prior to their reconciliation after the first separation. By appellant and her witnesses respondent was described as stingy toward his family. They charged that he at times acted unfriendly and unsociable towards appellant's sister's "boy friend" and objected to his smoking in respondent's house; that on two occasions when friends from Sacramento visited at the family home respondent ignored them; that respondent's foster son, Bobby Stearn, had for a time used the name of Cone and respondent ordered him to cease doing it; that on one occasion he refused to pay a foot specialist's bills for the child; that on one occasion some four years before the trial herein respondent scrubbed Bobby's teeth with a toothbrush when the boy had been using the brush with which to paint. Appellant testified she thought respondent spanked Bobby too hard and spanked him when he did not need it; that he refused orthodontistry for his own son; that he would not permit appellant to read the parties' income tax returns. Appellant's mother testified that her daughter had gone through an ordeal which she (the witness) felt might cause her to be mentally ill and to break up. In opposition, there was testimony that the family enjoyed but a small income and it could be inferred from the financial picture that being economical toward family expense was the way of wisdom; that the wife did not complain of being denied adequate funds; that the original allowance had been increased; that she had not asked for more; that when she ran short she asked and received additional sums. The net income was shown to be less than $200 per month. It was further shown that smoke irritated respondent and made him feel bad; that respondent's discipline of Bobby was only what seemed fairly to be called for and that appellant never remonstrated that respondent was being too severe; that Bobby liked the respondent and that near neighbors were aware of no ill treatment toward him from respondent. Shortly before the divorce action was filed, respondent took Bobby to Montana for a five weeks' trip, where they traveled through the mountains, rode, fished and hunted. Bobby expressed himself as being the luckiest boy in the world to have as good a parent as respondent. Enough has been said to show that the trial court's finding that respondent had not been guilty of extreme cruelty toward appellant is substantially supported. The issue was one of fact. With respect to the showing that appellant had been guilty of extreme cruelty toward respondent, the record displays the following: When the couple married respondent had been living in a small residence. Within three years' time he moved his family into an attractive new home on which he had done a good deal of the construction work himself. About four years after the marriage, appellant, stating she desired an outside interest, asked respondent to build her a beauty parlor, she being a licensed beautician. He complied by converting a double garage into a beauty shop, which he fully equipped, spending some $1,500 for equipment. Appellant operated the same a few months and then let the business go. In June, 1950, respondent suffered a severe hernia while working. He became

ill and unable to work at his hardware store for more than a few hours a day. In October he had a talk with his wife, explaining his inability to properly attend to the business. He told her it was running rapidly "into the red"; that he might have to seek a change of climate, that he might be hospitalized; and he asked her to reopen the beauty shop and help with the living expenses. Her only reply was to leave within two weeks and sue him for divorce. During the period that followed and before reconciliation she and her mother so alienated the affections of the two boys against respondent that when he called they were both fearful of him and would not come near him, although before separation both had been fond of him. When, on reconciliation, appellant returned to the family home, she insisted on using a separate bedroom and largely denied him marital relations. When respondent questioned her about a reason for her coldness toward him, she would not explain, but would simply say, "Oh, you know". Neighboring witnesses testified that she constantly complained to them about respondent's treatment of her and found fault with everything he did, unhesitatingly informing the neighbors about it. Respondent described the situation as one where it seemed to him he was "a meal ticket to be punched out as he was needed." On one occasion appellant talked with a neighbor about trips that respondent took into the mountains, although ill. The neighbor expressed the fear that due to his condition he might "go over a cliff". Appellant replied, "Well, wouldn't that be too bad", creating the impression in the mind of the neighbor that such a happening would be a welcome one. When she moved out the second time she did so without warning and just before respondent went to the hospital for a hernia operation. She revived her original action by a restraining order, preventing him from returning to his home when he left the hospital and compelling him to recuperate at a motel. She obtained this order upon her affidavit that she believed respondent would do her, her son, and respondent's son, bodily harm. This allegation, on hearing, the court found to be untrue and, so finding, set aside the order preventing him from returning to his home. He returned and on the first evening, while sitting on his front porch talking with two neighbors, the wife showed up with a policeman and ordered the officer to arrest respondent for "molesting" her, an allegation which was shown to be false. There was no evidence whatever that he had ever struck or chastised defendant or so much as threatened to do so. Under the circumstances shown in the evidence the conduct of appellant toward respondent was such that the trial court was justified in the finding it made. The corroboration, while not nonexistent, as argued by appellant, was slight; but slight corroboration is sufficient where, as here, there is no danger or claim of collusion. The parties contested every vital issue posed by the pleadings. Portis v. Portis, 122 Cal.App.2d 36, 264 P.2d 102; La Vigne v. La Vigne, 96 Cal.App.2d 531, 216 P.2d 75; Ruggles v. Ruggles, 43 Cal.2d 547, 275 P.2d 42.

[4] We hold that the decision of the trial court as to the separate and community property must also be upheld. We think it unnecessary to follow respective counsel in their varying presentations of the evidence concerning the property issues. The trial court evidently followed the rule laid down in the case of Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880 which rule has found frequent application and constant approval under facts similar to those presented by this record. When these parties were married respondent had for some time been engaged in a small implement and hardware business self-owned and largely self-operated. He owned the property on which the business was being conducted, the stock in trade and a considerable amount of cash in bank and in safety deposit. According to his counsel's computations, which are within permissible inferences drawn from the evidence, the value of respondent's property, which was his separate property at the time of marriage, was something about $32,000. There has been very little net gain through the years, and such as there has been, when expressed in dollar valuations, arise principally from the increase in value of his real property and from inflation. When, as here, the income of the husband and the

wife is produced by the use of the husband's separate property, which was his before marriage, and by his management thereof, that part of the income which is due to the personal character, energy, ability and capacity of the husband is community and the rest is separate. Pereira v. Pereira, supra, 156 Cal. at page 7, 103 P. at page 491. As the court there said:

"* * * without capital he could not have carried on the business. In the absence of circumstances showing a different result, it is to be presumed that some of the profits were justly due to the capital invested. There is nothing to show that all of it was due to defendant's efforts alone."

In Re Estate of Cudworth, 133 Cal. 462, 468, 65 P. 1041, 1044, it was stated:

"* * * Where a husband, charged with the support of a family, has some income derived from his separate property, and some from his earnings which are community property, there is no presumption that he has supported the family out of the separate property and preserved intact the community funds. He is at perfect liberty to devote all that is necessary of the community earnings to the family support, and to preserve his separate property intact." See, also, Thomasset v. Thomasset, 122 Cal.App.2d 116, 126, 264 P.2d 626; Huber v. Huber, 27 Cal.2d 784, 792, 167 P.2d 708.

[5] We have this situation: The respondent, engaged in business through the use of separate property, married and continued his business. He devoted his time, ability, experience and industry thereto. Hence, a part of the gross income is community property and part is separate. The proven family expense nearly equaled the net income allocable to both community and separate income. The parties lived frugally and at the end of the matrimonial experience the net worth of the husband exceeded by little, if by anything, the value of the property owned by him at the time of marriage. The trial court held that the total net gain did not exceed about $9,000. Within this there is contained inflationary values of real property still held by respondent. We hold that the trial court was fully justified in finding that the fair share of the total gain to be allocated to the community amounted to $6,500. Of this the trial court awarded one-half to the wife, although finding her guilty of extreme cruelty toward her husband. Such a result cannot be successfully challenged on appeal.

[6] Appellant complains that the trial court failed to properly find specifically and adequately upon the property issues. However, the trial court did find the ultimate facts and it was not necessary that it find and fix the specific value and character of each item of property. Thomasset v. Thomasset, supra; Pope v. Pope, 102 Cal. App.2d 353, 372–374, 227 P.2d 867.

[7] Appellant argues that the proper rule of law applicable to the property issues is the rule concerning commingling of community and separate property. She charges that such commingling took place here and that substantially all of the property must, therefore, be found to be community. In support of her argument, appellant quotes the rule on commingling as stated in 10 California Jurisprudence, 2d, 702, "Community Property" section 35:

"Where separate property or funds are intermingled with community property or funds, the respective properties or funds remain unchanged in character so long as they can be clearly ascertained. But the presumption in favor of community property applies to commingled property so that the burden of proof rests upon the party claiming a part as his separate property. Accordingly, if separate property or funds which have been commingled with community property cannot be traced, the entire mass is treated as community property."

[8] The text continues:

"However, if the community property is inconsiderable in amount as compared with the separate property confused and blended with it, the whole seems to be treated as separate property."

We think the court properly considered here that the exception to the commingling rule stated in the last sentence of the fore-

going quotation ought in major part to be applied to the case before us. What we have already said sufficiently shows that the community property which might have possibly been accumulated was of necessity inconsiderable in amount as compared with the separate property which respondent owned upon his marriage. As said in Cline v. Cline, 4 Cal.App.2d 626, 629, 41 P.2d 588, 590:

"* * * It is also true that where the community interest is inconsiderable in the property with which it has been intermingled, the community will not draw to itself the separate estate. Estate of Cudworth, 133 Cal. 462, 65 P. 1041; [In re] Estate of Granniss, 142 Cal. 1, 75 P. 324; [In re] Estate of Pepper, 158 Cal. 619, 112 P. 62, 31 L.R.A.,N.S., 1092."

Upon the whole record we are satisfied that the trial court's decision is supported by the evidence.

The judgment appealed from is, therefore, affirmed.

SCHOTTKY and PEEK, JJ., concur.



131 Cal.App.2d 451

Myrtle G. CATON, Plaintiff-Appellant,

v.

La Dean CATON, Defendant-Respondent.

Civ. 20572.

District Court of Appeal, Second District, Division 1, California.

March 14, 1955

Wife's action for divorce, wherein the husband moved to set aside a default. The Superior Court, Los Angeles County, Beach Vasey, J., granted the motion, and the wife appealed. The District Court of Appeal, White, P. J., held that under circumstances revealed in proceeding on motion to vacate default judgment of divorce because of allegedly "excusable neglect" of defendant husband who stated that papers had been handed to him by a person unknown to him in presence of plaintiff-wife, and that as soon as he had received the papers she had seized them from him without allowing him to learn contents thereof, it was an abuse of discretion to grant relief sought.

Reversed.

1. Judgment ⇐363

The doctrine, that the granting of relief, under Code section authorizing vacation of judgment taken against party through his mistake, inadvertence, surprise or excusable neglect, is primarily committed to discretion of trial court, does not mean that notion, caprice or inordinate disregard of the opposing evidence should be allowed to control, and such decision must be rooted in sound discretion based upon fair consideration of total evidence and grounded upon principles of justice and fair dealing. West's Ann.Code Civ. Proc. § 473.

2. Appeal and Error ⇐957(1)

In light of requirements that person against whom default judgment is taken must prove excusable neglect by preponderance of evidence in order to have judgment vacated, if from a scrutiny of all the evidence it is clear that court abused its discretion in holding that there was excusable neglect by defendant, order must be reversed. West's Ann.Code Civ.Proc. § 473.

3. Divorce ⇐161

Under circumstances revealed in proceeding on motion to vacate default judgment of divorce because of allegedly "excusable neglect" of defendant husband who stated that papers had been handed to him by a person unknown to him in presence of plaintiff-wife, and that as soon as he had received the papers she had seized them from him without allowing him to learn contents thereof, it was an abuse of discretion to grant relief sought.

J. V. Malouf, Glen D. Lucas, Long Beach, for appellant.

Donald J. MacCalman, Long Beach, for respondent.

WHITE, Presiding Justice.

On a default hearing, plaintiff obtained an interlocutory judgment of divorce from defendant, December 15, 1953. Defendant's default was entered October 27, 1953. Plaintiff appeals from the order made April 21, 1954, as follows: "Defendant's motion to set aside default comes on for hearing and is granted after argument by counsel and consideration by the court of the exhibits heretofore introduced at time of trial. Pursuant to stipulation, the answer heretofore served and filed may be deemed the answer herein."

The date of separation is set forth in the complaint as October 9, 1953, and is not denied by the proposed answer. The two affidavits of service show that a copy of summons, complaint and Order to Show Cause and Affidavit were delivered to and left with defendant personally on October 9, 1953, by Glen D. Lucas, plaintiff's attorney. It is averred by defendant in his affidavit that "on or about October 10, 1953, in the City of Long Beach, State of California, defendant was handed some papers by a person unknown to him and in the presence of the plaintiff herein; that as soon as he had received the said papers in his hand, the plaintiff seized the said papers, tore the same from his grasp, at the same time stating in words to the effect that the said papers were hers and that she would take care of them, and that they constituted a club which she could hold over him in event of future possible differences between them, and that she continued to keep said papers in her possession and has at no time allowed defendant to learn the contents thereof; * * *" He avers further "that shortly after the said 10th of October, 1953, the plaintiff herein did order defendant from the abode of the parties hereto and from the business conducted by the plaintiff and defendant * * * that the defendant did leave the abode of the parties and the said business and did temporarily move to the home of his sister in the City of Santa Ana, California; that he did thereafter from time to time communicate with the plaintiff by telephone, but that she did at no time state or in any manner indicate to him that divorce litigation was then pending between plaintiff and defendant; * * *"

Assuming the truth of respondent's statement that "plaintiff seized the papers tore the same from his grasp", and completely ignoring the plaintiff's denials and her more believable account of the incident and the affidavit of plaintiff's attorney, still nowhere has defendant averred that he made any investigation or inquiry, or that he asked the plaintiff what the papers were or requested her to return them to him. He does not explain what he thought the papers contained or why he did not "know or suspect the character of the said papers" until March, 1954.

The order to show cause was set for hearing October 13, 1953. The exhibits mentioned in the order from which this appeal was taken were put in evidence at the trial on December 15, 1953. They were a telegram and a letter, dated October 12 and 23, respectively, sent from Chicago by defendant to plaintiff. In the telegram, he said "everything is yours". In the letter he repeats "everything is yours" and adds "I want nothing". In the letter he also wrote, "If and when you care to let me know you got a divorce just send it to me care of Gen. Del. Santa Ana, California. They will forward it to me in Chic." He further stated in the letter, "You know I never ask for anything. I had to take it. I would off been a fool to leave Broke, for shure and I never left you Broke either. The hole place is and always was yours and all you can get out of it * * *"

In plaintiff's complaint it is alleged that "the community property of the parties hereto consists of One Thousand Dollars ($1,000) cash, withdrawn from the joint bank account of the parties hereto, by the defendant, within thirty (30) days prior to the filing of this Complaint". This allegation of the complaint is not denied, although by his proposed Answer defendant denies the next paragraph of the complaint which sets out plaintiff's separate property

and "affirmatively states" that the property therein described is community property of plaintiff and defendant.

At the hearing of the motion to vacate the judgment, defendant's attorney, in an attempt to explain the telegram and letter sent by his client a few days after he had been served with the summons, complaint and order to show cause, stated to the Court, "It is admitted that the defendant had considered the matter of divorce at previous times and had discussed the matter of divorce prior to this action by the wife * * *. The fact that there was a difference between the parties is not denied * * *. He had gone into the matter prior to this and had consulted someone in connection with a possible action before this took place * * *".

At the close of the hearing, the Court said: "I certainly do not think that the defendant has shown great diligence in protecting his own rights in this case. However, in view of the fact that this is a divorce case and the policy of the Courts as set forth in regards to that type of case, I will grant the motion."

"The court may, upon such terms as may be just, relieve a party * * * from a judgment, * * * against him through his mistake, inadvertence, surprise or excusable neglect." Code of Civil Procedure, section 473.

Respondent, in his brief, states the law as follows: "In a divorce case, a default judgment will be set aside on slight showing because the State is also an interested party (Rehfuss v. Rehfuss, 169 Cal. 86 at [page] 92 [145 P. 1020]), also because default divorce judgments are not favored and the Courts are alert to detect fraud therein (Aldrich v. Aldrich, 203 Cal. 433 at [pages] 437–[438, 264 P. 754]). Much weight is to be given to the fact that the one seeking to set aside a default judgment of divorce was at no time represented by nor had the advantage of guidance of counsel (Garcia v. Garcia, 105 Cal.App.2d 289, at [page] 292, [233 P.2d 23]), and even where a showing under Section 473 of the Code of Civil Procedure is not strong or where there is any doubt as to the setting aside of a default, such doubt should be resolved in favor of the application (Garcia v. Garcia, supra, [105 Cal. App.2d] at [page] 291, [233 P.2d 23]). * * * Further the statutory provision for setting aside a default judgment is remedial and any doubt as to the propriety of setting aside of default judgment under the statute should be resolved in favor of the application, even in a case where the showing is not too strong (Karlein v. Karlein, 103 Cal.App.2d 496 at [page] 498, [229 P.2d 831])."

In Rehfuss v. Rehfuss, supra, 169 Cal. at page 91, 145 P. at page 1021, it appears that the wife signed an agreement and permitted her husband to take a judgment against her by default because she feared that if she contested his action her infant child would be taken from her and its father and placed in some public institution. The court said: "This fear was engendered in her, according to her sworn statement, by the representations made to her by her husband and her own attorney. Her neglect, under the circumstances detailed in her affidavit, was excusable in law".

The record now engaging our attention on this appeal, discloses facts not in the least analogous to those considered in Rehfuss v. Rehfuss, supra. Here, there are no children; plaintiff and defendant are 50 and 60 years of age, respectively, and both have had business experience, including the operation of a cafe and bar; only 13 months had elapsed between the marriage and the filing of the complaint for divorce; according to plaintiff's affidavit, corroborated by the statements of defendant's attorney, defendant had previously consulted his own lawyer regarding a divorce from plaintiff; and here defendant makes no showing that he feared his wife or that any inducement offered by her prevented him from again consulting his attorney and telling him papers had been given to him "by a stranger" and "plaintiff seized the said papers tore the same from his grasp * * *".

In Aldrich v. Aldrich, supra, the court reversed the order denying defendant's motion to set aside the default against her. The parties were married in 1886 and lived in New Hampshire from then until 1919,

when the husband sent his wife to New York, and refused to permit her to return to him. He sent her $50 monthly for her support from 1919 until January, 1924. It took considerable searching through different firms of attorneys and from January to September, 1924, for defendant to learn that plaintiff had taken a divorce against her in California; and that service of the divorce papers had been made by publication upon a false affidavit that her "last-known place of residence was Vermont, when plaintiff well knew that defendant was a resident of Champlain, N. Y. * *." At page 437 of 203 Cal. at page 755 of 264 P., the court said: "Respondent concedes the power of the superior court to grant defendant's motion under the facts of this case, but states that there was no abuse of discretion in denying the same. It is true, of course, that, if there is a substantial conflict in the facts presented by the affidavits, the determination of the controverted facts by the trial court will not be disturbed; but, from the foregoing allegations, and from other matters appearing in the record, it is apparent that there is no such condition existing here. The defendant has made positive allegations in her affidavit, showing that plaintiff committed a fraud upon the court and upon the defendant. The plaintiff has introduced nothing to controvert this. His affidavit is evasive and insincere on its face, and it is obvious from the entire record that he knew the residence of defendant and planned to have notice mailed to her at an address which was never her address during the married life of the parties." Also in Aldrich v. Aldrich, supra, "Defendant was across the continent and claims that she was hampered, not only by distance, but by lack of funds."

In Garcia v. Garcia, 105 Cal.App.2d 289, 233 P.2d 23, the order denying defendant's motion to set aside a default and to vacate the judgment was reversed. Defendant's affidavit in support of her motion reveals "that at no time was she represented by counsel * * * that after service of complaint and summons upon defendant she went to the office of plaintiff's attorney * * * that she was informed by him it was unnecessary for her to engage counsel and that when the interlocutory decree of divorce would be granted she would be given at least one-half of the community property; that no one intended to take the custody of the minor child from her; that the child would remain in her custody, and plaintiff would agree to pay for the support of the child; that she had no knowledge the attorney intended to enter a decree 'until these matters had been settled.' * * * she pledged her separate security and paid off a delinquency of $850 on an indebtedness existing against the real property of the parties." At page 293 of 105 Cal.App.2d, at page 26 of 233 P.2d, the court said: "Sound policy favors the determination of actions on their merits. While discretion is vested in the lower court in ruling upon matters under section 473, such discretion is a legal, not an arbitrary, one. Friedrich v. Roland, 95 Cal.App.2d 543, 552, 213 P.2d 423. Having in mind the foregoing legal principles and the circumstances here appearing, it was clearly an abuse of discretion to deny the relief sought by defendant."

Karlein v. Karlein, 103 Cal.App.2d 496, 229 P.2d 831, 832 was a divorce action in which copy of the complaint and summons was served personally upon defendant, he failed to appear, and default judgment was taken. His motion to set it aside was denied by the trial court, and the order was reversed on appeal. His affidavit states that "he was not familiar with legal procedure, and had some difficulty with the English language", that in 1947 and again in 1949 his wife had commenced divorce proceedings which terminated by reconciliation, that he did not know the complaint had to be answered in 10 days, that he tried to get in touch with the attorney who had represented him in the other actions but had been unable to contact him; that "on January 11, 1950, he was taken into custody on a psychopathic warrant issued upon an affidavit sworn to by his wife; that he was held in Los Angeles County Hospital and in Patton State Hospital until January 27, 1950, when he was found sane by a jury and released; that at the time of the default hearing result-

ing in the interlocutory decree he was actually confined in the psychopathic ward of Los Angeles County Hospital, and that plaintiff well knew of his incarceration." From other affidavits it appeared that "Undoubtedly defendant was in a disturbed mental state". On appeal, 103 Cal.App.2d at page 498, 229 P.2d at page 833 it was said: "In the circumstances here appearing a showing of excusable neglect was made, and defendant was entitled to relief from the default taken against him and from the interlocutory judgment which followed. It certainly may not be said that he was guilty of inexcusable neglect."

From the foregoing review of the cases relied upon by respondent, it appears that the "excusable neglect" which supported the respective orders setting aside the defaults consisted of failure to defend because of (1) threats by plaintiff and his attorney to have defendant's baby put in a public institution; (2) complete ignorance of pendency of any action resulting from plaintiff's fraudulent affidavit for publication of summons; (3) erroneous advice and promises given to defendant by plaintiff's attorney; and (4) incarceration in a mental hospital.

None of the cited cases is authority for the decision in the instant action that defendant's conduct was "excusable neglect". In the instant action, copy of summons, complaint and order to show cause were delivered to defendant in Long Beach, California, on October 9th. The order to show cause required his attendance in court in Long Beach on the 13th. On the 12th he telegraphed plaintiff from Chicago and on the 23rd he wrote her a letter from there saying, "If and when you care to let me know you got a divorce just send it to me * * *". This defendant had within the past few weeks consulted his lawyer about a divorce from plaintiff and there is no showing that he was not properly advised.

[1, 2] An order granting defendant's motion to vacate a judgment taken against him by default was reversed on appeal in Elms v. Elms, 72 Cal.App.2d 508, 164 P.2d 936, 942, where defendant had filed a consent that the matter might be heard as a default, before the trial he telegraphed the court requesting a continuance and permission to file a cross-complaint, and a copy of the complaint was not received by him until four days after judgment. There the court stated the law applicable on the instant appeal as follows: "The doctrine that the granting of relief under section 473 is primarily committed to the discretion of the trial court does not mean that the notion, caprice or inordinate disregard of the opposing evidence should be allowed to control. Such decision must be rooted in a sound discretion, based upon a fair consideration of the total evidence and grounded upon principles of justice and fair dealing. It is not a mental discretion but an impartial discretion guided by fixed legal principles 'to be exercised in conformity with the spirit of the law, and in a matter to subserve and not to impede or defeat the ends of substantial justice.' Brill v. Fox, 211 Cal. 739, 743, 297 P. 25, 26; Bailey v. Taaffe, 29 Cal. 422, 424. The burden of proving excusable neglect is upon the defendant who must establish his thesis by a preponderance of the evidence. Bruskey v. Bruskey, 4 Cal.App.2d 472, 479, 41 P.2d 203. If from a scrutiny of all of the evidence in a proceeding under section 473 to vacate a judgment of annulment it is clear that the court abused its discretion in holding that there was excusable neglect on the part of the defendant, the order must be reversed. Essig v. Seaman, 89 Cal.App. 295, 264 P. 552. Where a defendant is possessed of his normal faculties and is capable of entering into contracts and transacting business, he must conform with and be guided by the rules of legal procedure in the conduct of a lawsuit as well as controlled by legal principles in his daily relations with his fellow men. Gillingham v. Lawrence, 11 Cal.App. 231, 233, 104 P.2d 584." Elms v. Elms, supra, 72 Cal.App.2d at page 519, 164 P.2d at page 942. See also Benjamin v. Dalmo Mfg. Co., 31 Cal.2d 523, 526, 190 P.2d 593.

[3] In the light of the foregoing statement of the law, the order from which the instant appeal was taken was clearly an abuse of discretion. Admittedly, defendant knew legal papers had been personally delivered to him in Long Beach, California; he resided in Long Beach and had already consulted an attorney there regarding a

divorce from plaintiff; he left the papers in Long Beach and went to Chicago without consulting his attorney or making any effort whatever to protect his interests or to take advantage of the day in court to which he was entitled; and then he wrote to plaintiff from Chicago requesting that she let him know when she got a divorce. Such careless and indifferent conduct is not "excusable neglect". Nor has defendant shown any mistake, surprise, or inadvertence on his part.

The order is reversed.

DORAN and DRAPEAU, JJ., concur.



131 Cal.App.2d 332

PARROTT & CO., Renfield Importers, Ltd., and Esquin Imports, Plaintiffs and Respondents,

v.

CITY AND COUNTY OF SAN FRANCISCO., a municipal corporation, Defendant and Appellant.

BELLOWS & COMPANY, Inc., a corporation, Plaintiff and Respondent,

v.

CITY AND COUNTY OF SAN FRANCISCO., a municipal corporation, Defendant and Appellant.

JAS. BARCLAY & CO., Limited, W. A. Taylor & Company, Hiram Walker & Sons, Inc., and Gooderham & Worts, Limited, Plaintiffs and Respondents,

v.

CITY AND COUNTY OF SAN FRANCISCO., a municipal corporation, Defendant and Appellant.

Civ. 16106, 16112, 16113.

District Court of Appeal, First District, Division 1, California.

March 8, 1955.

Rehearing Denied April 7, 1955.

Hearing Denied May 4, 1955.

Action by importers of foreign liquors for refund of personal property taxes imposed on imported liquor. From adverse judgment of the Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., the city appealed. The District Court of Appeal, Peters, P. J., held that where foreign imported liquor was physically present within city but still in its original package, unconsigned and unsold on assessment date, and still in hands of original importers, liquor was still in "foreign commerce" and city did not have power to impose personal property ad valorem tax on it.

Judgment affirmed.

1. Commerce ⇐41(1)

Where foreign imported liquor was physically present within city but still in its original package, unconsigned and unsold on assessment date, and still in hands of original importer, liquor was still in "foreign commerce" and city did not have power to impose a personal property ad valorem tax on it. West's Ann.Const. art. 13, § 1; Revenue and Taxation Code, §§ 201, 202; U.S.C.A.Const. art. 1, § 10; Amends. 18, 21, § 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Foreign Commerce".

2. Commerce ⇐77

The 21st Amendment to Federal Constitution prohibiting transportation or importation into any state for delivery or use therein of intoxicating liquors in violation of laws thereof did not repeal that provision of Federal Constitution prohibiting a state from imposing duties on imports so far as intoxicating liquors are concerned. U.S.C.A.Const. art. 1, § 10; Amend. 21.

3. Statutes ⇐158, 159

Repeals by implication are not favored in the law, and will not be found to exist unless the two provisions are wholly irreconcilable.

4. Commerce ⇐77

The import-export clause of the Federal Constitution permits federal government exclusively to regulate and tax all imports from foreign lands, including liquors, as long as they remain imports, but when importation is completed and liquor is being transported or imported into one of states for "use or delivery therein",

the power of the state attaches. U.S.C.A. Const. art. 1, § 10.

5. Commerce ⇐72, 77

Rule that a state may not tax liquor merely passing through the state applies both to foreign imported liquor and to liquor in interstate commerce. U.S.C.A. Const. art. 1, § 10; Amends. 18, 21, § 2; West's Ann.Const. art. 13, § 1; Revenue and Taxation Code, §§ 201, 202.

6. Taxation ⇐543(2)

Where assessment of ad valorem property tax on imported liquor still in its original package, unconsigned and unsold on assessment date was a nullity on ground liquor was still in foreign commerce, taxpayers were not required to exhaust their administrative remedies before seeking judicial relief by action for refund of taxes. Revenue and Taxation Code, §§ 201, 202, 1601–1615.

7. Taxation ⇐449(1)

Function of County Board of Equalization is to increase or lower an assessment in order to equalize property assessments on local rolls, and to make assessment conform with true value of property. Revenue and Taxation Code, §§ 1605, 1608.

Dion R. Holm, City Atty., City and County of San Francisco, Lawrence S. Mana, Deputy City Atty., San Francisco, for appellant.

J. Albert Hutchinson, San Francisco, for respondents Parrott & Co., Renfield Importers, Ltd., and Esquin Importers.

Theodore R. Meyer, Hart H. Spiegel and Brobeck, Phleger & Harrison, San Francisco, for respondent Bellows & Co., Inc.

Edward W. Rosston and Heller, Ehrman, White & McAuliffe, San Francisco, for respondents Jas. Barclay & Co., Limited, W. A. Taylor & Company, Hiram Walker & Sons, Inc., and Gooderham & Worts, Limited.

PETERS, Presiding Justice.

These are consolidated appeals by the City and County of San Francisco from judgments in three separate actions ordering the City to refund certain personal property taxes imposed by it on certain imported liquors.

[1] The factual backgrounds of and the law applicable to the three consolidated cases are similar. Respondents are importers from foreign countries of intoxicating liquors. On the first Monday of March, 1952, each respondent owned and possessed in warehouses in San Francisco a designated quantity of liquor, that it had imported from abroad. Admittedly, the liquor was still in the original unbroken packages in which it had been imported. Admittedly, this liquor was held by respondents in identifiable and segregated lots separate from their other merchandise stored in the warehouses. Admittedly, on the first Monday of March, 1952, the liquor had not been disposed of by respondents by consignment or sale. At that time it was impossible to determine the ultimate disposition of any of the imports, that is, there was no way to know whether the liquor was ultimately to be sold for delivery and use in California or would be delivered or used outside of California.

The City, purporting to act pursuant to Article XIII of the Constitution and sections 201 and 202 of the Revenue and Taxation Code, levied and collected an *ad valorem* personal property tax on the liquor in question. The levy was made after the City had demanded that the respondents list all personal property owned or controlled by them or in their possession on the tax date. The imported liquor was separately listed, and taxed separately from the other personal property of the taxpayers. These respondents paid that portion of the tax assessed against the imported liquor under protest, and then instituted these actions to recover that tax, claiming that the liquor was exempt from state taxation.

The trial court judge, the Honorable Albert Wollenberg, held in favor of the taxpayers and ordered the taxes refunded. He set forth the grounds of his decision in a memorandum opinion in which he stated, in part: "The question for decision is whether or not the defendant City and

County of San Francisco has the power to impose an *ad valorem* property tax on intoxicating liquors in the hands of the original importers and in the original package. An affirmative answer to this question can only be grounded on the premise that the Twenty-first Amendment to the Constitution of the United States repeals pro tanto, by implication, Article I, Section 10, Paragraph 2, of said Constitution [import-export clause], insofar as intoxicating liquors are concerned. The validity of this premise the Court is not willing to concede."

After discussing several of the problems involved the court concluded: "The Federal Government has sole, exclusive and plenary taxing power over imports and exports, with but one exception—that of reasonable inspection. * * * The Federal power to tax imports is plenary and exclusive. This has been expressed in an unbroken line of decisions over one hundred and twenty-five years * * *

"It is the decision of this Court that no state, nor any political subdivision thereof, can assess an *ad valorem* property tax on imports in the hands of the original importer and in the original package, and that the Twenty-first Amendment to the Constitution of the United States does not exclude intoxicating liquors from this prohibition."

We agree with these conclusions.

The problem revolves around the proper interpretation of two sections of the Constitution of the United States.

Article One, Section 10, of that Constitution contains an enumeration of those powers that are prohibited to the states. Paragraph 2 of the section reads as follows:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

The Twenty-first Amendment to the United States Constitution repealed the Eighteenth Amendment [1] and also provided in section 2: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The California Constitution, Article XIII, Section one, permits *ad valorem* taxation of "All property in the State * * * not exempt under the laws of the United States". (See also §§ 201 and 202, Rev. & Tax. Code.)

The question presented is whether intoxicating liquor, imported into the United States from a foreign country, while still in the hands of the importer, and while such liquor is still in its original packages, unconsigned and unsold, is property "exempt" from taxation "under the laws of the United States"? It is the theory of appellant that, although such liquors are imports to which the import-export clause would normally be applicable so as to prevent state taxation, such taxation is permitted because the Twenty-first Amendment removed intoxicating liquor from the constitutional protection of the import-export clause. In other words, it is urged that, under that amendment, intoxicating liquor has been made a special article of commerce, removed from the protection of the import-export clause, and that its control, including the power to tax it, has been granted exclusively to the states.

[2] The answer to the main question must be that foreign imported intoxicating liquor, while still in the hands of the importer and in its original packages, is an import which under the import-export clause, has been made immune to state taxation. In other words, the Twenty-first Amendment did not repeal the import-export clause insofar as intoxicating liquors are concerned.

Before directly dealing with the proper interpretation of the Twenty-first Amend-

1. The Twenty-first Amendment became effective December 5, 1933.

ment some mention should be made of the general law interpreting the breadth and scope of the import-export clause. As early as 1827 Chief Justice Marshall, speaking for the United States Supreme Court in the case of Brown v. State of Maryland, 12 Wheat. 419, 6 L.Ed. 678, enunciated the so-called "original package" doctrine. Under that doctrine foreign imports, while still in their original packages and in the hands of the original importers, were held immune from state taxation. In 1871, in the case of Low v. Austin, 13 Wall. 29, 20 L.Ed. 517, the United States Supreme Court, in a case similar to those here under consideration, held that the "original package" doctrine applied to foreign imported liquor so as to render such liquor free from state taxation. The "original package" doctrine, as far as foreign imports are concerned, has been followed by the United States Supreme Court in a long line of cases. One of the most recent is Hooven & Allison Co. v. Evatt, 324 U.S. 652, 65 S. Ct. 870, 89 L.Ed. 1252, decided in 1945, and written by Chief Justice Stone. In that case the state attempted to levy an *ad valorem* tax on certain hemp imported by an Ohio manufacturer and held by him in the original packages preparatory for use in his Ohio factory. It was held that the import-export clause barred such taxation. After quoting the import-export clause the court stated, 324 U.S. at page 656, 65 S.Ct. at page 873:

"These provisions were intended to confer on the national government the exclusive power to tax importations of goods into the United States. That the constitutional prohibition necessarily extends to state taxation of things imported, after their arrival here and so long as they remain imports, sufficiently appears from the language of the constitutional provision itself and its exposition by Chief Justice Marshall in Brown v. Maryland, supra. We do not understand anyone to challenge that rule in this case.

"It is obvious that if the states were left free to tax things imported after they are introduced into the country and before they are devoted to the use for which they are imported, the purpose of the constitutional prohibition would be defeated. The fears of the framer, that importation could be subjected to the burden of unequal local taxation by the seaboard, at the expense of the interior states, would be realized, as effectively as though the states had been authorized to lay import duties.[2]"

After discussing and quoting from Brown v. State of Maryland, supra, the court continued, 324 U.S. at page 657, 65 S.Ct. at page 873:

"Although one Justice dissented in Brown v. Maryland, supra, from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported. [Citing many cases, including Low v. Austin, the liquor case cited supra.]"

The court also discussed the difference between the power of the state to tax goods in the original packages when they are in interstate commerce and when they are foreign imports. In this conection the court stated, 324 U.S. at page 665, 65 S.C. at page 877:

"In the one case [foreign imports] the immunity derives from the prohibition upon taxation of the imported merchandise itself. In the other [interstate commerce] the immunity is only from such local regulation by taxation, as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not."

Appellant does not challenge the well-settled rules of law above set forth, and concedes that, were it not for the Twenty-

2. See Madison, Debates in the Federal Convention of 1787, August 28, 1787 (Hunt & Scott ed.).

first Amendment, the City would be powerless to tax the liquor here involved. But it is asserted that that amendment removed intoxicating liquor from the protection of the import-export clause.

[3, 4] In considering this argument there are certain general observations that should be made. The Twenty-first Amendment contains no mention of taxation at all, and certainly does not provide, expressly, for the repeal of any portion of Article 1, Section 10, of the Constitution. If a *pro tanto* repeal took place it occurred by implication based on the theory that in their application to foreign imported liquor the two section are inconsistent. Not only are repeals by implication not favored in the law, and will not be found to exist unless the two provisions are wholly irreconcilable (see discussion 11 Cal.Jur.2d p. 351, § 39), but here, if the two provisions are laid side by side it will be discovered that no word or phrase of one is inconsistent with the other. The two sections, in their application to foreign imported liquor, are quite clearly complementary. The import-export clause permits the federal government exclusively to regulate and tax all imports from foreign lands, including liquors, as long as they remain imports, but when the importation is completed and the liquor is being transported or imported into one of the states "for delivery or use therein" the power of the state attaches. The obvious purpose of the Twenty-first Amendment was to preserve the intrastate jurisdiction of the states so as to grant constitutional protection to those states desiring to remain or to become "dry." (See LV Yale Law Journal, p. 815.) That amendment raised to constitutional dignity the right of each state to control its own liquor traffic, but there is not the slightest reason to believe that it was intended to modify the traditional federal-state relationship in connection with foreign imported liquor. See State of Georgia v. Wenger, D.C., 94 F.Supp. 976, affirmed 187 F.2d 285, certiorari denied 342 U.S. 822, 72 S.Ct. 41, 96 L.Ed. 621.

Moreover, the practical effect of appellant's interpretation cannot be overlooked. If the coastal states could tax or prohibit the importation of foreign liquors, it could "dry up" the interior states so far as such liquors are concerned. Moreover, a coastal state could, for example, tax Irish whiskey and not tax Scotch whiskey, and thus influence foreign commerce and the tariff structure of the nation adverse to the public interest. It was for these very reasons that the United States Constitution placed all powers relating to foreign intercourse exclusively in the hands of the federal government. See for a few classic cases so holding Holmes v. Jennison, 14 Pet., 540, 570, 10 L.Ed. 579; Board of Trustees of University of Illinois v. U. S., 289 U.S. 48, 56, 53 S.Ct. 509, 77 L.Ed. 1025; United States v. Belmont, 301 U.S. 324, 331, 57 S.Ct. 758, 81 L.Ed. 1134. It should also be mentioned that if the coastal states could tax imported liquor and keep the tax proceeds they would be enriching themselves at the expense of the nation. The import-export clause above-quoted expressly provides that the revenue from any such imposts shall be for the use of the United States treasury. Thus, appellant's contention necessarily includes the argument that the Twenty-first Amendment repealed, *pro tanto,* this clause as well, an argument which has no basis at all.

One other general comment can be made. Although the Twenty-first Amendment has been in effect for nearly twenty-two years, the appellant is unable to point to any decision in the entire United States holding that a state or its agencies has the power under the amendment to levy an *ad valorem* tax on foreign imported liquor, while it is still in its original package, unconsigned and unsold, nor has appellant referred us to any statute of any city, county or state that has ever before attempted to levy such a tax. Of course, this does not prove that such a tax cannot be levied, but in view of the keen interest of local taxing authorities in finding new sources of tax revenue, if the two provisions of the Constitution are so inconsistent that the amendment repealed, *pro tanto,* the import-export clause as contended by appellant, it is somewhat surprising to find that no enterprising tax assessor has heretofore noted such inconsistency.

Appellant predicates the major portion of its argument on the case of State Board of Equalization of California v. Young's Market Co., 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38. That case involved the constitutionality of a California statute imposing a license fee on importers of foreign beer. In that case the plaintiffs were domestic corporations engaged in the business of selling at wholesale in California beer imported from Missouri and Wisconsin. The tax was attacked on the ground that it violated the commerce and equal protection clauses of the federal Constitution. The court held that the license fee was valid under the Twenty-first Amendment, and stated, 299 U.S. at page 62, 57 S.Ct. at page 78:

> "Prior to the Twenty-First Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide. * * *
>
> "The amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors."

The court went on to explain that the Amendment confers the right on a state to prohibit all "importations" if it so desires, and therefore, 299 U.S. at page 63, 57 S.Ct. at page 79, "the state may adopt a lesser degree of regulation than total prohibition. * * * It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domestic manufacture of beer and exclude all made without the state, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee?"

This case has been followed in several cases all holding that intoxicating liquor imported from one state to another for delivery or use in the second state can be subjected under the Twenty-first Amendment to various discriminating practices not otherwise permitted by the commerce clause. See, for example, Mahoney v. Joseph Triner Corp., 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424; Indianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391, 59 S.Ct. 254, 83 L.Ed. 243; Finch & Co. v. McKittrick, 305 U.S. 395, 59 S.Ct. 256, 83 L.Ed. 246.

There is no doubt some very general language in the Young case, and the cases following it, which, separated from the facts to which such language was intended to apply, seems to support appellant's argument. But all of these cases dealt with interstate commerce and not with foreign commerce. As was pointed out in Hooven & Allison Co. v. Evatt, 324 U.S. 652, 65 S.Ct. 870, 89 L.Ed. 1252, quoted from above, there is a vast difference between the commerce clause and the import-export clause. The commerce clause contains but a limited prohibition while the import-export clause is absolute. Moreover, in the Young case, it is apparent that the beer brought into California from Missouri and Wisconsin was brought in for the purpose of "delivery or use" in California, so that the case fell directly within the express language of the Twenty-first Amendment. In the instant case the liquors are still imports, not only in their original packages, but unconsigned or unsold so far as ultimate destination is concerned.

[5] Certainly the Young case does not stand for the proposition that any state can prohibit the transportation across it of liquor intended for another state. It has been expressly held that the Twenty-first Amendment does not apply to intoxicating liquor merely passing through a state and not imported "for delivery or use" in such state. Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502. In that case it was held that California had no power to tax liquor passing through the state to a National Park located within the state. See also Carter v. Commonwealth of Virginia, 321 U.S. 131, 64 S.Ct. 464, 88 L.Ed. 605; Motor Cargo v.

Division of Tax Appeals, etc., 10 N.J. 580, 92 A.2d 774. This rule of inability to tax liquor merely passing through the state applies both to foreign imported liquor and to liquor in interstate commerce. In Von Hamm-Young Co. v. City and County of San Francisco, 29 Cal.2d 798, 178 P.2d 745, 171 A.L.R. 224, the Supreme Court of California, in a thorough and well-reasoned opinion, held invalid a personal property *ad valorem* tax imposed on liquor stored in San Francisco warehouses, which liquor had been partially purchased outside California, partially inside California but outside San Francisco, and some inside San Francisco. All the liquor was intended for transportation to Hawaii. It was held that the state had no power, under the Twenty-first Amendment, to tax such liquor while it was in interstate commerce.

While it is true that the "original package" doctrine has been limited in interstate commerce cases by the doctrine that state power attaches when the goods have "come to rest" in a state, Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 38, 78 L.Ed. 131, that limitation has never been applied to foreign imports. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 65 S.Ct. 870; for several cases directly holding that the Twenty-first Amendment did not change this rule see During v. Valente, 267 App.Div. 383, 46 N.Y.S.2d 385; Jameson & Co. v. Morgenthau, 307 U.S. 171, 59 S.Ct. 804, 83 L.Ed. 1189.

We conclude that foreign imported liquor physically present within the taxing district but still in its original package, unconsigned and unsold on the assessment date, and still in the hands of the original importer, is still in foreign commerce, and that no state or any of its subdivisions has power to impose a personal property *ad valorem* tax on it.

[6, 7] The only other contention of appellant necessary to consider is its argument that respondents are without power to maintain this action because they did not exhaust their administrative remedies by applying to the County Board of Equalization for review and adjustment of their assessment prior to bringing this action. Sections 1601 through 1615 of the Revenue and Taxation Code provide for the review of assessments by the County Board of Equalization. Undoubtedly, when applicable, such remedy must be pursued before a superior court action for refund can be maintained. Thus, in City & Co. of San Francisco v. County of San Mateo, 36 Cal. 2d 196, 222 P.2d 860, it was held that before a taxpayer may apply for judicial relief against an improper tax he must exhaust his remedies before the administrative body that has the initial powers to correct the error. But if the attempted assessment is a nullity, resort to the Board of Equalization is not necessary before suit is filed. In the San Mateo case, supra, 36 Cal.2d at page 201, 222 P.2d at page 863, the court noted this exception by quoting with approval the following from Security-First National Bank v. County of Los Angeles, 35 Cal.2d 319, 320, 217 P.2d 946: "'An exception is made when the attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction. * * * But resort to the board of equalization is not rendered unnecessary by the fact that, as in the present case, the error is one in the classification of property' and the tax is assailed on the ground that it is in violation of constitutional mandates." In the San Mateo case it was claimed that there had been an erroneous inclusion of exempt improvements in the tax imposed on taxable lands. In other words, the question was the proper valuation to be placed on taxable property, that is, whether there should be included in the tax on the real property the value of the improvements. But in the instant case there was no mingling of the tax exempt imports with the taxable property of the taxpayers. There was nothing for the administrative board to adjudicate. The function of a County Board of Equalization, as its name implies, is to increase or lower an assessment in order to equalize property assessments on the local rolls, and to make the assessment conform with the true value of the property. (See Rev. & Tax.Code, §§ 1605, 1608.) In the instant case evaluation or revaluation is not involved at all. Here the foreign imports were segregated from

the other properties of the taxpayer, and separately assessed. The taxpayers claim, and properly so, that this total assessment was a nullity—beyond the power of the taxing officials to impose. In such a case there is no question of valuation that must be presented to the Board of Equalization for correction before judicial review may be sought. Parr-Richmond Industrial Corp. v. Boyd, 43 Cal.2d 157, 272 P.2d 16.

The three judgments appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



131 Cal.App.2d 439

John Coford CAIN, Plaintiff-Respondent,

v.

Emmett R. BURNS, Defendant-Appellant.

No. 16248.

District Court of Appeal, First District, Division 1, California.

March 14, 1955.

Hearing Denied May 11, 1955.

Action by investigator to recover from attorney amount allegedly due on contract for services rendered. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., gave judgment for investigator. Attorney appealed. The District Court of Appeal, Bray, J., held that although contract providing that investigator would receive for his services an amount equal to one-third of net attorney's fees in certain cases, was illegal as a fee-splitting arrangement, attorney and investigator were not in pari delicto, and attorney could not raise defense of illegality.

Judgment affirmed.

1. Attorney and Client ⇐29

Contract between attorney and investigator providing that investigator would receive an amount equal to one-third of net attorney's fees received by attorney in cases investigated, was illegal as a fee-splitting arrangement. Rules of Procedure of State Bar, rule 3, West's Ann. Bus. & Prof. Code following § 6087.

2. Contracts ⇐342

Generally, illegality of a contract is a defense which must be pleaded, but it need not be pleaded where illegality appears on the face of the contract, or where the evidence which proves the contract discloses the contract's illegality.

3. Attorney and Client ⇐29

In action by investigator to recover from attorney amount allegedly due on contract for services rendered, although attorney did not plead defense of illegality of the contract, such defense was considered where the illegality appeared on the face of the contract, and the evidence which proved the contract disclosed the contract's illegality as a fee-splitting arrangement. Rules of Procedure of State Bar, rule 3, West's Ann. Bus. & Prof. Code following § 6087.

4. Contracts ⇐138(1, 3)

Where parties to an illegal contract are in pari delicto, neither may recover from the other property or money transferred in the course of illegal transaction, but if refusal to enforce or rescind an illegal bargain would produce a harmful effect on parties for whom protection the law making the bargain illegal exists, enforcement or rescission, whichever is appropriate, is allowed.

5. Attorney and Client ⇐32
Champerty and Maintenance ⇐1

Common law doctrines of champerty and maintenance were never adopted in California, and rule prohibiting fee-splitting prohibits only the attorney, not the layman, and punishment for doing so is directed at attorneys only. Rules of Procedure of State Bar, rules 8–42, West's Ann. Bus. & Prof. Code following § 6087.

6. Attorney and Client ⇐29

In action by investigator to recover from attorney amounts allegedly due on contract for investigative services which was illegal as a fee-splitting arrangement, parties were not in pari delicto, and at-

torney could not raise the defense of illegality of contract. Rules of Procedure of State Bar, rules 8–42, West's Ann. Bus. & Prof. Code following § 6087.

Byron Snow, Robert E. Hayes, Santa Clara, for appellant.

Jarvis, Miller & Decker, Martin L. Jarvis, San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from a judgment against him in the sum of $11,029.13 and interest, on a contract for services as an investigator.

Questions Presented.

1. Was the contract one for splitting attorney's fees? 2. Must the defense of illegality be pleaded? 3. Are the parties in pari delicto?

Facts.

Defendant filed a general denial to plaintiff's complaint, but offered no evidence as to the facts here related. Defendant is an attorney at law. Plaintiff had experience as an insurance adjuster. The parties entered into an oral agreement under which plaintiff was to render service to defendant as a private investigator. Plaintiff's compensation was to be of two types: in certain cases defendant was to be paid mileage and an hourly rate; in other cases defendant was to receive an amount "measured by and equal to one-third (⅓) of the net" attorney's fees received by defendant in such cases. Defendant was to designate the cases as to which each type of compensation would apply. In the latter type cases, plaintiff's compensation was contingent upon defendant's success in the particular case and his receiving a fee therefrom. However, plaintiff's compensation was to come out of defendant's "general fund, without regard to the particular money paid in those designated cases." Plaintiff rendered services for approximately one and a half years, during which time six of the cases investigated by him were designated by defendant as being of the contingency fee type. Plaintiff received payment in full for five of these and for all cases to which the hourly rate applied. In the sixth case defendant received a fee of $36,609.40. For his work in that case defendant paid plaintiff only $1,174. On the one-third basis he was entitled to $12,203.13, leaving a balance due him of $11,029.13, the amount for which he sued and the amount the trial court awarded him.

1. Fee Splitting.

[1] Rule 3 of the State Bar Rules of Professional Conduct approved by the Supreme Court, 26 Cal.2d 34, provides: "A member of the State Bar shall not * * * nor, except with a person licensed to practice law, shall he directly or *indirectly* share compensation arising out of or incidental to professional employment * * *." (Emphasis added.) While plaintiff testified that his contingent fees were not "tied into the recovery," that the amount defendant received as attorney's fees in the particular case was only "a scale" to determine the amount plaintiff was to receive, and that plaintiff's money was not to come out of the fees themselves but out of defendant's "general fund," it is obvious that the arrangement actually was one by which the attorney was in fact splitting his fees. Plaintiff was working on a percentage basis without regard to the work done, the time consumed or the difficulties encountered.[1] The evidence shows that plaintiff worked solely for defendant and at least on one occasion suggested that the injured person employ defendant and subtly "led" such person to him. It is clear that the devices of having plaintiff's fee paid out of defendant's "general fund" instead of directly from the attorney's fees upon which it was based, and of using the latter fees as a "scale" were merely subterfuges to attempt to get away from the inhibition in Rule 3. See Hildebrand v. State Bar, 36 Cal.2d 504, 225 P.2d 508, for discussion of fee-splitting.

2. Defense of Illegality.

[2, 3] Plaintiff contends that as defendant merely filed a general denial of the

1. The contingency nature of the contract does not in itself make the contract illegal. See Bergen v. Frisbie, 125 Cal. 168, 57 P. 784.

allegations of the complaint and did not plead such defense he is barred from raising it. As stated in 2 Witkin's California Procedure, 1531, the problem of pleading illegality is confused by contradictory expressions in the opinions. So far as applicable to the circumstances of this case, the authorities seem clear that although generally illegality of a contract is a defense which must be pleaded, that rule is qualified as follows: (1) where the illegality appears on the face of the contract, or (2) where the evidence which proves the contract discloses the contract's illegality. See Gelb v. Benjamin, 78 Cal.App.2d 881, 178 P.2d 476, and cases cited in Witkin, supra, 1532–1533. The facts bring our case within both of the qualifications of the rule above-mentioned. Therefore, the failure to plead illegality would not prevent the defense from being considered.

3. Pari Delicto.

[4] However, a different rule bars the defense from being available to defendant. This rule is stated in 12 Cal.Jur.2d 302–3, 304: "Where parties to an illegal contract are in pari delicto, neither may recover from the other property or money transferred in the course of the illegal transaction. But a member of a class for whose protection a statute was enacted is ordinarily not considered in pari delicto with those who violate the statute. The statute being for his benefit and he not being in pari delicto, he is entitled to relief and may resort to the courts to recover * * *. The rule, therefore, is that if refusal to enforce or rescind an illegal bargain would produce a harmful effect on parties for whose protection the law making the bargain illegal exists, enforcement or rescission, whichever is appropriate, is allowed."

[5] The object of the contract here—investigation—is legal and proper. It is only the fee-splitting that is against public policy. Nevertheless the contract may be enforced if the parties are not in pari delicto. As said in Re Estate of Cohen, 66 Cal.App.2d 450, 458, 152 P.2d 485, the common law doctrines of champerty and maintenance were never adopted in this state. Here the statute prohibiting fee-splitting prohibits only the attorney, not the layman. The punishment for doing so is directed at attorneys only. See Rules of Procedure of the State Bar, Rules 8–42, 26 Cal.2d 38–54.

As said in Irwin v. Curie, 171 N.Y. 409, 64 N.E. 161, 58 L.R.A. 830, where the court permitted recovery by a customs broker who had placed claims of a third party in the hands of the attorney under an agreement that the attorney would divide with him half of the amount of recovery (New York has a statute similar to California's Rule 3), "* * * we note that the penalty inflicted is upon the attorney and counselor alone and not upon his accomplice, or possibly intended victim." 171 N.Y. at page 412, 64 N.E. at page 161. The court stated further, 171 N.Y. at pages 413–414, 64 N.E. at page 162: "'* * * whenever the statute imposes a penalty upon one party, and none upon the other, they are not to be regarded as *par delictum*.' * * * The application of that test to this case establishes the plaintiff's right to recover, for this statute was leveled against attorneys and counselors, to the ranks of which this defendant belonged, and therefore it operated directly upon him, but did not in terms prohibit plaintiff from making such a contract; therefore it must be held, upon the authority of Tracy v. Talmage, supra [14 N.Y. 162], and the many cases cited there, that this plaintiff is not *in pari delicto* with the defendant, and hence the courts may interfere in his behalf."

In Anderson v. Nelson, 83 Cal.App. 1, 256 P. 294, a son obtained title to his father's property for fraudulent purposes. The court held that the father's administratrix, standing in the father's shoes, was not in pari delicto with the son who had induced the father to make the transfer for fraudulent purposes, and could maintain an action for the recovery of the property. See Donnelley v. Rees, 141 Cal. 56, 74 P. 433, where the court applied the same rule to a grantor of a deed to defraud creditors, holding that under the circumstances the grantor was not in pari delicto with the grantees.

In Wilson v. Stearns, 123 Cal.App.2d 472, 267 P.2d 59, a real estate broker entered

into an exclusive employment agreement which did not state a termination date. Section 10176(f) Business and Professions Code prohibited a broker from entering into such an agreement. The broker performed his part of the agreement and sued for his commission. The defendant set up the illegality of the contract. In allowing recovery, the court applied the rule stated by this court in Norwood v. Judd, 93 Cal. App.2d 276, 289, 209 P.2d 24, 31: "But the courts should not be so enamored with the Latin phrase *'in pari delicto'* that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied." See also Denning v. Taber, 70 Cal.App.2d 253, 257–258, 160 P.2d 900, and Marshall v. La Boi, 125 Cal.App.2d 253, 267–268, 270 P.2d 99.

[6] In the language of the trial judge here, "Rule 3 is not a two-edged sword, but a rule binding the lawyer who has accepted the fruits of his unlawful contract and now says he is forbidden to pay for them because he has violated the rules of professional conduct." To permit the attorney to retain the moneys he promised to pay plaintiff would put a premium on the attorney's disregard of the rules made for his guidance and conduct.

Therefore, although the illegality of the contract appears on its face, and the defense of illegality would therefore not have to be pleaded, as the parties are not in pari delicto defendant cannot successfully raise the defense of illegality.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

131 Cal.App.2d 538

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jack Vernon SMITH, Defendant and Appellant.

Cr. 984.

District Court of Appeal, Fourth District, California.

March 15, 1955.

Defendant was convicted in the Superior Court of Riverside County, Russell S. Waite, J., for rape, and appealed. The District Court of Appeal, Barnard, P. J., held that the evidence was sufficient to support the trial judge's implied finding of resistance by complaining witness and the finding of defendant's guilt.

Judgment affirmed.

1. Rape ⇐51(4)

In prosecution for rape, evidence was sufficient to support trial judge's implied finding of resistance by complaining witness and finding of defendant's guilt. Pen.Code, § 261, subd. 3.

2. Criminal Law ⇐656(1)

In prosecution for rape, trial judge's remark, in commenting on evidence after both sides rested, that doctor who examined complaining witness after attack testified that he paid no particular attention to her face and was more interested in another part of her anatomy, about which he testified, was reasonable inference from doctor's testimony as whole and had no erroneous effect on judgment of conviction as showing that it was based at least partly on mistake as to facts. Pen.Code, § 261, subd. 3.

3. Criminal Law ⇐656(1)

The trial court's remark to defendant, in pronouncing judgment on his conviction of rape after receiving probation officer's report, that "it seems rather peculiar that two women who are total strangers apparently would find it necessary to file the same charge against you", was not erroneous or prejudicial to defendant as mistakenly assuming that prosecuting witness was total stranger to defendant, though they had

known each other for many years, as remark referred to prosecuting witness and woman involved in defendant's prior conviction of assault with intent to rape as being strangers to each other. Pen.Code, § 261, subd. 3.

Gerald F. Schulte, Riverside, for appellant.

Edmund G. Brown, Atty. Gen., James C. Maupin, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with a violation of Penal Code Section 261, Subd. 3, in that on July 24, 1954, he accomplished an act of intercourse with the complaining witness against her will and over her resistance. He was also charged with a prior conviction of assault with intent to commit rape, with a prison term served. He pleaded not guilty and admitted the prior conviction. After a trial before the court without a jury he was found guilty. Probation was denied and he was sentenced to state prison for the term provided by law. He has appealed from the judgment, with a purported appeal from an order denying his motion for a new trial, although the record does not disclose that such a motion was made.

The incident in question occurred about 1:00 a. m. on July 24, 1954. The complaining witness testified that she was sleeping in a bedroom in her home and that her children, one 19 months old and the other three months old, were sleeping in the same room; that she awoke and saw the defendant standing by her bed; that she raised herself and screamed; that he grabbed her and put his hand over her mouth; that he told her not to scream and that it would not do any good to scream; that when he let go of her mouth she screamed again; that he then said "If you scream I will kill you"; that she pleaded with him, fought with him, and tried to get loose but he would not let her go; and that he accomplished his purpose.

When the defendant left, the complaining witness ran to the home of her parents who lived next door. She was crying and practically in hysterics when she woke her mother. Her mother and father dressed and went to look for the appellant but did not find him. Police officers were called and two officers arrived at 2:50 a. m. One of these officers testified that when he arrived the complaining witness was crying; that there was a smudge mark on her face and also a slight abrasion on the side of the jaw below the mouth; that they tried to talk to her but could not get much of a statement; that she was walking the floor and crying all the time; that they could not get a statement that you could really put together until after they got her into the doctor's office; and that they arrived at the doctor's office with her at 3:15 a. m. The other officer testified that when they arrived the complaining witness was crying and wringing her hands, that "she didn't seem to make much sense when we talked to her, until we kind of got her quieted down", and that "there was marks across her mouth, kind of abrasions" which were "right over her mouth, on each side." The doctor testified that he examined the complaining witness about 3:15 a. m.; that he found evidence of recent intercourse, with a slightly swollen condition; that he did not notice any smudge marks or anything about her head; and that she was quite emotionally upset.

The defendant was picked up shortly after the doctor's examination, and before morning he made two statements to the officers which strongly indicate an admission of guilt.

[1] The appellant contends that the evidence is not sufficient to sustain the verdict, because the evidence for the prosecution was inherently improbable, and because it was not sufficient to support a finding of resistance on the part of the complaining witness. It is argued that the evidence of screaming and struggling, to which the complaining witness testified, is unbelievable because there is no evidence that this aroused the two children sleeping in the same room, or her parents who lived next door; that her testimony that her bedroom window was closed before the appellant came, and open after he left, is improbable because most people in that area leave their windows open on summer nights; that the

evidence as to smudges and bruises about her mouth is unbelievable because while three witnesses testified that they saw them the doctor testified that he did not notice such marks, and two witnesses for the appellant testified that they saw no such bruises or smudges when they saw her the next day; and that the testimony as to her hysterical condition is unbelievable because one of the officers testified that they got her quieted down in about ten minutes after they arrived, while the other testified that they were unable to get an understandable statement from her until they arrived at the doctor's office some 15 minutes later. Obviously, these matters relate to conflicts in the testimony or to inferences which might be drawn therefrom. No inherent improbability appears and these matters presented factual questions for the trial court. The appellant admitted the act of intercourse, but testified that this occurred with the consent of the complaining witness. The trial judge was convinced that the complaining witness was telling the truth, and so stated. There was ample evidence to support the implied finding of resistance, People v. Cassandras, 83 Cal.App.2d 272, 188 P.2d 546, and the evidence as a whole was entirely sufficient to support the finding of guilt and the judgment.

[2, 3] It is further contended that the court committed error in basing his decision, at least in part, on a mistake as to the facts. In commenting on the evidence, after both sides had rested, the judge remarked that the doctor had testified that he did not pay any particular attention to the victim's face, and that the doctor was more interested in another part of her anatomy about which he testified. It is argued that the doctor did not testify that he paid no particular attention to her face, but merely testified that he did not notice any marks on her face or any place about her head. The judge's remark was a reasonable inference from the doctor's testimony as a whole, and could have had no erroneous effect on the judgment. Three weeks later, at the time of pronouncing judgment, in response to the defendant's assertion that a certain statement in the probation officer's report was wrong, the court remarked "Well, as I say, it seems rather peculiar that two women, who are total strangers, apparently would find it necessary to file the same charge against you." It is argued that the court thus mistakenly assumed that the prosecuting witness was a total stranger to the appellant, whereas the evidence shows they had known each other for many years. It is obvious that in making this remark the court referred to the complaining witness and the woman involved in the prior conviction as being total strangers to each other, and neither error nor any possible prejudice appears.

The purported appeal from an order denying a new trial is dismissed. The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



131 Cal.App.2d 356

Hugo RIHN, Plaintiff and Appellant,

v.

FRANCHISE TAX BOARD of the State of California, Defendant and Respondent.

Civ. 20459.

District Court of Appeal, Second District, Division 3, California.

March 8, 1955.

Action by taxpayer to recover state income tax paid upon tips. From adverse judgment of the Superior Court of Los Angeles County, Philbrick McCoy, J., the taxpayer appealed. The District Court of Appeal, Ashburn, J. pro tem., held that tips received by taxpayer while employed as a waiter were taxable income.

Judgment affirmed.

1. Courts ⇐97(5)

Where federal and state statutes and regulations are substantially identical, interpretation and effect given them by fed-

eral court are highly persuasive. Revenue and Taxation Code, § 17101; 26 U.S.C.A. § 22(a).

2. Taxation ⇐986

Tips received by taxpayer while employed as a waiter were taxable income. Revenue and Taxation Code, § 17101; Labor Code, §§ 350–356.

Geo. H. Zeutzius, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Edward Sumner, Deputy Atty. Gen., for respondent.

ASHBURN, Justice pro tem.

Action to recover money paid under protest as a state income tax upon tips received by plaintiff-appellant while working as a waiter at the Biltmore Hotel, Los Angeles, during the year 1951. The sole question is whether a waiter's tips may be taxed as income under the Personal Income Tax Law of this state, Rev. & Tax Code § 17001 et seq. The trial court answered that question in the affirmative. Plaintiff, as appellant, contends that tips are gratuities, gifts, and as such not taxable. The case was submitted upon stipulated facts; it appeared that plaintiff collected wages of $2,106.05 and received tips aggregating $1,573. There is nothing in the record to suggest that the employer received any portion of the tips or credited same on wages, or that appellant was required to report their receipt to his employer.

The applicable statute is section 17101 Revenue and Taxation Code. It says: "Gross income includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." The crucial phrases are "* * * gains, profits, and income derived from * * * compensation for personal service, of whatever kind and in whatever form paid * * *" and "gains or profits and income derived from any source whatever."

This section is interpreted by Personal Income Tax Regulation 17101(b), which, so far as pertinent, is as follows: "Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, and pensions or retiring allowances paid by private persons or by the United States are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. However, so-called pensions awarded by one to whom no services have been rendered, by either a taxpayer or taxpayer's beneficiary, are mere gifts or gratuities and are not taxable."

Our section 17101 of the statute is copied from Section 22(a) Internal Revenue Code, 26 U.S.C.A. § 22(a), as it stood before the 1954 revision, with one immaterial departure.[1] And our regulation 17101(b) is in the same phrasing as Federal Income Tax Regulations 111, Section 29.22(a)–2, down to and including the word "tips"; in other particulars it is substantially the same so far as the problem presented in this case is concerned.

The federal courts have declared that the statute, Internal Revenue Code § 22(a), uses broad language as an "effective means to indicate the purpose to include all items that are constitutionally income." Commissioner of Internal Revenue v. Linde, 9 Cir., 213 F.2d 1, 6. In United States v. Robertson, 10 Cir., 190 F.2d 680, 682, the court said: "Sec. 22(a) broadly defines gross income and by its sweeping terms it is evident that Congress intended that income should be taxed comprehensively and in so doing intended to exercise to the 'full meas-

1. The text of the federal statute and regulation herein mentioned is set forth in a footnote on pages 191 and 192 of 10 A.L.R.2d.

ure' its constitutional power. * * * Under this Section all income is taxable unless specifically excluded by other provisions of the statute. Sec. 22(b) (3), excludes gifts from the income tax provisions but in view of the general purpose to tax all income, specific exemptions should be strictly construed. * * * The practical test which the courts have applied in cases where income has been claimed to have been a gift is to determine if the income was received gratuitously and in exchange for nothing."

And the use of the word "tips" in the regulation has been held to be permissible interpretation of the broad statutory language. The current of federal decisions is uniform in this direction. Roberts v. Commissioner of Internal Revenue, 9 Cir., 176 F.2d 221, 10 A.L.R.2d 186, is directly in point. It deals with tips received and retained by a taxicab driver, who also collected a salary from his employer. The court said at page 223: "The essential question for determination is whether tips are income." In rejecting the argument that they are gifts, it also said: "From the very beginning of the practice, it was evident that, whether considered from the standpoint of the giver or the recipient, it lacked the essential element of a gift,—namely, *the free bestowing of a gratuity without consideration.* Despite apparent voluntariness, there is an element of compulsion in tipping. * * * In tipping, the financial advantage is conferred on the basis of *a consideration which is related to service.* This makes it clearly income. * * * So it is quite plain that the contention here made that tips, in general, are merely the result of the donor's exhibitionism and are given merely to satisfy the egotistical instinct of the giver, cannot overcome the unalterable fact that, so far as the recipient is concerned,—the petitioner here,—he received tips as an incident to the service which he rendered to his patrons. They were paid concurrently with the fare as a token of better service received. They are gain derived from his labor as a taxicab driver, i. e., income from the practice of a calling."

In United States v. Burdick, 3 Cir., 214 F.2d 768, a conviction for fraudulent income tax return was affirmed. Defendant was Executive Clerk of the New Jersey State Senate and received moneys from various persons whose contributions were designed to help them in legislative matters. The failure to report these receipts formed the basis of the criminal charge. The court said at page 771: "The testimony fully established that defendant's unreported receipts, which he treated as 'gifts' were compensation for services rendered or to be rendered, even though the payments were voluntarily made. They could, at the least, be broadly identified as 'gratuities' or 'tips' and it is well-settled that such receipts are not gifts, but taxable income."

In Williams v. Jacksonville Terminal Co., 315 U.S. 386, 62 S.Ct. 659, 86 L.Ed. 914: "The court had before it the question of whether the tips received by red caps could be counted as a part of the minimum wage under the Fair Labor Standards Act, 29 U.S.C.A. 201 et seq. It was held that they could and that legally speaking such tips were wages under the agreement between the employer and employee."[2] The Williams opinion contains this observation in 315 U.S. at page 398, 62 S.Ct. at page 667: "A tip to a red cap is compensation for service. It is customarily given and always expected when such service is rendered." See, also, Bateman v. Commissioner, 34 B.T.A.(1936) 351, 367; Stephen v. Commissioner, 11 T.C.M. 157; and 10 A.L.R.2d 191, Annotation "Tips as Taxable Income."

[1] Where, as here, the federal and state tax statutes and regulations are substantially identical, the interpretations and effect given them by the federal courts are highly persuasive. In Holmes v. McColgan, 17 Cal.2d 426, 430, 110 P.2d 428, 430, it is said: "The legislature has consistently followed the federal provisions generally in the Personal Income Tax Act. This policy makes available to the state a ground work of relevant federal experience and judicial

2. The quoted language is taken from California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, at page 296, 140 P. 2d 657, at page 662, 147 A.L.R. 1028.

pronouncements. 'It is a cardinal principle of statutory construction that where legislation is framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment. * * A similar principle applies where a statute is patterned after legislation of another state, or of the federal government, or, indeed of a foreign country, which has been judicially construed in the jurisdiction of its enactment.'" Innes v. McColgan, 47 Cal.App.2d 781, 784, 118 P.2d 855, 856: "The California Personal Income Tax Act [Deering's Gen.Laws, 1937, Act 8494] in many respects closely follows the provisions of the Federal Income Tax Law. 26 U.S. C.A. Int.Rev.Code, § 1 et seq. The definitions of gross income are similar in both enactments so we may presume that the California law was adopted with the definition in mind that the federal courts had placed on gross income. Union Oil Associates v. Johnson, 2 Cal.2d 727, 32 P.2d 360, 43 P.2d 291, 98 A.L.R. 1499. Therefore, we will look to the decisions of the federal courts to determine the definition of gross income in cases identical with or similar to the one we have here." The court, in Meanley v. McColgan, 49 Cal.App.2d 313, 317, 121 P.2d 772, 774, puts the matter thus: "The provisions of our statute applicable to the present problem were copied from the federal statute. Under such circumstances the federal decisions constitute not only argumentative authority, but are conclusive on the proper interpretation of our statute."

California cases are not opposed to the federal rulings on this matter of tips.

Hartford Accident & Indemnity Co. v. Industrial Acc. Comm., 41 Cal.App. 543, 183 P. 234, holds that tips received by a waiter and retained by him are properly included as earnings in computing an award under the Workmen's Compensation Act. This result was reached without the aid of any regulation such as 17101(b), supra. The court said in 41 Cal.App. at page 545, 183 P. at page 234: "We are satisfied that the phrase 'other advantages received by the injured employe as part of his remuneration and which can be estimated in money' is broad enough to permit the inclusion of tips in the 'average weekly earnings' of such employe upon which the amount of his award is to be calculated." And in 41 Cal. App. at page 546, 183 P. at page 235, referring to Sloate v. Rochester Taxicab Co., 221 N.Y. 491, 116 N.E. 1076: "In the latter case the court quite aptly says: 'The employe could not have received the tips if the employer had not put him in the way of getting them, and we may well conclude that the tips were an advantage received from the employer similar in effect to board, lodging or rent furnished in addition to the wages paid. * * * The usual tips have come to be considered as a part of the cost of entertainment at a hotel, upon a sleeper or public conveyance, and it is realized both by the person paying and receiving them that it is a part payment of the wages which the employer compels the persons served to pay. In effect, therefore, the employer and not the employe alone is benefited * * by the patrons of the company. * * * The court should treat these tips in the same manner as the employer and employe treat them, as a part of the compensation to be received by the employe for the services rendered the employer—a part of the wages, a part of the average annual earnings of the employe.' We are satisfied with the reasoning and conclusion of the foregoing authorities and with the action of the respondent herein, which was based thereon."[3]

The fact that regulation 17101(b) (adopted pursuant to § 19253 Rev. & Tax.Code Ann.) declares tips to be "compensation for personal service" strengthens the reasoning of the case of Hartford Accident & Indemnity Co. v. Industrial Acc. Comm., supra. "Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of a statute, the contemporaneous administrative construc-

3. This is also the holding in Powers' Case, 275 Mass. 515, 176 N.E. 621; the case is annotated in 75 A.L.R. 1220, from which it appears that the authorities are almost uniformly to the same effect.

tion of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." Coca-Cola Co. v. State Bd. of Equalization, 25 Cal.2d 918, 921, 156 P.2d 1, 2. Cf. Bodinson Mfg. Co. v. California E. Comm., 17 Cal.2d 321, 325, 109 P.2d 935.

California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 140 P.2d 657, 147 A.L.R. 1028, held valid an order of the Industrial Welfare Commission prohibiting the deduction of waitresses' tips in computing the required minimum wage. This was because "the purpose sought to be obtained by the fixing of minimum wages" was to provide compensation "adequate to supply the necessary cost of proper living and to maintain the health and welfare of the employees" and "that purpose may be thwarted if tips may be included in the minimum wage." 22 Cal.2d at page 299, 140 P.2d at page 663. The court added this: "The foregoing discussion does not mean that tips may not be considered wages under certain circumstances such as, computation of compensation under workmen's compensation laws. Hartford Accident & Indemnity Co. v. Industrial Acc. Comm., 41 Cal.App. 543, 183 P. 234; 29 Cal.L.Rev. 774; Case of Powers, 275 Mass. 515, 176 N.E. 621, 75 A.L.R. 1223, and generally Williams v. Jacksonville Terminal Co., supra [315 U.S. 386, 62 S.Ct. 659, 86 L.Ed. 914]. An employer may permit his employee to retain the tips and the arrangement may be that they shall be compensation, but section 3 is aimed at the evils above-mentioned in connection with *minimum wages,* and merely because tips may be termed wages under certain circumstances does not mean that they may be counted as part of the minimum wage where to do so would contravene the policy of section 3 and permit the evils there denounced." This case does not rule upon the question presented at bar and is not opposed to the federal decisions which do pass upon it.

Anders v. State Board of Equalization, 82 Cal.App.2d 88, 185 P.2d 883, does not involve the exact issue here presented. It dealt with a retail sales tax matter. The court stated the problem in 82 Cal.App.2d at page 91, 185 P.2d at page 885, as follows: "The question to be determined is whether tips received by waitresses in a restaurant on account of their services, to the extent of their minimum wages fixed by law, become part of the gross receipts of the employer for sales of tangible personal property, to-wit, food and drinks, in view of the contract of employment to the effect that such tips shall be credited to the payment of minimum wages as a part of the waitresses' compensation for services, and that they were actually so credited." And the answer in 82 Cal.App.2d at page 96, 185 P.2d at page 888: "It follows that the tips in this case, to the extent of the minimum wages due, *were received by the waitresses for performance of duties incident to their employment,* and that, by agreement or mutual understanding they became the property of plaintiffs and were credited by the waitresses upon plaintiffs' obligation to pay minimum wages. Such tips therefore became, to that extent, part of plaintiffs' gross receipts from sales of tangible personal property, and hence properly taxable under the Retail Sales Tax Act." (Emphasis added.)

Herbert's Laurel-Ventura, Inc., v. Laurel, etc., Corp., 58 Cal.App.2d 684, 138 P.2d 43, contains considerable language to the effect that "whatever be the motive of the giver, his tip remains a gift to the donee." 58 Cal.App.2d at page 694, 138 P.2d at page 48. But the question decided was whether the tips received by a "car-hop" waitress should be included in the basis for computation of a percentage rental payable by a lessee to his lessor. The answer was in the negative. It will be noted that the controversy arose between lessor and lessee, no one else being interested, and no tax matter was involved. The case is explained in a footnote on page 224 of 176 F.2d 221, Roberts v. Commissioner of Internal Revenue, supra, as follows: "Cases such as Herbert's Laurel-Ventura, Inc., v. Laurel Ventura Holding Corp., 1943, 58 Cal.App.2d 684, 694, 138 P.2d 43, dealing with the ownership of tips as between the employer and the employee are not very helpful. They do not touch the problem before us. For there, the

court was concerned mainly with the question whether the tips of employees belonged to the lessor (employer) or the lessee, under a percentage rental contract of a drive-in restaurant. It held that they belonged to neither. And the language used in determining the matter is not an authoritative determination of the nature of tips as taxable income under the Internal Revenue Act."

The California decisions are not opposed to Roberts v. Commissioner of Internal Revenue, supra, and other federal authorities above discussed, nor do they indicate any error in the administrative construction of the Personal Income Tax Law.

Appellant relies upon Magruder v. Yellow Cab Co. of D. C., 4 Cir., 141 F.2d 324, 152 A.L.R. 516. That was an action to recover contribution taxes paid by the cab company under the Social Security Act. The cab drivers leased their cabs and kept their fares and tips, paying the company stipulated sums as rent. The cab company paid nothing to the drivers. It was held entitled to recover moneys paid on account of the drivers' earnings. Reference was made in the opinion to Social Security Tax Regulations 106, sections 402.228(e) and 403.228, which "expressly exclude from the denotation of wages: 'Tips or gratuities paid directly to an employee by a customer of an employer and not accounted for by the employee to the employer.'" Page 325. The case is not in point here, but it does serve to emphasize the fact that different statutes, with differing objectives, may include or exclude tips as earnings. The fact is recognized in California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 299, 140 P.2d 657, 147 A.L.R. 1028, quoted above. And it is made clear in Williams v. Jacksonville Terminal Co., supra, 315 U.S. 386, 404, 62 S.Ct. 659. At page 407 of 315 U.S., at page 671 of 62 S.Ct.: "We can therefore examine the Fair Labor Standards Act with the safe assumption that the word 'wages' has no fixed meaning either including or excluding gratuities."

[2] As heretofore indicated the income tax laws reach out for whatever is constitutionally includable as income, the customary tip properly may be so classified and this has been done in California. There is but one further contention that requires consideration.

Appellant argues that regardless of the merits of the foregoing views when considered apart from sections 350(e) and 356, California Labor Code, those enactments require a holding that tips cannot be treated or taxed as income. The pertinent portion of section 350 is as follows: "As used in this article, unless the context indicates otherwise: * * * (e) 'Gratuity' includes any tip, gratuity, money, or part thereof, which has been paid or given to or left for an employee by a patron of a business over and above the actual amount due such business for services rendered or for goods, food, drink, or articles sold or served to such patron."

Section 356: "The Legislature expressly declares that the purpose of this article is to prevent fraud upon the public in connection with the practice of tipping and declares that this article is passed for a public reason and cannot be contravened by a private agreement. As a part of the social public policy of this State, this article is binding upon all departments of the State." These sections do not stand alone. The heart of the statute is found in sections 351 and 352 which provide: "§ 351. Every employer or agent who collects, takes, or receives any gratuity or a part thereof, paid, given to, or left for an employee by a patron, or who deducts any amount from wages due an employee on account of such gratuity, or who requires an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer, shall keep posted in a conspicuous place at the location where his business is carried on, in a place where it can easily be seen by the patrons thereof, a notice, in lettering or printing of not less than forty-eight-point black-face type, to the following effect: (a) If not shared by the employees, that any gratuities paid, given to, or left for employees by patrons go to and belong to the business or employer and are not shared by the employees thereof. (b) If shared by the employees, the extent to which gratuities are shared between employer and employees." "§ 352.

The notice shall also state the extent to which the employees are required by the employer to accept gratuities in lieu of wages or the extent to which the employee is required to accept and credit gratuities against wages."

It will be noted that this Article 1 of Chapter 3 does not relate to taxation; that its declared purpose is "to prevent fraud upon the public in connection with the practice of tipping." These sections were considered in the California Drive-In Restaurant case, supra. The court observed on page 292 of 22 Cal.2d, on page 660 of 140 P.2d that "The purpose and object sought to be accomplished by legislation is an important factor in determining the legislative intent." And, concerning these sections: "* * * the statute is concerned exclusively with tipping in respect to its relation to the public * * *." 22 Cal.2d at page 292, 140 P.2d at page 660. Again: "The statute does not purport to cover the special field of tipping in regard to its effect on the minimum wage law. It is aimed at the protection of the public against fraud." 22 Cal.2d at page 293, 140 P.2d at page 661.

Not only is this portion of the Labor Code limited in its purpose as stated but it is specifically confined by its terms to operation within "this article." Sections 350–356 constitute Article 1 of Chapter 3 of Part 1, Division 2 of the Labor Code. Division 2 covers "Employment Regulation and Supervision"; Part 1 thereof treats of "Compensation"; Chapter 3, of "Privileges and Perquisites", of which Article 1 embraces "Gratuities." By no sound process of reasoning could this part of the code be deemed to be concerned with the tax status of tips. It is to be harmonized with the Revenue and Taxation Code, People v. Darby, 114 Cal.App.2d 412, 424, 250 P.2d 743; Civil Code, §§ 23.2–23.5, each being limited to its own declared sphere of influence. And the phrase "as used in this article" carefully limits the field of application of sections 350–356 to the matter of tipping in relation to the public.

People v. McEntyre, 32 Cal.App.2d Supp. 752, 758, 84 P.2d 560, is pertinent. The validity of section 405 of the Labor Code was under consideration; it requires that any property put up by an employee or applicant as a part of the contract of employment shall be deemed a bond and be held in trust as such. At page 758 of 32 Cal.App.2d Supp., at page 563 of 84 P.2d: "Section 350 of the Labor Code, upon which the argument against the validity of section 405 is partly based, provides that, 'as used in this article,' the terms 'employer' and 'employee' shall have the meanings there stated. Those definitions can have no effect on section 405, for it is not a part of the article in which section 350 appears, to which, by the terms of section 350 its definitions are limited." In this connection see also Hard v. Hollywood Turf Club, 112 Cal.App.2d 263, 268–269, 246 P.2d 716.

Appellant's counsel stresses the concluding sentence of section 356, which is: "As a part of the social public policy of this State, this article is binding upon all departments of the State." He argues that the Franchise Tax Board is a department of the state and hence obligated to treat tips as gifts thus precluding their taxation. The short and sufficient answer is that sections 350–356 are binding upon all departments of the state when operating within the field delineated by that Article of the Labor Code, and only when there operating.

The inclusion of tips within the definition of income in regulation 17101(b) is a valid classification and the lower court correctly so ruled.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

131 Cal.App.2d 459

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Howard Grant SALTZ, Defendant and Appellant.

Cr. 5206.

District Court of Appeal, Second District, Division 1, California.

March 14, 1955.

Rehearing Denied March 21, 1955.

Defendant was convicted of grand theft, of taking automobile of another without her consent and with intent to deprive her of title or possession, and of burglary. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and order denying motion for new trial, and defendant appealed. The District Court of Appeal, White, P. J., held that defendant could be charged in information with both taking of automobile without owner's consent and with intent to either permanently or temporarily deprive owner of his title or possession and with grand theft, but, even though record would support his conviction of either crime, entry of judgment finding defendant guilty of both offenses was error, and therefore conviction for taking automobile would be set aside.

Judgment affirmed in part and in part reversed with directions.

1. Burglary ⇐41(1)
Larceny ⇐65

Evidence was sufficient to sustain conviction for grand theft and for feloniously entering apartment of another with intent to commit theft. Pen.Code, §§ 459, 487, subds. 1, 3; Vehicle Code, § 503.

2. Criminal Law ⇐1159(2)

Reviewing court is not authorized to retry cause or weigh evidence but may consider the evidence.

3. Criminal Law ⇐1159(2)

The duty of District Court of Appeal begins and ends with determination as to whether there is in record evidence, contradicted or not, of sufficient substantiality to support conclusions arrived at by duly constituted arbiters of the facts.

4. Criminal Law ⇐351(3)

In burglary prosecution, jury was entitled to consider defendant's flight from scene of burglary and from scene of subsequent automobile accident. Pen.Code, § 1127c.

5. Criminal Law ⇐1159(2, 4)

Reviewing judge is not in position to determine credit which should be accorded to witnesses or to weigh their testimony, and, therefore, reviewing court is not authorized to review evidence except where, on its face, it may be justly held that it is inherently improbable and is insufficient to support ultimate issues involved.

6. Criminal Law ⇐1035(5)

Defendant, who, in his original notice of appeal, had failed to ask for transcript of the voir dire examination of jurors and, at trial, had not challenged jury panel or any prospective jurors for cause and had not exhausted his peremptory challenges, failed to sustain burden imposed upon him to show error and prejudice as result of failure to segregate complaining witnesses and prospective jurors prior to trial.

7. Criminal Law ⇐641(6)

Where, in criminal proceeding, defendant was afforded opportunity to be represented by a private counsel or the public defender but not by both, and he chose private counsel, trial court properly permitted public defender to withdraw as defendant's counsel. Government Code, § 27706.

8. Criminal Law ⇐641(6)

Where defendant has counsel, public defender's office must step out of picture, since the public defender is not authorized to act as advisor to other counsel who have been regularly retained to represent defendant. Government Code, § 27706.

9. Criminal Law ⇐641(1)

Defendant can waive his right to counsel altogether and elect to conduct his own defense or may elect to be represented by out of state counsel in lieu of the public defender. Government Code, § 27706.

10. Criminal Law ⇐667(1), 680(1)

Trial judge is clothed with discretionary power to regulate order and manner of presentation of evidence.

11. Criminal Law ⇐1170(1)

Where, in burglary prosecution, jury had not yet heard testimony relating to burglary of certain apartment, refusal to allow cross-examination of complaining witness as to location of such apartment on ground that such questioning was irrelevant and immaterial was not prejudicial.

12. Criminal Law ⇐1170(5)

In prosecution for assault with intent to commit rape and for assault by means of force likely to produce great bodily injury, refusal to allow cross-examination of complaining witness in regard to her son, to which witness had made reference by stating that son and another had brought defendant to witness' apartment, was not prejudicial in view of fact that the testimony related solely to issues of the alleged attack and that defendant was acquitted on such counts. Pen.Code, §§ 220, 245.

13. Criminal Law ⇐1166½(12)

Where investigating officer testified that defendant had been suffering severe pain at time he was interrogated, court's statement that testimony concerning whether defendant had suffered from penicillin poisoning as result of treatment following arrest might be relevant and material if it referred to such poisoning to be existent at time defendant was questioned was not prejudicial.

14. Criminal Law ⇐444

Exclusion of purported diagram of apartment in building in which crimes charged were alleged to have been committed was not error in view of fact that one prosecuting witness stated that diagram did not even approximately show area purportedly indicated and that defendant did not testify that diagram was substantially or at all correct.

15. Criminal Law ⇐1170(2)

Even if error, exclusion of purported diagram of apartment in building in which crimes charged were alleged to have been committed was not prejudicial, in view of fact that there was much other testimony concerning physical layout of premises in question.

16. Criminal Law ⇐721½(1)

In criminal proceeding, defendant was entitled to show the efforts he had made to produce sailor alleged to have been with defendant just prior to defendant's arrest, but prosecutor was also entitled to comment on absence of such witness and to argue that diligent, but unsuccessful, efforts of defendant to produce sailor warranted inference that such missing witness was a myth.

17. Criminal Law ⇐770(2)

Court has duty to instruct jury on any issue raised by pleadings, or disclosed by evidence.

18. Criminal Law ⇐774

In prosecution for grand theft, for taking of automobile without owner's consent, for burglary, for assault, and for assault with intent to commit rape, both character of some of crimes charged and evidence warranted giving of instructions on issue of voluntary intoxication and its materiality in cases where existence of any particular motive is a necessary element to constitute particular degree of crime.

19. Criminal Law ⇐984

Defendant could be charged in information with grand theft and with taking of automobile without owner's consent and with intent to either permanently or temporarily deprive owner of his title or possession, but, even though record would support his conviction of either crime, entry of judgment finding defendant guilty of both offenses was error, and, therefore, conviction for taking the automobile would be set aside. Vehicle Code, § 503; Pen. Code, § 487, subd. 3.

Simmons & Griffin, E. A. Simmons, Chicago, Ill., for appellant.

Edmund G. Brown, Atty. Gen., and Jay L. Shavelson, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an amended information filed by the District Attorney of Los Angeles County defendant was accused in Count I of the crime of grand theft, Penal Code, Sec. 487, Subd. 3, in that he feloniously took an automobile owned by Mary Ann Haigh.

Count II alleged a violation of section 503 of the Vehicle Code in that defendant feloniously took and drove an automobile belonging to Mary Ann Haigh without her consent and with the intent to deprive her of title and possession thereof.

Count III accused the defendant of the crime of burglary, Penal Code, Sec. 459, in that he feloniously entered the apartment of Dotti Allen with intent to commit theft.

In Count IV defendant was accused of grand theft, Penal Code, Sec. 487, Subd. 1, in that he feloniously took jewelry and clothing belonging to Dotti Allen and valued in excess of $200.

In Count V, as a separate offense connected in its commission with the charges set forth in all preceding counts, defendant was accused of assault with intent to commit rape upon the person of Louise M. Soper in violation of section 220, Penal Code of California.

In Count VI, as a separate cause of action connected in its commission with Count V, defendant was accused of assault upon Louise M. Soper by means of force likely to produce great bodily injury in violation of section 245, Penal Code of California.

In Count VII, as a separate cause of action, the offense being connected in its commission with the charges set forth in Counts V and VI, defendant was accused of burglary in that he entered the apartment of Louise M. Soper with intent to commit a felony.

It was further alleged that appellant had been previously convicted of armed robbery in Cook County, Illinois.

The Public Defender was appointed as counsel for defendant and the latter entered a plea of not guilty to each of the offenses charged against him, and denied the prior felony conviction.

When the cause was called for trial a motion was made by a member of the State Bar of California that Messrs. E. A. Simmons and Homer C. Griffin of the Illinois State Bar be admitted to practice in the courts of California for the purpose of representing defendant in the trial of this action. The motion was granted and attorneys Griffin and Simmons were substituted for the Public Defender as counsel for defendant. Thereupon, the latter admitted the prior conviction as charged against him in the amended information.

The cause proceeded to trial before a jury which returned verdicts finding defendant guilty as charged in Counts I, II, III and IV. The burglary charged in Count III was found to be burglary of the first degree. As to Counts V, VI and VII defendant was found not guilty. Motion for a new trial was denied and defendant was sentenced to concurrent terms of imprisonment in the state prison.

From the judgments of conviction and the order denying his motion for a new trial, defendant prosecutes this appeal.

As an aid to understanding the subsequent discussion of points raised on this appeal which refer to matters deemed by us as being beyond the scope of the record on appeal, we deem it advisable to here refer to proceedings had for augmentation of the record on appeal.

In the trial court defendant filed an amended notice of appeal wherein he requested augmentation of the record beyond the normal record on appeal by the addition thereto of certain proceedings and documents. The trial court denied such request on the ground that a notice of appeal had theretofore been filed, and that defendant had failed to set forth the "points on which he intends to rely" Rule 33(b), Rules on Appeal. Thereafter, defendant, pursuant to Rule 12 of the Rules on Appeal, filed in this court a motion for "diminution of the record", in which he sought to have included in the record on appeal the following:

(1) *Voir dire* examination of jurors;

(2) Opening statement of the District Attorney;

(3) Argument of Counsel;

(4) Affidavit of defendant's attorney H. C. Griffin;

(5) Certain exhibits of a documentary nature marked and offered in evidence, whether refused or allowed;

(6) Jury instructions, both those given and those requested by defendant but refused;

(7) Defendant's written motion for a new trial.

This court granted defendant's motion in part by ordering the Clerk of the Superior Court to transmit the following items:

(1) The affidavit of H. C. Griffin;

(2) Exhibits introduced or offered into evidence;

(3) Defendant's written motion for a new trial;

(4) Jury instructions given, and those offered by appellant and refused by the trial court.

In all other respects, the motion for "diminution of the record" was denied.

In the order granting in part defendant's motion for diminution of the record this court said: "The record reveals that there was no showing whatever of any materiality of any of the additional matters sought to be included in the record. Therefore, in denying the motion to incorporate such additional matters, the trial court committed no abuse of discretion.

"Augmentation of the record is not a matter of right and granting or refusing thereof is committed to the sound discretion of the court. Augmentation of the record is not to be regarded as a cure-all for negligent preparation of the record by the appellant.

"However, in the instant case the original request for preparation of the record was made by appellant in propria persona, and because of the inclination of the courts to permit augmentation of the record liberally in furtherance of justice, we have come to the conclusion, by reason of the contentions advanced by appellant in the present motion, that his request for diminution of the record should be granted in part."

While defendant was acquitted on Counts V, VI, and VII, a brief summary of the evidence as to such counts is here set forth because of its close connection with the events upon which defendant's convictions were predicated.

From a reading of the lengthy Reporter's Transcript we conclude that the following narrative appearing in the respondent's brief presents a fair epitomy of the factual background surrounding this prosecution.

"I

"People's Case

"A. *Evidence Relating to Counts V through VII of the Amended Information.*

* * * * * *

"Mrs. Soper, the prosecuting witness as to Counts V through VII, first met appellant on May 16, 1953. At that time he came to the apartment house of which Mrs. Soper was the landlady, accompanied by her son and a James Triplett. Triplett and appellant did some work for the prosecutrix and subsequently rented a room from her. At 2:30 a. m. on May 19, 1953, the prosecutrix was awakened by appellant who shouted through her window that he had lost his key. She opened the door to admit him, after which he allegedly grabbed her throat, threw her to the floor, and suggested sexual intercourse. Mrs. Soper's screams aroused a neighbor and appellant was frightened away. Appellant was seen to jump into a yellow car and drive off swiftly. * * *

"B. *Evidence Relating to Counts I and II of the Amended Information.*

"At 12:15 a. m., May 19, 1954, the owner of the stolen vehicle, a 1953 Nash Rambler, with yellow body, black top, and Oklahoma license plates, left the car unlocked in the parking lot at the rear of her apartment. The car was found to be missing at 6:15 the same morning. The owner did not see it again until several days later when she was notified by police, at which time the car was severely damaged. Neither appellant nor any other person had permission to take the car. * * *

"After appellant's altercation with Mrs. Soper, he was seen fleeing in a car answer-

ing the general description of the stolen vehicle. No one else was seen in the car at that time. * * *

"At about 3:00 a. m., May 19th, appellant was found by police officers at the corner of Broadway and Sunset Boulevard in Los Angeles sprawled on the sidewalk with his legs dangling into the street, bleeding profusely from the mouth. The stolen vehicle was found, unoccupied, on a turnoff of the Hollywood Freeway, about one-quarter of a mile from the spot where appellant was lying. It was in a severely damaged condition, having crashed against a wall. * * * Inside the car were two suitcases and some woman's jewelry. One of the suitcases was very similar to one owned by appellant and contained some of his clothing and his elementary school diploma. * * * Appellant admitted having been in an automobile accident on the Freeway, but asserted that another had been driving. * * *

"C. *Evidence Relating to Counts III and IV of Amended Information.*

"Mrs. Dotti Allen rented a room separated by a garage from that rented by appellant. She left the room about 11:30 p. m., or 12:00 midnight, May 18, 1953, to spend the night with a neighbor, leaving her door unlocked. She went to Mrs. Soper's apartment at about 2:30 a. m. to investigate the commotion caused by the altercation between appellant and Mrs. Soper, and about one hour later returned to her own room. The room showed signs of having been ransacked and a number of items of a total value of $250.00 or $260.00 were missing. Mrs. Allen identified many of the items which were found in the wrecked automobile as those which had been taken from her room. Some of these items were found in the wrecked car, packed in the suitcase which also contained appellant's clothing. * * *

"II

"Defense

"Appellant testified as follows: He met Mrs. Soper's son and James Triplett on May 15 or 16, 1953, and the three of them went to Mrs. Soper's apartment house. Appellant and Triplett did some work for Mrs. Soper and later rented a room from her. On May 18, 1953, appellant worked in Manhattan Beach during the day and returned to his room at 7:00 p. m. At 7:30 p. m., appellant had a quarrel with Mrs. Soper about her son and she ordered him to leave the premises and vacate his room. She threatened, in the event he failed to leave, to 'fix' him by accusing him of attempted rape. After getting some food and resting in his room until 11:00 p. m., appellant went to the Sunset Bowling Alley where he watched the bowling until 12:30 a. m., May 19th. He then went to a hot dog stand across the street from the bowling alley, where he met a sailor named Jim who was driving East. Appellant offered to accompany him and at about 12:45 a. m. appellant and the sailor returned to appellant's room in the sailor's car. The sailor rested on a bed and appellant went out to get some food. He returned at 1:45 a. m. and found the sailor in the car. The sailor said he had appellant's suitcase and that he was in a hurry to see a girl in a tavern before they left for the East. After unsuccessfully looking for the girl, they decided to get a night's rest before starting their trip, and returned to appellant's room although the sailor was reluctant to do so. Appellant could not find his key and Mrs. Soper called him into her apartment stating that she had it. When he entered the apartment, she reiterated her demand that he leave and refused to give him the key. When he took it from the table, she tried to get it away from him and threatened him with a bottle. He fled to the car and the sailor drove away. Appellant then fell asleep and did not awaken until the accident. He left the scene of the accident to get help and after he arrived at a service station and had spoken to the attendant, he passed out. Appellant denied having burglarized Mrs. Allen's room, denied having stolen Miss Haigh's automobile and denied having attempted to rape Mrs. Soper. He had no explanation for the fact that Mrs. Allen's property was found in his suitcase. * * *

"Mrs. Soper contradicted appellant's testimony in many particulars. She stated that she had never told him to move, had never

told him to keep away from her son, and had never threatened to 'fix' him. * * *

"A police officer who had interrogated appellant about the existence of the sailor testified in part as follows:

"'I asked him again if he was sure that there was another man.

"'At that time he said, "What if I was alone?"

"'I said, "If you were alone we want to know so that we don't waste time chasing down and running around looking for a second man."

"'He refused to answer any further questions and became sullen, and we finished our interrogation.' * * *

"The owner of a hot dog stand across from the Sunset Bowling Alley testified that his was the only such stand within an area of about five blocks, and that on May 18, 1953, the stand had closed for the night at 10:00 or 11:00 p. m., probably closer to 10:00 p. m. * * * This contradicted appellant's story that he had met the sailor in the hot dog stand across from the Sunset Bowling Alley at about 12:30 a. m. on May 19, 1953."

[1–3] As his first ground for reversal appellant urges that the evidence is insufficient to establish his guilt on Counts I through IV. In this contention appellant cannot be sustained. An appellate tribunal is not authorized to retry the cause, and while we may consider the evidence, we cannot weigh it. Our duty begins and ends with a determination as to whether there is in the record evidence, contradicted or uncontradicted, of sufficient substantiality to support the conclusions arrived at by the duly constituted arbiters of the facts. Many of appellant's arguments as to the function of this court were set at rest in the case of People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779, wherein it was stated: "* * The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' * * *"

We have set forth herein a detailed narrative of the testimony at the trial and will not now repeat it. Suffice it to say that contained therein is sufficient testimony which when considered in the light of inferences reasonably deducible therefrom, amply support the jury's verdict. To cite a few instances, there is in the record testimony that appellant was positively identified by Mrs. Soper as her assailant; he was seen to jump into an automobile similar to the one he was charged with stealing after his altercation with his landlady. No one other than appellant was seen in the vehicle at this time. Appellant was found four blocks from the scene of an accident in which the stolen automobile was badly damaged. He admitted having been in the car, and a suitcase similar to his own and containing many of his possessions (including his elementary school diploma) was found in the vehicle. As pointed out by respondent, "Appellant's only explanation for these circumstances was his story that the car was in the possession of a sailor whom he had met for the first time at 12:30 a. m., at a hot dog stand. If this story was not true, the jury's only alternative was to find that the car was in appellant's exclusive possession, and had been stolen by him. It is submitted that the jurors were certainly entitled to disbelieve appellant's story. There was absolutely no evidence of the sailor's existence beyond appellant's own story, and his identification of an otherwise unidentified photograph as that of the alleged sailor."

Appellant testified that the sailor had been driving the automobile at the time of the accident. From the condition of the car the jury could reasonably have inferred that the driver must have been severely injured, but upon arrival of the police, the car was empty and the only injured person in the vicinity thereof was the accused. Appellant's story that he met the sailor at the hot dog stand about 12:30 a. m. on May 19, was contradicted by the proprietor of the stand who testified that it had been closed at 10:00 p. m. or not later than 11:00 p. m. on the night in question. The jury was also entitled to take into consideration appellant's statement to the police, "What if I was alone?"

[4] As to the burglary charge, there was testimony that Mrs. Allen returned to her room about 3:30 a. m. on the morning of May 19th and discovered it had been burglarized. That an hour before, appellant engaged in an altercation with his landlady and was observed fleeing from the vicinity of the burglary in great haste, vaulting over a porch and leaping into a waiting vehicle which was driven away rapidly and with headlights unlighted. Subsequently, the automobile was found wrecked on the Hollywood Freeway, and in it was found the stolen property as well as some of appellant's belongings. The jury was also entitled to consider appellant's flight from the scene of the burglary and the accident, People v. Fowler, 178 Cal. 657, 673, 174 P.2d 892; Penal Code, § 1127c.

Appellant urges that the overall picture presented by the evidence militates against any hypothesis other than that of his innocence. He directs our attention to the fact that he secured a room from Mrs. Soper through the latter's son, that he gave to them his true name, told them he was from Chicago and was trying to obtain sufficient funds to return there. In this regard appellant urges that, "It must be obvious to even the most naive that a defendant, 25 years of age, and married, who had previously run afoul of the law, would certainly not steal a car, and in the very same place where he is living, break into some other person's room and ransack that room, become engaged in a hassle with the landlady, and then flee. Certainly the appellant, or any one else, would know that just as soon as the burglary was discovered there would be an investigation and that, when his absence was detected, he would be the prime suspect. Persons with criminal experience, who have already given their true name, and additional information about themselves, just don't steal cars and commit burglary in the same building or place where they reside, for they know that it is only a matter of a short time before they will be apprehended by the police. A criminal seeks to hide his crime—not to call attention to himself as being the criminal."

[5] While these contentions might have afforded opportunity for a persuasive argument to the jury against the reliability of witnesses for the prosecution, we see in them nothing from which a reviewing court could justly conclude that the entire testimony of the People's witnesses is, *per se,* unbelievable, and that it was therefore, the jury's duty not only to wholly disregard it, but to accept the appellant's story, or at least find that the latter's guilt had not been disclosed by the evidence to a moral certainty and beyond a reasonable doubt. As has often been repeated, reviewing judges are in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. Consequently, appellate courts are not authorized to review evidence except where, on its face, it may justly be held that it is inherently improbable and is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. A statement to bear upon its face the brand of inherent improbability, or which may be said to be unbelievable *per se,* must involve, we think, a claim that something has been done that it would not seem possible could be done under the circumstances described. The evidence presented against appellant cannot be thus strictured.

[6] Appellant's next contention is that the court erred in permitting the complaining witnesses to sit among and converse with members of the jury venire over his objection. However, appellant failed to ask

for a transcript of the *voir dire* examination of jurors in his original notice of appeal, and both the trial court and this court, as heretofore pointed out, denied permission to augment the record in that respect. While we do not therefore, have any information as to what took place during the selection of the jury, appellant in his brief asserts that he asked the court to direct the witnesses in the case to sit apart from the prospective jurors, and that the court replied that " 'it might be a good thing' but that he had no authority over how members of the public were seated in the court room." Appellant however, makes no claim that he interposed a challenge to the panel or that he attempted to challenge any prospective jurors for cause nor that he exhausted his peremptory challenges. Appellant has therefore failed to meet the burden imposed upon him, not only to show error but that prejudice to his substantial rights ensued therefrom.

[7] Appellant's claim that the court erred in permitting the Public Defender to withdraw as his counsel is without merit.

The record reflects that until the beginning of the trial on January 4, 1954, appellant was represented by Deputy Public Defender Martin. When the cause was called for trial Mr. Martin made the following statement: "Defendant is ready, with one exception, your Honor. I would like to make a motion at this time in this case—there are two attorneys who are here from Chicago who are acquainted with the case; they came out here from Chicago for the purpose of helping with the preliminary hearing—Mr. Homer Griffin and Mr. Simmons—and they are completely familiar with this case; they have been here for a week preparing it; we have assisted them in getting subpoenas out. At this time I should like to make a motion they be substituted in the place—"

After attorneys Griffin and Simmons, appellant's present counsel, were admitted to practice law in this state for the limited purpose of trying this cause and after the court had relieved the Public Defender and substituted private counsel, attorney Simmons advised the court that it was true that since the preceding month of May he and his associate had been conducting their own investigation of the case in question, that while they were licensed to practice law in Illinois they were not conversant or familiar with the laws of California and that, "* * * it may well be that during the course of the trial certain situations conceivably may develop where we will need the assistance of local counsel. Now, we certainly at this time would oppose the substitution on the basis of the Public Defender walking out of the case. We think they should be required to stay."

Following the ruling of the court that appellant could not be represented by both private counsel and the Public Defender, the court inquired of appellant whether it was satisfactory to him to have private counsel represent him, to which he replied in the affirmative. From the record it is manifest that appellant's counsel, from their own statements, had spent at least seven months investigating the facts of the case. They had assisted in the preliminary examination, were "completely familiar" with the case, and had received assistance from the Public Defender.

That the court was justified in relieving the Public Defender is made manifest by reference to section 27706 of the Government Code of California which, insofar as pertinent to this case provides as follows:

"(a) Upon request of the defendant or upon order of the court, he shall defend, without expense to the defendant, any person who is not financially able to employ counsel * * *."

[8] We are satisfied that the learned trial judge correctly interpreted the foregoing section when he stated: "* * * Where the defendant has counsel the Public Defender's office has to step out of the picture. There is no provision which authorizes him nor permits him to act as advisor to other counsel who have been regularly retained to represent the defendant * * *"

[9] Appellant was afforded an opportunity to be represented by private counsel or the Public Defender but not by both. He chose the former. Under these circumstances he was deprived of no constitutional

right to be represented by counsel, People v. Northcott, 209 Cal. 639, 648, 649, 289 P. 634, 70 A.L.R. 806. If an accused can waive his right to counsel altogether and elect to conduct his own defense, People v. Rose, 42 Cal.App. 540, 553, 554, 183 P. 874, certainly he may also elect to be represented by out of state counsel in lieu of the Public Defender. If therefore, he thinks he now has reason to believe he suffered by reason of having selected private counsel to assist him in his defense rather than the Public Defender who had been acting in his behalf, he and not the court nor the law, is to blame.

[10, 11] Appellant next complains that the court unreasonably restricted his right of cross-examination, and limited the direct examination of himself. In this regard it appears that the witness Mrs. Soper, on direct examination, had testified she rented one of the units of her property to Dotti Allen (complainant in the burglary charge contained in Count III). On cross-examination of Mrs. Soper appellant attempted to interrogate her as to the location of Mrs. Allen's apartment in the units and an objection was sustained on the ground it was irrelevant and immaterial. We perceive no prejudice in the ruling. As yet the jury had heard no testimony relating to the burglary of Mrs. Allen's apartment. Clothed as the trial judge is with discretionary power to regulate the order and manner of presentation of evidence, we see no error, under the facts of this case, in the ruling of the court.

[12] During the course of her direct examination, Mrs. Soper made reference to her son when she testified that he and another man brought appellant to her apartment when she first met the latter. On cross-examination the court excluded questions pertaining to the son. No offer of proof was made by appellant as to what he expected to prove by questions concerning the son of Mrs. Soper. In any event, the testimony related solely to the issues of the alleged attack on Mrs. Soper. Since appellant was acquitted as to these counts, little if any prejudice could have ensued to him by reason of the court's ruling.

[13–15] During the direct examination of appellant his counsel interrogated him as to the nature of the treatment he had received for his injuries following his arrest. He was asked whether he suffered from penicillin poisoning as a result of that treatment. The question fixed no date as to this ailment and when the court intimated that the testimony might be relevant and material if it referred to the penicillin poisoning as being existent at the time appellant was questioned by the officers, his counsel made no attempt to fix the time of the penicillin poisoning. Furthermore, there was no prejudice because the investigating officer himself testified that appellant was suffering severe pain at the time he was interrogated. Appellant's claim that the exclusion by the court of a purported diagram of Mrs. Soper's apartment offered in evidence by appellant was error cannot be sustained. No proper foundation was laid for its introduction. When the diagram was shown to Mrs. Allen (victim of the burglary charged in count III and grand theft charged in Count IV) she testified that it did not accurately or even approximately, show the area purportedly indicated. And when the document was again offered during appellant's testimony, the court refused its admission into evidence. The ruling was correct. Appellant did not testify that the diagram was substantially or at all correct. That the rulings were without prejudice appears also from the fact that there was much testimony in the record concerning the physical layout of the apartment house, the units, and premises here in question.

Appellant next urges that the Deputy District Attorney was guilty of prejudicial misconduct during the trial. While the opening and closing arguments of the District Attorney are not part of the record on appeal, we are satisfied that assuming the accuracy of appellant's allegations in his brief, no reversible error is made to appear. He complains that in his opening statement to the jury the prosecutor stated "that the defendant tried to blame the theft of an automobile * * * on a sailor and to insult the uniform of a person who is serving his country * * *", and that during his closing argument the Deputy District Attorney exhorted the jury to convict the appellant "* * * because if he

told you the truth he would have had that imaginary sailor here * * * you know and I know that he made that sailor up—a figment of his imagination. Why doesn't he bring the sailor in? If he existed you know he'd have him here. That he didn't bring the sailor in is a fact that clearly proves the defendant's guilt. And you should consider that as pretty conclusive of his guilt. * * *"

[16] Appellant asserts that at the inception of the trial, in a conference at the bench outside the presence of the jury, the court and prosecutor were advised of the strenuous efforts made by the defense to locate the sailor who appellant claimed was driving the automobile here involved. We perceive no error in the remarks of the Deputy District Attorney. Appellant was entitled to show what efforts he made to produce the sailor as a witness, but the prosecutor was also entitled to comment upon the absence of this witness and to argue that the diligent but unsuccessful efforts of appellant to produce the sailor warranted the inference that the story regarding the missing witness was a myth.

[17, 18] Appellant next contends that the court misdirected the jury on matters of law. In this respect it is asserted that the court committed error in giving an instruction on the issue of voluntary intoxication, and its materiality in cases where the existence of any particular motive, purpose or intent is a necessary element to constitute a particular kind or degree of crime. Appellant argues that in this case there was no claim of voluntary or any other type of intoxication on his part. It is the duty of the court to instruct the jury on any issue raised by the pleadings, or disclosed by the evidence. In the case at bar, the witness Mrs. Soper testified that when appellant knocked on her window and asked for a key she "noticed he was drinking * * * that he wasn't sober". And on cross-examination of this witness appellant's counsel interrogated her as to his intoxication. There also was testimony that appellant had told interrogating officers that he and the sailor "had been drinking very heavily" on the night here in question; that they had been drinking vodka and whiskey, and mixing their drinks. Appellant himself testified that when he and the sailor visited a tavern they did some drinking. Both the character of some of the crimes charged in the information and the evidence adduced in connection therewith, justified giving the instruction here under attack. (See CALJIC (Crim.) Instruction 78–b, p. 105 and authorities therein cited, pp. 102, 103.)

Finally, although the issue was not raised by appellant, the Attorney General with commendable fairness, calls our attention to the fact that appellant was convicted of violation of section 503 of the Vehicle Code (taking an automobile without consent of the owner thereof, with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same), as well as section 487(3) of the Penal Code (grand theft).

[19] Under the evidence here presented and upon the authority of People v. Kehoe, 33 Cal.2d 711, 204 P.2d 321, it must be held that although it was proper to charge appellant with both crimes in the information and the record would support his conviction of either of them, it was error to enter a judgment finding him guilty of both offenses. And, as was said in People v. Kehoe, supra, 33 Cal.2d at page 716, 204 P.2d at page 324, "Although the sentences were ordered to run concurrently, to 'preclude the dual judgments of the trial court from hereafter working any possible disadvantage or detriment to the defendant in the later fixing of his definite term by the (Adult Authority)'", the judgment, insofar as it finds appellant guilty of a violation of section 503 of the Vehicle Code (Count II) should be set aside.

We have with care and much patience examined the whole record consisting of some 400 pages of the reporter's transcription of the testimony, as well as the briefs exhaustively and ably treating the numerous points pressed upon us for a reversal of the several judgments and the order denying appellant's motion for a new trial, but we have thus discerned no just reason for declaring that appellant was not fairly and legally tried and justly convicted, except as hereinbefore pointed out as to Count II.

For the reasons herein stated the judgment insofar as it finds defendant guilty of a violation of section 503 of the Vehicle Code (Count II) and the order denying a new trial as to that Count is reversed with directions to the court below to dismiss Count II of the information. In all other respects the judgments are affirmed as is also the order denying a new trial.

DORAN and DRAPEAU, JJ., concur.



131 Cal.App.2d 389

KORRY OF CALIFORNIA, a California corporation, Plaintiff and Respondent,

v.

Harold LEFKOWITZ, Defendant and Appellant.

Civ. 20663.

District Court of Appeal, Second District, Division 2, California.

March 10, 1955.

Rehearing Denied March 24, 1955.

Action by employer to recover from former employee commissions advanced to him which were not earned. The Superior Court, Los Angeles County, Arthur K. Marshall, judge pro tem., gave judgment for employer. Employee appealed. The District Court of Appeal, Fox, J., held that where employer's vice president testified employee promised he would wipe out debt to employer, trial judge could infer employee promised to pay any balance of advances over earned commissions, and evidence was sufficient to support judgment.

Judgment affirmed.

1. Appeal and Error ⇐846(2, 5)

In the absence of findings of fact and conclusions of law, on appeal every intendment is in favor of the judgment

2. Appeal and Error ⇐846(2, 5)

In the absence of finding of facts and conclusions of law, reviewing court will assume that trial court found every fact essential to support judgment, and when transcript of evidence is before reviewing court it will not weigh evidence to determine what is true and what is not, but will search record for purpose only of determining whether there is substantial evidence supporting judgment and will resolve all doubts in favor of judgment.

3. Master and Servant ⇐79

In action by employer to recover from former employee commissions advanced to him which were never earned, it was for trial judge to evaluate witnesses and weight to be given to their testimony and to determine inferences to be drawn from acts and conducts of the parties during their business dealings.

4. Master and Servant ⇐79

In action by employer to recover from former employee commissions advanced to him which were never earned, where employer's vice president testified employee promised he would wipe out debt to employer, trial judge could infer that there was a promise to pay any balance of advances over earned commissions, and evidence was sufficient to support judgment for employer.

5. Master and Servant ⇐79

In action by employer to recover from former employee commissions advanced to him which were never earned, inferences to be drawn from testimony of vice president of employer that employee promised he would wipe out debt to employer were for determination of trial court.

6. Appeal and Error ⇐989, 996

A reviewing court is not at liberty to re-evaluate evidence or draw inferences therefrom contrary to those reasonably drawn by the trial judge.

Arkin & Weissman, Culver City, for appellant.

Edward Mosk, Hollywood, for respondent.

FOX, Justice.

This is an action by plaintiff against one of its salesmen to recover "a balance on an open, mutual and current account." Defendant appeals from an adverse judgment.

Plaintiff, a Los Angeles concern, manufactures and sells men's ties. In early February, 1952, defendant was hired by plaintiff as a salesman. His territory was Texas and portions of Kansas and Oklahoma. Defendant remained in the employ of plaintiff until August, 1953. Because of the expense of establishing himself in distant territory and his lack of funds, defendant stated "he would like an advance against his commission." Such procedure was customary in this business. A weekly advance of $125 was agreed upon. These weekly advances were charged against defendant's earned commissions. Each month a statement of the invoices credited to the account of the defendant showing the commission due him and the advances paid him, together with the debit or credit balance in favor of the parties, was mailed by plaintiff to him. Defendant admitted receipt of these monthly statements. He made no complaint that they did not truly reflect the state of the account between the parties.

As time went on defendant fell behind in his sales so that his advances always exceeded his commissions. Plaintiff thereupon informed defendant that "the balance due Korry was just getting too high." In discussing the account in April or May, 1953, with a vice president of plaintiff, defendant stated "he would wipe out the debt to" plaintiff.

At the time the defendant's services were terminated, the balance by which his advances exceeded the commissions earned by him as reflected by the records kept by plaintiff was $3,206.13. The court awarded plaintiff judgment in this amount, notwithstanding defendant's testimony that he was to have a guaranteed advance.

In his notice to the clerk to prepare the record on appeal, the defendant, in addition to the reporter's transcript, requested a clerk's transcript "to include the complaint, answer of the defendant, and judgment of the court, and also to include all exhibits admitted in evidence." As a consequence there are no findings of fact and conclusions of law in the record. Furthermore, the Salesman's Commission Work Sheets, plaintiff's Exhibit 1, which reflected the character and state of the account between the parties, is not among the exhibits. It appears to have been released at the conclusion of the trial, pursuant to stipulation, to counsel for plaintiff, who signed for it on that date.

[1, 2] In the absence of findings of fact and conclusions of law every intendment is in favor of the judgment. Bryant v. Marstelle, 76 Cal.App.2d 740, 744, 173 P.2d 846. In such circumstances "the reviewing court will assume that the trial court found every fact essential to support the judgment, and when a transcript of the evidence is before the reviewing court it will not weigh the evidence to determine what is true and what is not, but it will search the record for the purpose only of determining whether there is substantial evidence supporting the judgment and will resolve all doubts in favor of the judgment." Baker v. Baker, 98 Cal.App.2d 424, 426, 220 P.2d 576, 578; In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Jappe v. Mandt, 130 Cal.App.2d 426, 278 P.2d 940.

[3, 4] Thus searching the record pursuant to this rule we find testimony on behalf of plaintiff indicating that defendant was hired on a commission basis; that he was to have a weekly advance which would be charged against his commissions; that an account was set up on plaintiff's books, kept in the due course of business, correctly reflecting the commissions earned by defendant and the charges against him, which account disclosed that when defendant's commissions for a particular month, as, for example, March, September and November of 1952, exceeded the amount drawn by him, the excess was used to reduce the credit balance at that time; that a copy of these monthly accounting records (which made up the exhibit not before us) was sent to defendant regularly; that he admittedly received the same; and

that he did not during the course of his employment make objection to any of the items thereon. There were also conversations between Mr. Kopelow, vice president of plaintiff, and defendant in the spring and summer of 1953, when defendant's advances substantially exceeded his earned commissions, indicating that he was indebted to the plaintiff in the amount of such unfavorable balances and indicating further that defendant so understood the situation, and intended and expected to pay off such balance.[1] Bearing in mind it was for the trial judge to evaluate the witnesses and the weight to be given to their testimony, and to determine the inferences to be drawn from the acts and conduct of the parties during the year and a half of their business dealings, it cannot be said, as a matter of law, that there is insufficient evidentiary support of the judgment, for the trial judge could reasonably infer from the items we have enumerated that there was a promise to pay any balance of advances over earned commissions. See Theriault v. E. L. King & Co., 282 Mass. 109, 112, 184 N.E. 386.

It is implicit, of course, in the judgment for plaintiff that the trial judge did not give credence to defendant's testimony that he was to receive a guaranteed advance.

[5, 6] Defendant, in his reply brief, argues the significance of certain testimony, viz., the fact that monthly statements showing the detailed condition of the account between the parties were mailed to defendant and that defendant promised that he would "wipe out the debt to" plaintiff. The inferences to be drawn from this testimony were for the determination of the trial court. A reviewing court is not at liberty to re-evaluate such evidence or to draw inferences therefrom contrary to those reasonably drawn by the trial judge.

Defendant cites a number of cases from other jurisdictions to the effect that where advances made to a salesman are charged against his commissions, he is not required to repay any excess of advances over commissions unless it has been expressly or impliedly agreed that he do so. These cases, of course, are not helpful to defendant since there is ample evidence in the instant case to support an implied finding that he agreed to repay any balance.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

1. Mr. Kopelow testified as follows to a conversation he had with defendant on this subject in April or May of 1953:

"Q. By Mr. Mosk: Was there any discussion * * * that you had with Mr. Lefkowitz in which you discussed specifically the matter of the balance showing on these accounts as due Korry of California from Mr. Lefkowitz? A. Oh, yes.

"Q. Will you tell us who was present at the time of this conversation? This also took place at Korry's? A. Yes.

"Q. What was said by Mr. Lefkowitz and what was said by you or anyone else present? * * * A. He said we don't have to worry as far as he was concerned, that he was certain that his business in the fall—it was running into the spring and summer when business was down but by fall that he would do a considerably greater amount and not only *he would wipe out the debt to us* but he would earn more than enough to take care of his sales and commissions and taxes." (Italics added.)

On cross-examination defendant gave the following testimony on this subject:

"Q. Did you have conversations with Mr. Philip Kopelow in the late summer of 1953 at the office of Korry of California? A. We had conversations summer and winter; I don't remember.

"Q. Was there an occasion when you had a conversation with him with regard to the continuation of the advance of certain sums of money that you had been receiving? A. Yes, sir.

"Q. And is it not true that Mr. Kopelow indicated that Korry could no longer continue advancing these sums to you? A. Yes, sir.

"Q. And did he not say on that occasion that the reason he could not was that *the balance due to Korry was just getting* too high for them to keep it going that way? (Italics added.) A. Yes, sir."

131 Cal.App.2d 521

Sidney Perry PIERCE, Plaintiff and Appellant,

v.

Harry BLACK, Defendant and Respondent.

Civ. 20493.

District Court of Appeal, Second District, Division 2, California.

March 15, 1955.

Hearing Denied May 11, 1955.

Pedestrian brought action against motorist to recover for injuries sustained when motorist stepped on starter of parked automobile, while automobile was in reverse gear, while door of automobile was open, and while pedestrian was standing by open door, causing automobile to lurch backwards and door of automobile to strike and injure pedestrian. The Superior Court of Los Angeles County, Wallace L. Ware, J., entered judgment adversed to pedestrian, and pedestrian appealed. The District Court of Appeal, Fox, J., held that motorist was guilty of negligence, which was the proximate cause of the accident, that pedestrian was not contributorily negligent, and that giving of instruction on contributory negligence was prejudicial error.

Purported appeals from verdict and order denying motion for new trial dismissed, and judgment reversed.

McComb, J., dissented.

1. Negligence ⇐136(14, 26)

Questions of negligence and contributory negligence are ordinarily for jury to determine.

2. Appeal and Error ⇐996, 1001(1)

Jury's determination of questions of negligence and contributory negligence will not be disturbed on appeal, if record discloses any substantial evidence or reasonable inferences in support thereof.

3. Appeal and Error ⇐989
Negligence ⇐136(9)

Though reviewing court may not weigh evidence, it must examine evidence, on which jury has predicated its determination, and if circumstances of case, as developed by evidence, point irresistibly to but one reasonable conclusion, then issues of negligence and contributory negligence become questions of law.

4. Negligence ⇐136(9)

Whether or not defendant is negligent, is ordinarily a question of mixed fact and law and may be determined, as a matter of law, only if reasonable men following the law can draw but one conclusion from the evidence presented.

5. Automobiles ⇐160(1), 201(1)

Where defendant got into his automobile, left door open, and invited plaintiff to join him, and, while plaintiff was standing in doorway of automobile, defendant stepped on starter while automobile was in reverse gear, causing automobile to lurch backward, and door of automobile struck and injured plaintiff, defendant was guilty of negligence proximately causing plaintiff's injuries. Vehicle Code, § 543.

6. Automobiles ⇐216

Where defendant got into his automobile, left door open, and invited plaintiff to join him, and, while plaintiff was standing in doorway of automobile, defendant stepped on starter while automobile was in reverse gear, causing automobile to lurch backward, and door of automobile struck and injured plaintiff, plaintiff was free from contributory negligence. Vehicle Code, § 543.

7. Automobiles ⇐147, 201(1)

Unexcused or unjustifiable violation of statute prescribing a standard of conduct for operator of motor vehicle is negligence as a matter of law, and, if such violation is the proximate cause of injury, liability is properly fastened on violator.

8. Negligence ⇐68

Generally, every person has a right to presume that every other person will perform his duty and obey the law, and, in absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.

9. Automobiles ⇐216

The law does not require a pedestrian on a sidewalk reasonably to apprehend that

automobile parked at curb with its door open will suddenly lurch backward because of negligence of driver in attempting to start automobile while in reverse gear without disengaging the clutch. Vehicle Code, § 543.

10. Appeal and Error ⇐1066
Trial ⇐252(8)

In action against motorist by pedestrian to recover for injuries sustained when motorist stepped on starter of parked automobile, while automobile was in reverse gear, while door of automobile was open, and while pedestrian was standing by open door, causing automobile to lurch backward and door of automobile to strike and injure pedestrian, wherein there was no evidence from which a legitimate inference of negligence on part of pedestrian could be drawn, it was prejudicial error to instruct jury on contributory negligence. Vehicle Code, § 543.

11. Appeal and Error ⇐1066
Trial ⇐252(1)

The giving of an instruction, which finds no support in the evidence, constitutes prejudicial error, if the instruction is calculated to mislead the jury.

Louis Warren and Eugene E. Glushon, Los Angeles, for appellant.

C. F. Jorz and John G. Zelezny, Los Angeles, for respondent.

FOX, Justice.

Plaintiff appeals from an adverse judgment in his action for damages for personal injuries. The accident occurred while plaintiff was standing on the sidewalk near the curb. He was struck by the open door of defendant's car which had been parked at the curb when defendant attempted to start his motor while it was in reverse gear with the clutch not disengaged. This caused the car to lurch backward and its open door, which extended over the sidewalk, struck plaintiff during such movement.

Plaintiff was employed as sales manager by Remington Sewing Machine Company, which maintained offices and a plant on Chico Avenue in El Monte. Shortly before 10:00 a. m. on June 2, 1952, he left the company offices to go across the street. Defendant was an official of this company.

The exposition of the events leading up to this accident is best recounted by quoting the pertinent testimony of the parties. Plaintiff testified as follows:

"Q. After you left the building, what did you do? A. Well, after I left the building, I proceeded to walk straight out to the curb to cross the street, * * * and I looked to my left, and as I was looking to my left, while I was standing on the curb, I was struck by, * * * the door of the automobile.

"Q. Now, this automobile that you are talking about, did you see this automobile before you were struck? A. I saw an automobile standing there when I first walked out of the building, yes.

"Q. This automobile that you saw, where was it with respect to this exist from which you left? A. Well, it was to the right of me.

"Q. About how far to the right would you say this car was? A. I would say ten or fifteen feet.

"Q. And when you first saw this car, what did you notice about it, if anything? A. I noticed * * * that it was Mr. Black's car, and the car door of the car was open. That is, the front car door on the passenger's side was open, extended over the curb.

"Q. Did you notice whether or not the car was in motion at that time? A. Yes, the car was not.

"Q. The car was not in motion at that time? A. No. * * *

"Q. As you left the building, and as you saw this car, you proceeded to the curb? Is that correct? A. That is correct.

"Q. Did you proceed on across the street? A. No, sir.

"Q. What did you do? A. Well, I walked up to the curb, and I looked to my left; and just as I looked to my left, I was struck. I would say I was about eight or ten inches away from the curb when I looked to my left to see if there

was any oncoming traffic * * * when I was struck. * * *

"Q. Now, from the time you left this building up to the time that you were struck, did you leave the sidewalk at any time? A. No, sir. * * *

"Q. You didn't see your brother-in-law [defendant] in the car? A. No, sir."

Defendant, who was an official of the sewing machine company, gave this version of the events leading up to the accident:

"Q. Directing your attention to * * * June 2, 1952, at about the hour of 10:00 a. m., will you tell us what happened * * * at that time, briefly? A. Well * * * it had been my custom to have some coffee along about 10:00 o'clock or before noon, and I left my office and proceeded towards my car, and I noticed Mr. Pierce [plaintiff] in the vicinity and I suggested to him at that time that he join me in some coffee and we could discuss the results of a trip which he had made on behalf of the company. And I then slid into the seat of my car which was parked—

"Q. From which side of the car? A. From the curb side, sir.

"Q. That is the right side of the car as it was parked? A. It would be the right side as parked, that is correct. * * * And as I did, I left the door open, assuming at that time that Mr. Pierce would follow me. He did approach the car, and bent over, and at that time I said, 'Well, come on, go with me now and we will have some coffee and we can take up other business as it transpires when we get back.' And it was my impression he planned on entering the car, so I turned on the key and put my foot on the starter, and as I did that, the car lurched backward. I had obviously left the machine in a reverse gear position. And as this happened, Mr. Pierce was framed in the doorway. That is about the best way I can describe it.

"Q. In other words, he was in the doorway of the car when this happened, getting in the car, and you were going to get coffee? Is that it? A. * * * He was standing on the curb, and when I say 'framed in the doorway' what I mean is that the door stands ajar and he was right in alongside the door, not in the car. He hadn't entered the car as yet, * * * that is what I mean when I say 'framed.' He was against the door. The door was standing ajar, and he was standing there in a sort of bent over position. And I had the impression that he planned to enter the car at that moment, and that is when I hit the starter, and the next thing I knew of, the car lurched back and Mr. Pierce then appeared to be falling. And I hit the button on the brake and tried to stop as quickly as I could because I didn't know what was happening at that time. And as I did that, it seemed he sort of jounced around back and forth and fell into a prone position to the sidewalk. * * *

"Q. *When you began to start your automobile, did you look to notice whether the car was in gear*? A. *No, I assumed it wasn't.* I don't know why—I just didn't think of it. I just assumed I was going to start the car, so I turned the switch on and hit the button, which I customarily do." (Italics added.)

"Q. As related to the outside of the door and the inside of the door, would you say that the inside of the door struck Mr. Pierce? * * * A. Yes, the part of the door which would swing to and close you into the car. * * *

"Q. After you attempted to start your automobile, did your car start to move? A. It did.

"Q. In which direction? A. In a reverse direction. * * *

"Q. Did you see this door strike Mr. Pierce? A. Yes, sir, because as I say, I looked to see whether he was entering the car, and I assumed he was, and I, *not realizing I was in reverse, I thought it was perfectly safe to start the car at that time.* (Italics added.)

"Q. After the door struck Mr. Pierce, what happened to Mr. Pierce

himself? A. He fell * * * [to the sidewalk]."

[1–6] The issues in this case are: (1) Was defendant guilty of negligence; and (2) is there any evidence of negligence on plaintiff's part which would justify giving an instruction on contributory negligence. The cases are legion which announce the settled principles that these questions are ordinarily for the jury to determine and such determination will not be disturbed upon appeal if the record discloses any substantial evidence or reasonable inferences in support thereof. Nonetheless, though a reviewing court may not weigh the evidence, it must examine the evidence upon which the jury has predicated its determination, and if the circumstances of the case, as developed by the evidence, point irresistibly to but one reasonable conclusion, then the issues of negligence and contributory negligence become questions of law. Gray v. Brinkerhoff, 41 Cal.2d 180, 183, 258 P.2d 834; Le Blanc v. Browne, 78 Cal.App.2d 63, 75, 177 P.2d 347. While such situations arise infrequently, the applicable rule in an appropriate case is succinctly stated in Gray v. Brinkerhoff, supra [41 Cal.2d 180, 258 P.2d 836]: "Whether or not defendant was guilty of negligence [citations] is ordinarily a question of mixed fact and law and may be determined as a matter of law only if reasonable men following the law can draw but one conclusion from the evidence presented [citations]." This states the law here applicable as we view the record, defendant's own testimony establishing beyond peradventure of doubt that he was guilty of negligence proximately causing plaintiff's injuries, while it is equally apparent that plaintiff was free from contributory negligence.

According to his own testimony, defendant entered his parked automobile, left the door open over the sidewalk, stepped on the starter while the gears were in reverse, without looking to see whether the car was in gear and without disengaging the clutch. This caused defendant's car unexpectedly to lurch backward. His car was thus not under control and created a dangerous hazard to persons who chanced to be in the orbit of its backward movement or on the sidewalk, as was the plaintiff, within the sweep of the open door. Defendant's lack of control of his car and the hazard created by its unexpected backward lurch was admittedly due to his attempt to start the motor without putting the gears in neutral or disengaging the clutch. He gave no attention to the fact that his car was in reverse gear. He testified that he did not look to see whether his car was in gear; he simply "assumed" it was not. By his conduct defendant demonstrated a lack of reasonable care in failing to observe the most elementary precaution imposed on one about to start a parked automobile, viz., the ascertainment of the position of the gears. He thus created an unexpected hazard for anyone within the range of the movements of his uncontrolled vehicle. Actually, defendant impliedly admitted the hazardous situation which he created, for on cross-examination he said that "not realizing I was in reverse, I thought it was perfectly safe to start the car at that time."

Cook v. Sanger, 110 Cal.App. 90, 293 P. 794, 797, is a case in which the discussion of a comparable situation is worthy of reproduction. There, defendant Sanger returned to his parked car and, without observing that the gear-shift lever was in reverse and the brake released, proceeded to crank the car. This caused the car to back down a hill and knock down plaintiff, who was standing on a sidewalk. The court summarized Sanger's position as follows: " 'I did not notice that the car was in gear; I did not notice that the brake had been released; I did not notice that the car had been moved.' " The court commented, 110 Cal.App. at pages 97–98, 293 P. at page 797: "This, we think, is properly assigned by the respondent not only as a poor excuse, but as no excuse. Sanger, when starting his car by using the crank, was, of course, in a position where he could not have immediate control over the movement of the automobile. The very absence of this power of control would cause any reasonable person to ascertain if his car was in proper condition to be started. Every operator of an automobile knows, and we think must be reasonably held to know, that the starting of a car when in gear, by means of using a crank, is a hazardous operation. If in

forward gear, it is likely to run over the person doing the cranking. If in reverse, it would immediately go in the opposite direction and away from the control of the person doing the cranking. The record shows that Sanger did nothing to determine whether the car was in neutral gear or had been changed. Appellant claims that he did not have to do anything to determine whether the car was in neutral gear, whether it had been changed, or whether the brakes were released. This would be tantamount to saying that a person starting a car need not take any precautions whatever to ascertain whether, in so doing, he would either be endangering himself or endangering some other person. Such is not the law. An automobile is a dangerous instrument when not operated with wisdom and due caution, and anyone who fails, whether in the operation of the car after set in motion, or in the setting of a car in motion, without taking reasonable precautions to see that in so doing injury will not follow, is guilty of acts upon which a jury may find the fact of negligence, even if a court might not declare such acts negligence as a matter of law."

[7] Any doubt as to the legal significance of defendant's conduct is dissipated when it is measured by the duty imposed by section 543 of the Vehicle Code. This section provides: "No person shall start a vehicle stopped, standing or parked on a highway nor shall any person back a vehicle on a highway unless and until such movement can be made with reasonable safety." Defendant's own testimony demonstrates a violation of this statutory duty for, in his own words, he states that "not realizing I was in reverse, I thought it was perfectly safe to start the car. * * *" In this case we have an unqualified admission that defendant started his car without attempting to ascertain whether it was in gear. This, coupled with defendant's implied recognition that the starting of his car while in gear, without the clutch disengaged, and with the open door extending over the sidewalk, would be unsafe, establishes conclusively that defendant's starting of the car under the circumstances was not accomplished with that degree of "reasonable safety" contemplated by section 543, Vehicle Code. No other reasonable inference is possible in the light of defendant's failure to show that his violation was justifiable or excusable under the circumstances. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 588, 177 P.2d 279. It is well settled that the unexcused or unjustifiable violation of a statute prescribing a standard of conduct for the operator of a motor vehicle is negligence as a matter of law, and if such violation is the proximate cause of injury, liability is properly fastened upon the violator. Satterlee v. Orange Glenn School Dist., supra; Le Blanc v. Browne, 78 Cal.App.2d 63, 72, 177 P.2d 347; Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L.R.A.1917C, 477; 19 Cal. Jur., 632, sec. 65.

[8] We now direct our attention to the conduct of the plaintiff for the purpose of determining whether he was in any way guilty of contributory negligence and whether, therefore, it was proper to give an instruction on that question. We shall first view his situation as revealed by the testimony of the defendant to the effect that he entered his parked car from the curb side, left the door open, that plaintiff was "right in along side the door" but not in the car; that he was "framed in the door" but standing on the curb; that it was the inside of the door that struck plaintiff when the car lurched backward as a result of his attempt to start it while in reverse gear. In this setting, defendant argues that plaintiff must have seen him turn the key and begin to start the car and that since plaintiff was in the process of entering the car, he should have either asked defendant to wait until he could get in, or else have moved away from the door, and that his failure to take either course of action constituted contributory negligence. Even if it be assumed that plaintiff saw defendant turn the key, there is nothing to suggest that he knew the car was in reverse or that defendant would step on the starter before he was in the car and while the door was still open. Furthermore, since defendant's car could not be started in its then condition without violating a duty imposed by section

543 of the Vehicle Code, plaintiff was entitled to assume that he was not exposed to danger for "'The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.'" Harris v. Johnson, supra, 174 Cal. at page 58, 161 P. at page 1156. There was here no reasonable basis for plaintiff to even suspect that defendant would start his car before plaintiff could get in and while it was in reverse. Hence there is no basis for an inference that plaintiff was contributively negligent under defendant's testimony.

[9–11] Plaintiff, however, testified that he did not go to defendant's car but that he walked straight to the curb in contemplation of crossing the street; that he observed defendant's car parked at the curb some 10 or 15 feet to his right with the door open; that he did not observe anyone in the car; that while he was still on the sidewalk about 8 or 10 inches from the curb he looked to his left to see whether there was any oncoming traffic, "and just as I looked to my left, I was struck," and knocked down by the open door of defendant's car. Defendant contends that the jury might infer contributory negligence from the above facts on these grounds: (1) that although plaintiff was on the sidewalk he was nevertheless under the duty to ascertain if any person was in the vehicle parked at the curb, and (2) that he should have kept his eye on this parked car whose door was open since "he could reasonably apprehend danger from that quarter." These contentions are patently far fetched. The law does not require a person on a sidewalk reasonably to apprehend that a car parked at the curb with its door open would suddenly lurch backward because of the negligence of its driver in attempting to start such car while in reverse gear without disengaging the clutch. Such clairvoyance is not required of one on the sidewalk. The evidence shows that plaintiff looked to his left, which was the direction from which the passing traffic would reasonably constitute a hazard to one in plaintiff's position. However, he was hit from an unexpected and not to be anticipated source as a result of defendant's violation of the duty imposed by section 543, Vehicle Code, which plaintiff had no reason to apprehend. Plaintiff was not negligent in failing to anticipate danger which could only come to him from a violation of a duty imposed by law. Harris v. Johnson, supra; Le Blanc v. Browne, supra; 19 Cal.Jur. p. 632, sec. 65. Since there is a complete absence of any showing that plaintiff should have been on guard against possible danger from defendant's vehicle, there is no evidence from which a legitimate inference of negligence on plaintiff's part can be drawn. Gray v. Brinkerhoff, supra; Le Blanc v. Browne, supra. It was therefore prejudicial error to instruct the jury on contributory negligence. Buttrick v. Pacific Electric Ry. Co., 86 Cal.App. 136, 139–140, 260 P. 588; Aurenz v. Los Angeles Ry. Corp., 19 Cal.App.2d 401, 402–403, 65 P.2d 910. It is well established that the giving of an instruction which finds no support in the evidence constitutes prejudicial error, where as here, it is calculated to mislead the jury. Davenport v. Stratton, 24 Cal.2d 232, 254, 149 P.2d 4.

The purported appeals from the verdict and the order denying the motion for a new trial are dismissed. The judgment is reversed.

MOORE, Presiding Justice.

I concur.

McCOMB, Justice.

I dissent.

Hearing denied; CARTER, J., dissenting.

131 Cal.App.2d Supp. 885

M. JACOBS, Plaintiff, Appellant and Respondent,

v.

Clifford SPRAGUE, Defendant, Respondent and Appellant.

C. A. 8603.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 28, 1955.

Action in California on Oregon judgment which had expired and thereafter been renewed. From judgment of Muncipal Court, El Monte Judicial District, John K. Otis, J., for plaintiff, both parties appealed. The Superior Court, Appellate Department, Patrosso, J., held that in view of fact that order of revival judgment in Oregon could be made ex parte and without notice, and language of statute in which word "judgment" as used throughout section referred to original judgment, not a new judgment, proceeding in Oregon resulting in order for revival of judgment was not a new suit, but merely continuation of old, with result that action upon judgment was upon original judgment and was barred by statute of limitations.

Plaintiff's appeal dismissed; judgment reversed.

1. Judgment ⇐928

Whether proceeding for revival of a judgment is a new action or merely continuation of that in which original judgment is rendered is, for purpose of determining whether order or judgment duly entered therein is entitled to full faith and credit, to be determined by law of state where such proceedings were had, and not those of a foreign forum where revival judgment is sought to be enforced.

2. Judgment ⇐928

Where original judgment had been rendered in Oregon, California courts would look to law of Oregon to determine whether revival judgment, made on order that judgment be renewed and remain in full force for second ten-year period, constituted new judgment upon which statute of limitations began to run from its rendition, or was merely continuation of original judgment with enforcement of it in California, consequently barred by statute of limitations.

3. Constitutional Law ⇐48

Where statute is susceptible of different constructions, that construction will be adopted which will make it valid and constitutional.

4. Judgment ⇐934(1)

In view of fact that order of revival judgment in Oregon could be made "ex parte" and without notice and in view of language of statute, in which word "judgment" as used throughout section referred to original judgment, proceeding in Oregon resulting in order of revival of judgment was not a new suit but merely continuation of old suit with result that action upon judgment was upon original judgment, and was barred by statute of limitations. O.R.S. 16.730, 18.360.

Marvin A. Burnett, Los Angeles, for appellant Jacobs.

Eugene Kelly, Los Angeles, for appellant Sprague.

PATROSSO, Judge.

This action was filed November 14, 1952 upon a judgment obtained by plaintiff's assignor against defendant, in the Circuit Court of the State of Oregon, for the County of Multnomah, and from a judgment in favor of plaintiff both parties appeal. The judgment sued upon was rendered April 27, 1937, and under the applicable Oregon law action thereon would be barred ten years thereafter. However, pursuant to the provisions of an Oregon statute hereafter referred to, the Oregon court by which the judgment was rendered, on April 4, 1949, made an order that the judgment be renewed and remain in full force and effect for a period of ten years from the date of the order.

It is in effect conceded that but for the order last mentioned this action was barred by our statute of limitations, which was unsuccessfully pleaded by defendant. The plaintiff, however, contends that the order

renewing the judgment is in effect a new judgment upon which the statute of limitations begins to run from its rendition, while defendant asserts that the order of April 4, 1949 is not a new judgment, but a continuation of the original judgment.

The authorities are not harmonious upon the question as to whether proceedings for renewal of a judgment by motion or the equivalent of the common-law writ of *scire facias* constitute a new action or a mere continuation of the old, and hence whether the order of revival constitutes a new judgment, as a result of which the statute of limitations commences to run anew from the date of the order of renewal. See 50 C.J.S., Judgments, § 871(2), page 447. The greater weight of authority and the modern view, however, appear to be that such proceedings are but a continuation of the original suit. 49 C.J.S., Judgments, § 548(a), page 1005; Annotation, 36 A.L.R.2d 575, et seq.; Annotation 144 A.L.R. 408, et seq. The adoption of the latter view seems to have been prompted, in some measure at least, by the decision of the Supreme Court of the United States in Owens v. McCloskey, 1896, 161 U.S. 642, 16 S.Ct. 693, 40 L.Ed. 837, wherein it was held that if a revival of a judgment by *scire facias* be treated as a new action, the order of revival is not entitled to full force and credit unless predicated upon personal service upon the judgment debtor within the state of notice of such revival proceedings, which was not had in this case. Thus in Bank of Edwardsville v. Raffaelle, 1942, 381 Ill. 486, 45 N.E.2d 651, 653, 144 A.L.R. 401, the Supreme Court of Illinois held that a *scire facias* proceeding to revive a judgment was not equivalent "to the starting of a new suit to secure a personal judgment", and hence that there was no constitutional objection to the entry of an order of revival as against a nonresident defendant pursuant to the service of constructive notice of the proceeding by publication.

[1, 2] It is now settled that the character of the proceeding for the revival of a judgment, whether a new action or merely a continuation of that in which the original judgment was rendered, is (at least for the purpose of determining whether the order or judgment newly entered therein is entitled to full faith and credit under the federal constitution) to be determined by the law of the state where such proceedings were had and not those of the foreign forum wherein the revival judgment is sought to be enforced. Union Nat. Bank v. Lamb, 1949, 337 U.S. 38, 44, 69 S.Ct. 911, 93 L.Ed. 1190, 1195–1196. Hence, we must look to the law of Oregon for a solution of the question which confronts us, and as our search has failed to reveal any decision by the courts of that state determinative thereof, it becomes necessary to consider the statutes of Oregon pursuant to which the order in question was made.

Section 18.360, Oregon Rev. Statutes, reads as follows:

"Whenever, after the entry of a judgment, a period of 10 years shall elapse, the judgment and the lien thereof shall expire. However, before the expiration of 10 years the circuit court in which such judgment was docketed, on motion, may renew such judgment and cause a new entry of the same to be made in the judgment docket, after which entry the lien of the judgment shall continue for another 10 years unless sooner satisfied, and after which entry execution may issue upon such judgment for another 10 years."

It will be noted that the foregoing section provides that the court may make the order of renewal "on motion," and section 16.730 provides that "Notice of a motion is not necessary except when required by statute, or when directed by the court or judge in pursuance thereof." Our examination of the Oregon statute fails to reveal any requirement that notice shall be given of the motion mentioned in section 18.360 quoted above, and the transcript of the judgment in evidence contains no statement that notice of any kind was given of the motion upon which the order was made.

[3] The fact that the order of revival may be made ex parte and without notice affords some evidence that it was not intended that the proceeding (motion) should be treated as a new action nor

that the order should be considered as a new judgment in view of the grave constitutional question which would thereby be presented. Owens v. McCloskey, supra; see also Thompson v. Cook, 1942, 20 Cal.2d 564, 569, et seq., 127 P.2d 909. Applicable here is the principle that of different constructions of which a statute is susceptible, that will be adopted which will make it valid and constitutional. See Swift & Co. v. Peterson, 1951, 192 Or. 97, 233 P.2d 216, 222. Persuasive to the same result is the language of the statute: "* * * the circuit court in which such judgment was docketed * * * may *renew such judgment* and cause a *new entry* of the *same* to be made in the judgment docket, after which entry the lien of the *judgment* shall continue for another 10 years * * *." Thus it would appear that the word "judgment" as used throughout the section, refers to the original judgment—not a new one. Indeed, there is no provision for the entry of a new judgment, but only "a new entry" of the old. A reading of the order of revival here also fortifies this view. It reads, in part, as follows: "It further appearing that plaintiff is entitled to have *said judgment kept alive* by the renewal thereof by order of Court for ten years. It is ordered that the judgment of the plaintiff herein against the defendant herein be and the same is renewed at the date hereof and *shall remain in full force and effect* for a period of ten years from the date of this order * * *." (Emphasis added.)

Plaintiff contends that a different result is dictated by Thomas v. Lally, 1915, 28 Cal.App. 308, 152 P. 53, wherein it was held that the revival by *scire facias* of an Illinois judgment constituted a new cause of action, and that the California statute of limitations commenced to run from the date of the order of renewal rather than the date of the original judgment. The opinion, however, proceeds upon the erroneous assumption that a proceeding to revive a judgment by *scire facias* in every case constitutes "a new cause of action," and seemingly the court was not cognizant of the fact that the contrary is true in Illinois. Bickerdike v. Allen, 1895, 157 Ill. 95, 41 N.E. 740, 742, 29 L.R.A. 782, and Bank of Edwardsville v. Raffaelle, supra.

[4] We, therefore, conclude that the Oregon proceedings resulting in the order of revival was not a new suit but merely a continuation of the old, and hence that the instant action was upon the original judgment and barred by limitation. This conclusion renders moot plaintiff's appeal from the judgment, and it is dismissed. The judgment is reversed, defendant to recover his costs of appeal.

BISHOP, Acting P. J., concurs.

131 Cal.App.2d Supp. 862

BAKERSFIELD LAUNDRY ASSOCIATION, a corporation, Appellant,

v.

Harry W. RUBIN and Manuel W. Rubin, a co-partnership, Respondents.

C. A. 17.

Appellate Department, Superior Court, Kern County, California.

Feb. 16, 1955.

Lessor brought action against lessees to recover rent. The Municipal Court of Bakersfield Judicial District, Frank Noriega, J., entered judgment for lessees, and lessor appealed. The Appellate Division of the Superior Court, Bradshaw, J., held that where lessees retained possession of leased premises, which had been leased for term of one year, for more than six months before electing to surrender possession, on ground that there had been constructive eviction of lessees by lessor, lessees did not surrrender leased premises within a reasonable time, and lessees were not entitled to prevail, on ground that there had been constructive eviction.

Judgment reversed and Municipal Court directed to enter judgment for lessor.

1. Appeal and Error ⇐846(5)

Where no written findings were made by trial court, reviewing court would presume that trial court made whatever findings were necessary to support judgment.

2. Landlord and Tenant ⇐152(1)

Where lease provided that lessee had inspected leased premises, was thoroughly familiar with condition thereof, and accepted premises in such condition and would maintain premises in such condition except for damages caused by elements, fire, or earthquake, no covenant to repair could be implied against lessor.

3. Evidence ⇐441(1)

A written instrument may not be varied by evidence of oral agreement that contravenes the terms of the written instrument. West's Ann.Civ.Code, § 1698.

4. Evidence ⇐441(4)

Where lease provided that lessee had inspected leased premises, was thoroughly familiar with conditions thereof, and accepted premises in such condition and would maintain premises in that condition except for damages caused by elements, fire, or earthquake, the admission, in action by lessor for rent, of evidence in support of theory of alleged oral agreement by lessor to repair was error. West's Ann.Civ.Code, § 1698.

5. Landlord and Tenant ⇐171(3)

To constitute constructive eviction of lessee, lessee must be deprived of a substantial part of leased premises and must elect, within a reasonable time, to surrender possession.

6. Landlord and Tenant ⇐190(1)

Where lessees retained possession of leased premises, which had been leased for term of one year, for more than six months before electing to surrender possession, on ground that there had been constructive eviction of lessees by lessor, lessees did not surrender leased premises within a reasonable time, and lessees were not entitled to prevail, in action against lessees by lessor for rent, on ground that there had been constructive eviction.

Siemon & Siemon, Bakersfield, for appellant.

Morris B. Chain, Bakersfield, for respondents.

BRADSHAW, Judge.

This case is an action to recover rent alleged to be due to appellant by virtue of a written lease of real property.

On August 27, 1952, the appellant, who was plaintiff in the trial court, entered into a written lease (Exhibit 1) with the defendants for the use of the premises at 505 19th Street in the City of Bakersfield. These premises consisted of a large one-story structure of approximately 13,230 square feet of floor space (Plaintiff's Exhibit 2). The lease was in writing and was for a term of one year, with option of lessee to renew, and fixed the rental at $4,800 per annum, payable monthly (Exhibit 1). Another provision of the lease was to the effect that the lessees had inspected the building and was thoroughly familiar with its condition and accepted the building in the condition it was in. The destructive earthquake had occurred a few days prior to the time of making the lease and had damaged the building in some respects, and this was known to lessees at the time of the execution of the lease (R.T. p. 35). The lessees are in the general merchandise business and moved into the premises forthwith with their business. Within a few days subsequent to their moving in, the lessees were required by the municipal authorities to close for a day or two (R.T. p. 11, 1.23); then about two or three weeks later the rear wall was torn down and a plywood wall or partition was erected farther in than the original. The facts are disputed as to area that was lost to the lessees by reason of this alteration, respondents claiming some 2,500 square feet and appellants asserting that the loss approximated 1,000 square feet. The availability to the lessees of the toilet facilities is also disputed.

The lessees remained in possession and occupancy of the premises in excess of six months after the above described alterations were made, then vacated the premises leaving five months to run on the lease and $2,000 unpaid on the agreed rental.

[1] The plaintiff sued for the balance of the rent and defendants set up by way

of defense (1) constructive eviction and (2) failure to repair. There is no dispute that the $2,000 remains unpaid. No written findings were made by the trial court. It is the rule under these circumstances that the Appellate Court will presume that the trial court made whatever findings that are necessary to support the judgment (4 Cal. Jur.2d, p. 760.)

Over plaintiff's objection much evidence was admitted at the trial to show that plaintiff promised to repair or replace the rear wall by a permanent wall (R.T. p. 24, 1.21 to p. 26, 1.12) and defendant relies upon this evidence to support his theory of a breach of covenant to repair. The lease in question expressly provides as follows:

> "The Lessee has inspected the above described premises, is thoroughly familiar with the condition thereof, and accepts the same in such condition and will maintain the same in the condition that said premises now are except for damages caused by the elements, fire or earthquake."

[2-4] The only reasonable interpretation of this provision would seem to be that the lessees themselves had expressly waived any obligation to repair, and where the parties have thus expressly agreed, no covenant to repair may be implied against the owner, Kushner v. Home Service Co., 91 Cal.App. 692, 267 P. 555. It would appear, also, that the admission of evidence in support of the theory of an alleged oral agreement to repair *against the lessors* was error in itself. One of the most elemental principles of law is that a written instrument, such as plaintiff's exhibit 1 may not be varied by evidence of an oral agreement that contravenes the terms of the written instrument (CC 1698) and it is error for the Court to consider such evidence as the basis for any finding of fact, Harding v. Robinson, 175 Cal. 534, 166 P. 808; Shiver v. Liberty Building-Loan Ass'n, 16 Cal.2d 296, 106 P.2d 4.

Defendant also alleges a constructive eviction by reason of the loss of some square footage in the rear of the building occasioned by the erection of the plywood wall. It appears that this wall was necessary and no objection by defendants was ever made during its construction (R.T. p. 32, 1.11 to p. 33, 1.15) and the defendants continued to occupy the premises for some six months after the temporary wall was erected, then they moved out.

[5, 6] To constitute constructive eviction, the lessee (1) must be deprived a substantial part of the leased premises, (2) and must elect to surrender possession, Tregoning v. Reynolds, 136 Cal.App. 154, 28 P.2d 79, and this surrender must be done within a reasonable time, (32 Am.Jr. 231, 232, 237). Many cases hold as a matter of law one month is a reasonable time (Am.Jr. supra). And it would seem that retaining possession for at least one half of the term of the lease and in this case, more than six months, should be held to be *beyond* a reasonable time to allow the lessee to make his election.

The judgment is reversed and the Court directed to enter judgment for plaintiff.

LAMBERT, P. J., and MAIN, J., concur.

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